Matters of Life and Death: Inheritance Consequences of Reproductive Technologies

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MATTERS OF LIFE AND DEATH:
INHERITANCE CONSEQUENCES OF
REPRODUCTIVE TECHNOLOGIES

Helene S. Shapo*

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I. INTRODUCTION

Recent developments in reproductive technologies are creating a new body of law. Adding to the means by which people create families, these technologies have also complicated both family and inheritance law, creating not only a social and legal environment in which as many as five people could claim—or could be claimed—to be the parents of one child, but one in which a child may be born without legal parents.

By reproductive technologies, this Article refers to artificial insemination ("AI"), 1 especially artificial insemination by donor ("AID"); in vitro fertilization ("IVF"), 2 egg and embryo donation for implantation in a woman who is not a donor; and posthumous procreation from cryopreserved gametes or embryos. 3 Also discussed in this Article are surrogacy contractual arrangements that involve the use of these methods of conception and gestation. 4 These arrangements have created noncoital means to parenting that are increasingly used by infertile married couples and by unmarried individuals, producing an estimate of more than 40,000 assisted conceptions a year at more than 300 clinics. 5 The legal, ethical, and social implications of their use have been said to be "amongst the most important issues of this century." 6 By permitting conception without a sexual partner, by severing genetic contribution and gestation,
and by permitting posthumous conception by means of frozen gametes and embryos, the use of reproductive technologies has taken the already frequently asked question of who is a parent and transformed its context.

The impact of reproductive technologies on the creation of life has drawn considerable discussion in journalism and popular literature, as well as in academic literature. Less in public focus, but still immensely important, is the impact of those technologies on the legal consequences of death.

This Article analyzes this intriguing linkage between life and death by analyzing the inheritance consequences to children born of reproductive technologies, especially when one of the participating individuals dies intestate.

II. THE BASIC LEGAL FRAMEWORK

A. Inheritance

If a person dies without a valid will, the laws of intestate succession in every state determine to whom that person's property will be distributed. Intestacy statutes favor first the decedent's nuclear family, descending and ascending blood lines, and then follow the decedent's collateral blood lines. They typically provide no discretion to the court to choose among possible recipients. In enacting intestacy statutes, the state must determine its goals when deciding to whom a decedent's property will go and how much each beneficiary will take.

Like all legislation, intestacy statutes should be based on a community's widely shared beliefs. Thus, the stated goal of the original Uniform Probate Code ("UPC"), adopted in 1969, was to design a statute that reflects the "normal" dispositive preferences of the average property owner. In formulating this goal, the drafters conformed to the general policy behind default rules in that those rules should reflect what the parties would have wanted. Commentators have suggested two reasons for the UPC goal: (1) the accepted policy of testamentary freedom in this

8. The exception is Louisiana, where a child may be statutorily disinherit because of the child's conduct towards the deceased parent. See LA. CIV. CODE ANN. art. 1621 (West 1987).
country includes the right not to have a will, and (2) an intestacy statute that does not conform to the wishes of an intestate decedent creates a trap for those who are not aware of the statute’s provisions.11

Default rules, however, may also promote goals other than to effectuate what the individual would have intended. They may have more communitarian goals, including the promotion of social well-being.12 For example, states have a widely recognized interest in effectuating an orderly, accurate, and efficient transfer of property at death.13 The authors of a study on intestacy statutes list four other community goals that intestacy statutes could implement: “(1) to protect the financially dependent family; (2) to avoid complicating property titles and excessive subdivision of property; (3) to promote and encourage the nuclear family; and (4) to encourage the accumulation of property by individuals.”14

An intestacy statute implementing community goals rather than an individual’s goals would not be unique among default rules.15 In most cases, an individual’s goals for devolution of property will coincide with community interests. Inheritance by the nuclear family reinforces family ties and ensures that the decedent’s property will go to those with whom he or she has established the closest emotional ties and financial interdependencies.16 This distribution benefits those who have likely contributed the most toward the decedent’s accumulation of property and protects the decedent’s family. Because the decedent typically has strong emotional ties to the nuclear family, he or she will be encouraged to accumulate property to provide for them. Inheritance by the decedent’s nuclear family also makes for an orderly and efficient probate process because the beneficiaries should be easily identifiable. Thus, rules of

12. See id. at 324.
14. Fellows et al., supra note 11, at 324 (footnotes omitted); see also Cristy G. Lomenzo, Note, A Goal-Based Approach to Drafting Intestacy Provisions for Heirs Other than Surviving Spouses, 46 HASTINGS L.J. 941, 947 (1995) (setting out goals of intestacy legislation and concluding that protecting the financially dependent family “best serves society’s interests”).
15. For example, an important commentary has argued that a default rule may appropriately be set at what the parties would not themselves have chosen in order to effectuate an important social interest. See Ayres & Gertner, supra note 10, at 91. These authors would impose what they call a penalty default, where appropriate, in order to encourage parties to reveal information to each other. See id.
16. See Edward C. Halbach, Jr., Introduction to DEATH, TAXES AND FAMILY PROPERTY, supra note 7, at 5.
inheritance have been called a genetic code of a society in that "[t]hey guarantee that the next generation will, more or less, have the same structure as the one that preceded it. . . . Rules favoring wives and children reinforce the nuclear family. Any radical change in the rules . . . will radically change the society."

Intestacy statutes also serve what has been labeled, in other contexts, a channelling function: they sustain and promote certain social institutions that "serve desirable ends." For example, present inheritance law favors marriage. Under all intestacy statutes, the surviving spouse takes a share of the decedent spouse's estate, and in almost every non-community property state, the spouse has a statutory election of a fixed share of a testate decedent's estate. Intestacy law also favors parenthood in that the issue of an intestine decedent take a share of the estate.

B. Parenthood

Family law classifies parenthood into categories that include biological parenthood, legal parenthood, and social (or psychological) parenthood, that is, the person from whom a child receives care, nurturing, and guidance. A biological parent is the genetic parent, often called the natural parent, who establishes the child's genealogical

17. See Friedman, supra note 7, at 14.
18. Id.
21. Under the UPC, however, an intestate's issue do not inherit if the other parent survives and neither parent has issue born of another relationship. See UNIF. PROBATE CODE § 2-102(1)(i), 8 U.L.A. 98 (Supp. 1996). Except in Louisiana, descendants have no statutory protection against a testate estate unless they come within the state's pretermitted heir statute. See Lawrence H. Averill, Jr. & Ellen B. Brantley, A Comparison of Arkansas's Current Law Concerning Succession, Wills, and Other Donative Transfers with Article II of the 1990 Uniform Probate Code, 17 U. ARK. LITTLE ROCK L.J. 631, 689 (1995). A pretermitted heir is a testator's child (in some states, also a child's issue) who is not named or provided for in the testator's will. See BLACK'S LAW DICTIONARY 1187 (6th ed. 1990). Some states' statutes limit protection to those born after the testator executed the will. See Averill & Brantley, supra, at 690. A pretermitted heir usually takes an intestate share of the estate. See id. The purpose of the statutes is to prevent the decedent from unintentionally disinherit the issue. See id. at 689-90.
ties. Until modern IVF techniques, the biological mother had always been the gestational mother and traditionally had been presumed the legal parent at the child’s birth. The law, however, has determined legal fatherhood in different ways. For a child born of a married woman, fatherhood is determined by marital status, that is, a man’s marriage to the child’s mother. If a married woman bore a child out of the marriage, the common law of England presumed that the child was legitimate and that her husband, although not the biological father, was the child’s legal father. The husband could rebut this presumption only if he were “out of the kingdom” for more than nine months prior to the birth. Although this presumption arose in a time when nonmarital children were severely disadvantaged legally and socially, it still exists but is now rebuttable in nearly every state by parties other than the presumed father. Evidence to rebut the presumption now includes medical evidence that the husband is sterile or impotent or a blood test evidencing that the child could not be his. The modern version of the presumption would allow a presumed father (or his wife) to rebut his paternity of a child conceived by AID, although a number of courts have held that they will not overcome the presumption “if a finding of nonpaternity would be contrary to the child's best interests.”

Paternity of a child borne by an unmarried woman has been determined by different rules under which biological parenthood of the father, once established, may be considered more important. The biological father of a child born to an unmarried woman owes a duty of support but does not have full parental rights over the nonmarital child. For example, he may not be granted custody or visitation. In addition, he may also not be able to prevent an adoption of the child to which the mother has consented unless he has played a role in rearing the child. Furthermore, the Supreme Court has held that an unwed biological father has no due process right to a hearing before his child is

24. See id.
26. See id.
27. See id.
29. Harris et al., supra note 25, at 1078.
adopted unless he has established a relationship with the child or with the family unit of mother and child and has demonstrated commitment to the relationship.\textsuperscript{32} If, however, a biological father has demonstrated that commitment, his rights to his children may not be terminated without his consent or a determination of unfitness.\textsuperscript{33}

Against this background, the use of gamete donors and surrogates has required rethinking of what it is that makes a person a mother or a father. That reconsideration has previously taken place in the context of a long process of legal development that has assimilated both adopted children and nonmarital children into family and inheritance law. Adoption provides a means of achieving legal parenthood by state-supervised contract. Adoption laws, however, have evolved by a "patchwork of legislation,"\textsuperscript{34} placing children within the adopting family and aligning state domestic relations codes and inheritance laws. Current adoption laws in almost every state, however, place a child into the adopting family for all purposes and replace the child's birth parents with the adopting parents for all purposes, including inheritance.\textsuperscript{35} These statutes further a policy of integrating adopted children into their adopting families.\textsuperscript{36}

The law regarding inheritance by nonmarital children has also changed significantly from the traditional common law. Under the common law regime, the nonmarital child was considered the child of no one and did not inherit from or through the mother or father.\textsuperscript{37} In this country, most states held that the nonmarital child was an intestate heir

\textsuperscript{32} See Lehr, 463 U.S. at 261-62.
\textsuperscript{33} See Caban, 441 U.S. at 391-94; Quilloin v. Walcott, 434 U.S. 246, 248-49 (1978); Stanley v. Illinois, 405 U.S. 645, 652-58 (1972). However, the biological father of a nonmarital child, whose mother is married to another man, has no due process right to establish paternity and visitation, even if he had established a relationship with the child. See Michael H. v. Gerald D., 491 U.S. 110, 121-30 (1989). The children in Caban, Quilloin, and Stanley were born to women who were not married at the time.
\textsuperscript{35} See, e.g., CAL. PROB. CODE § 6451 (West Supp. 1997); MASS. GEN. LAWS ANN. ch. 210, § 7 (West 1987); N.Y. DOM. REL. LAW § 117 (McKinney 1988). But see LA. CIV. CODE ANN. art. 214(C) (West Supp. 1997) (allowing an adopted child to retain inheritance rights from his or her biological parents).
\textsuperscript{37} See JESSE DIKEMINER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 106 (5th ed. 1995).
of the mother, but not of the father, unless the parents married and the father acknowledged paternity. However, in the late 1970s the Supreme Court, in *Trimble v. Gordon*, declared an Illinois statute of this type unconstitutional as violative of the Equal Protection Clause. Under *Trimble*, a state may not completely disinherit a nonmarital child; however, it may limit the means by which a child can prove paternity because of the greater difficulty of proving paternity than maternity and the important state interest in orderly transmission of estates. In *Lalli v. Lalli*, the Court upheld a New York statute which provided that if a child's biological parents had not married, a child could establish paternity for inheritance purposes only by a filiation order entered during the father's lifetime. State laws now differ as to the type of proof required in order for a child to inherit from the father. Many states permit a child to inherit if the man's paternity was established during his lifetime by judicial decree or by his written acknowledgment of the child as his. Some states permit the child to prove paternity after the father's death, even if it entails exhuming his body for DNA testing.

Modern family law has been described as tending "toward minimizing the differences in the treatment of nonmarital and marital children." The Uniform Parentage Act ("UPA"), for example, determines legal parentage by a parent-child relationship rather than by a child's legitimacy or illegitimacy. The UPA rebuttably presumes that a man is the natural father of a child if he married or attempted to marry the mother, receives the child into his home and holds the child out as his, or files a written acknowledgment of paternity with an appropriate governmental agency. The UPA presumes that the woman who gave

39. See id. at 769-76.
45. MNOOKIN & WEISBERG, supra note 30, at 300.
birth to the child is the mother.\(^{48}\)

Identifying a child’s legal parents at the child’s birth is crucial;\(^{49}\) yet, the law regarding children born of reproductive technologies has failed to do so. The designation of a legal parent “establishes fundamental emotional, social, legal and economic ties between parent and child.”\(^{50}\) Parenthood has important financial consequences. Legal parents owe a duty of support,\(^{51}\) and their parental status may assure that their child receives insurance, social security, and health benefits. They make important decisions such as those relating to health care. Legal parents also have custodial and visitation rights over the child.\(^{52}\)

Most importantly for these purposes, legal parentage establishes inheritance rights.\(^{53}\) That relationship determines the beneficiaries of intestate estates, of family allowance statutes, and of class gifts in private donative instruments. It also identifies who may claim as a pretermitted heir to a testate estate. In Professor Carl Schneider’s terms, inheritance law may perform a channelling function by the way it treats inheritance within families created by noncoital means.\(^{54}\) Although the influence of inheritance law on primary behavior is limited, and it cannot be used punitively against the children created by reproductive practices not favored by the community,\(^{55}\) inheritance law can exert important marginal incentives when it recognizes those parent-child relationships that best serve society’s ends. Inheritance law can play a protective function\(^{56}\) by imposing financial responsibility on the estates of those who are involved in conceiving a child by noncoital means. Although

\[^{48}\text{See id. § 3, 9B U.L.A. 297-98.}\]
\[^{50}\text{Parness, supra note 49, at 574 (quoting U.S. COMM’N ON INTERSTATE CHILD SUPPORT, SUPPORTING OUR CHILDREN: A BLUEPRINT FOR REFORM 120 (1992)).}\]
\[^{51}\text{See MNOOKIN & WEISBERG, supra note 30, at 245.}\]
\[^{52}\text{See Katharine T. Bartlett, Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Promise of the Nuclear Family Has Failed, 70 Va. L. Rev. 879, 884-85 (1984).}\]
\[^{54}\text{See Schneider, supra note 19, at 517 n.60.}\]
\[^{55}\text{See Trimble v. Gordon, 430 U.S. 762, 769-70 (1977).}\]
\[^{56}\text{This phrase is again from Professor Schneider. See Schneider, supra note 19, at 497. The protective function is one of the functions of family law, to protect from harms caused by others, such as “economic wrongs and psychological injuries.” Id.}\]
reproductive technologies have complicated inheritance laws, relatively little attention has been paid to this subject when compared to the many analyses of their complications to family law, especially with regard to determining parenthood.57

C. The Traditional Family and Reproductive Technologies

Reproductive technologies can be viewed as either encouraging traditional families or as undermining them. In our society, the traditional family is one in which parental roles are filled by two people—a man and a woman married to each other who raise their biological (or adopted) children. Because legal parenthood has always been an exclusive status,58 under traditional law a child cannot have more than one parent of each sex at one time, although she can have fewer than two parents. Thus, when a child is adopted, the adoption extinguishes the biological parents’ legal ties to the child, and the adopting parents become the child’s legal parents.59

Although reproductive technologies have increased the opportunity of infertile married couples to conceive a child who is biologically related to at least one of them, enabling them to raise the child within their “traditional family,” they also offer choices that make creating a nontraditional family a more desirable option than ever before. For example, an unmarried woman can use AI or IVF to conceive a child without a sexual partner. Thus, reproductive technologies have also been viewed as a threat to the traditional family.

The traditional family, however, may no longer represent the major pattern of child rearing in this country. Child rearing is now being accomplished in a number of ways that are considered nontraditional. Divorce has produced increasing numbers of remarried people living in reformulated, or blended families including stepparents and stepchildren.60 Divorce has also increased the number of single-parent fami-

57. But see Ralph C. Brashier, Children and Inheritance in the Nontraditional Family, 1996 Utah L. Rev. 93; Ronald Chester, Freezing the Heir Apparent: A Dialogue on Postmortem Conception, Parental Responsibility, and Inheritance, 33 Hous. L. Rev. 967 (1996). While these articles represent a growing analysis of the complications raised by reproductive technologies in the context of inheritance law, they were published too late for this Author to completely integrate into the analysis made by this Article.
58. See generally Bartlett, supra note 52.
59. If a child is adopted by a stepparent, however, the natural parent (spouse of the stepparent) remains the child’s other parent.
lies. With more social acceptance of unmarried people living together in sexual unions, there have been significant increases in the numbers of families with heterosexual domestic partners raising their own children or the children of one of them, of homosexual partners raising children of one of them, and of single women raising children not born of marriage. Some of these family situations involve complex combinations of biological, legal, and social parents.

Indeed, reproductive technologies now make it possible that a baby may have up to five people who could be designated as a parent at birth: two genetic parents, a gestational parent, and one or two people not biologically related to the resulting child who have orchestrated the others’ contributions, intending to raise the child. Because reproductive technologies have accelerated the splintering of the aspects of parenthood, they have generated difficult issues in determining legal parenthood and especially strong disagreements over whom should be a child’s legal parents. For example, some authors have identified another category of parents of children born with reproductive technologies: the preconception intended parents.

The typical response to issues raised by reproductive technologies has been to call for new legislation to determine parentage. In 1968, only four states had enacted AI legislation. Now more than half the states have AI statutes. An increasing number of states are enacting surrogacy legislation, and a few have enacted legislation that applies to IVF. Much of this legislation, however, leaves open many gaps. Without specific legislation, the child’s status in a number of situations will be determined under common law presumptions of paternity and maternity, under statutes determining inheritance by nonmarital children, and under adoption statutes.

61. See id. at 9, 11 tbl.M.
62. See id. at 9, 12.
64. See 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, 413-18 (1991). For a discussion of parenthood by intent, see infra Part VII.
66. See Crabtree, supra note 65, at 914. In 1964, Georgia became the first state to enact an AI statute. See GA. CODE ANN. § 19-7-21 (1991); Wadlington, supra note 34, at 793-94.
67. See Brasier, supra note 57, at 183 n.301.
Three recent uniform acts are relevant to inheritance rights: the UPC, the UPA, and the Uniform Status of Children of Assisted Conception Act ("USCACA"). Neither the UPC version adopted in 1969 nor the amended version of 1990 include specific provisions for inheritance by children conceived by reproductive technologies. Section 2-109 of the 1969 UPC, still in effect in several states, determines the meaning of "child." Subsection (1) of that section establishes a parent-child relationship for purposes of intestate succession between an adopted child and adopting parents and cuts off inheritance from the child's "natural" parents. Subsection (2) applies to nonmarital children and provides that the child is the child of the mother and father if the two are married or if the child proves paternity by the required burden of proof. In 1975, this section was amended to conform to the UPA and provide that a child is the child of its parents "regardless of the marital status of its parents and the parent and child relationship may be established under the [UPA]." This subsection includes an alternate subsection two, retaining the original language for those states that had not adopted the UPA.

The 1990 UPC provisions for adopted and nonmarital children appear in section 2-114. This section retains the former section 2-109(2) and establishes that the legal relationship between parent and child determines inheritance, providing that "an individual is the child of his [or her] natural parents, regardless of their marital status." The UPC then refers to the UPA and to other applicable state law as the vehicles for establishing the parent-child relationship. Section 2-114(b), once fulfilled, establishes a parent-child relationship between an adopted child and the adopting parents and severs the legal relationship with the natural

71. See id. § 2-109(2).
73. Id. § 2-109(2), 8 U.L.A. 66.
74. See id.
76. Id.
77. See id. The comment to section 2-705 (class gifts) parenthetically defines natural parent as a biological parent. See id. § 2-705 cmt., 8 U.L.A. 181. Under the UPC, in order for an adopted or nonmarital child to be included in a class gift in an instrument executed by a donor who is not the natural or adopting parent, that child must have established a parent-child relationship with the parent under section 2-114, and the parent must be the child's social parent, i.e., the child must have lived as a minor as a regular member of the parent's household. See id. § 2-705(b)-(c), 8 U.L.A. 180.
parents. The latest comment to section 2-114 refers the reader to the USCACA, discussed below, as a companion statute. However, that statute is significantly different from the UPA.

Section 5 of the UPA, the only section in the UPA that applies to children of reproductive technology, applies only to children born of AI. The UPA was proposed for enactment by legislatures before the first child conceived by IVF was born and does not refer to that more advanced procreative technique. Even as to AID, as its commentary makes clear, section 5 is limited in scope and was enacted as a stop-gap measure. Section 5 treats a child conceived by insemination of a married woman with sperm of a man other than her husband as the child of the husband, not the sperm donor. The insemination must have been performed under the supervision of a licensed physician and with the written consent of the husband, signed by him and his wife.

A third uniform act, the USCACA, adopted in 1988, determines parentage under all types of reproductive technology, rather than just AID. It has been adopted in two states. The Prefatory Note to the USCACA explains that the act "was designed primarily to effect the security and well-being of those children born and living in our midst as a result of assisted conception," and to give those children "the same rights in property and inheritance as though conceived by natural means." Under section 10(b) of that legislation, the parent-child relationship determines intestate succession, probate allowances and exemptions, and the child's eligibility to take under a class gift determined by relationship.

The USCACA includes two alternative provisions for surrogacy.

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78. However, if a child's natural parent remarries and the parent's second spouse adopts the child (a stepparent adoption), that adoption does not extinguish the child's relationship between the natural parent whose new spouse has adopted the child, or the child's inheritance from or through the other natural parent. See id. § 2-114(b), 8 U.L.A. 107.


80. The UPA was approved in 1973 at a time when state law treated legitimate and illegitimate children differently, including their right to intestate succession. The UPA establishes a parent-child relationship between a child and the natural or adoptive parents, regardless of the marital status of the parents. See UNIF. PARENTAGE ACT § 2, 9B U.L.A. 296 (1987).

81. See id. § 5, 9B U.L.A. 301.

82. See id. § 5 cmt., 9B U.L.A. 302.

83. See id. § 5(b), 9B U.L.A. 301.


85. USCACA, supra note 69, Prefatory Note, 9B U.L.A. 162.

86. Id., 9B U.L.A. 163.

87. See id. § 10(b), 9B U.L.A. 175.
Under Alternative A, a surrogacy contract is enforceable if it is approved by a court, subject to several requirements.\textsuperscript{88} If approved, the child’s parents are the commissioning couple and not the surrogate.\textsuperscript{89} Under Alternative B, surrogacy contracts are unenforceable.\textsuperscript{90}

Thus, of three uniform acts, the USCACA is the broadest in scope and addresses the issue of inheritance; however, it has been adopted in only two states. The other two uniform acts only minimally address the issues raised by reproductive technologies, and the law in the states in which issues have been raised is often unsatisfactory.

Many of the issues discussed in this Article also arise from coital reproduction and adoption. Such issues include the strength of the traditional presumptions of maternity and paternity; respect for the family unit as manifested in the different legal treatment of married and unmarried women and their children, and of fathers of children born to either married or unmarried women; enforcement or lack of enforcement of private agreements that determine parental responsibility; and whether an adopted child should be told of her biological beginnings and allowed to contact her biological parents. Reproductive technologies have added even more complexity and disagreement to these already contentious issues. If one of the possible parents dies at or soon after the child’s birth and before the parties or a court have determined the child’s parenthood and custody, the probate court may find itself in uncharted territory.

Occasionally law reviews can be relevant. A California trial judge, in \textit{Jaycee B. v. Superior Court},\textsuperscript{91} assured the relevance of this Article in the week that the Author had to return proofs. The judge concluded that a man—who, with his wife, had contracted with a surrogate for the gestation of a baby conceived through IVF from the union of a sperm and an egg from two other persons—had no obligation to support that child. The judge determined that neither spouse in the contracting couple was the child’s legal parent.\textsuperscript{92}

This decision raised precisely the specter imaged in the conclusion of this Article: the case of the judicially orphaned child deprived of inheritance rights. This Article probes the legal problems inherent in a

\begin{itemize}
\item \textsuperscript{88} See \textit{id.} § 5 (Alternative A), 9B U.L.A. 167.
\item \textsuperscript{89} See \textit{id.} § 8, 9B U.L.A. 172.
\item \textsuperscript{90} See \textit{id.} § 5 (Alternative B), 9B U.L.A. 174.
\item \textsuperscript{91} 49 Cal. Rptr. 2d 694 (Ct. App. 1996).
\item \textsuperscript{92} At the time this Article was published, \textit{Jaycee B.} had been remanded and decided, but not reported. For a discussion of that opinion, see Davan Maharaj, \textit{Surrogate Ruling Leaves a Girl, 2, Legally Parentless, L.A. Times}, Sept. 9, 1997, at A1; Judy Peres, \textit{Surrogacy Case Breeds New Legal Dilemma, Chi. Trib.}, Sept. 11, 1997, at 1.
\end{itemize}
situation in which a child might claim that four, or even five, persons have parental responsibility for her, but in which the law may deny that she is the natural object of devolution for any.

This Article also discusses the legal issues related to parenthood and inheritance that arise with each type of reproductive technology. It then analyzes three types of responses to the question of who should be the child's parents and how these responses could apply to the child's inheritance.

III. ARTIFICIAL INSEMINATION

A. Technological and Legal Foundations

AI is technologically the simplest of the noncoital means of reproduction, the least expensive, and the one that has been used for the longest period of time, with the highest success rate of resulting pregnancy. Yet, it presents a number of complicated legal issues. For example, there is controversy over the methods of selecting and screening sperm donors, over whether unmarried women may be recipients of sperm donations, and over whether children born of AID should receive information about their biological father, and if so, information of what kind. There is also some disagreement over who should be the legal father of the child born of AID and how that person should be determined. Legislative and judicial responses to issues of fatherhood, however, do not always clearly address the question of the child's inheritance rights.

Of the noncoital reproduction techniques, AI is the most similar to coital conception because it involves insertion of semen into the female genital tract. Thus, fertilization occurs in vivo, that is, in the woman's body. If a married woman is artificially inseminated with her husband's semen, the procedure is referred to as artificial insemination by husband

93. AID results in a 15 to 20% fecundity rate (conception rate per cycle within the last two years of attempted pregnancy). See J.K. Mason, MEDICO-LEGAL ASPECTS OF REPRODUCTION AND PARENTHOOD 190 (1990).


A child conceived through AIH presents no issues of parenthood or inheritance because the child is biologically linked to both the husband and the wife. When a woman is inseminated by sperm of a man that is not her husband, for example, because the husband is sterile or carries a genetic disease, or because she is unmarried, the procedure is known as AID or heterologous artificial insemination. This method of conception has grown substantially. Recent estimates indicate that 75,000 women a year are artificially inseminated with donor sperm, and that in the United States approximately 500,000 children have been born from AI, most of them from donor sperm.

A child conceived by AID has a known biological mother and a biological father whose identity is usually unknown since the semen is purchased from a sperm bank. If the inseminated woman is married, the child is the biological child of the mother and a man that is not her husband, although her husband usually intends to raise the child. Similarly, a child conceived by AID of an unmarried woman will have no known biological father if the provider of the sperm is anonymous. Although many doctors and clinics will not artificially inseminate an unmarried woman, a woman can self-inseminate by recruiting her own sperm donor. It is in this situation that the child's biological father is a known person who may wish to become involved in the

97. See id.
102. See id. at 86, 93-94.
103. See id. at 106; Barbara Kritchevsky, The Unmarried Woman’s Right to Artificial Insemination: A Call for an Expanded Definition of Family, 4 HARV. WOMEN’S L.J. 1, 3 (1981); Patricia A. Kern & Kathleen M. Ridolfi, Note, The Fourteenth Amendment’s Protection of a Woman’s Right to Be a Single Parent Through Artificial Insemination by Donor, 7 WOMEN’S RTS. L. REP. 251, 253 n.8, 254 (1982). If AID facilities are involved with the state such that their refusal to offer services is state action, Kern and Ridolfi argue that the facilities violate unmarried women’s Fourteenth Amendment right to procreate. See id. at 258; see also Kritchevsky, supra, at 5-6, 26-40 (discussing an unmarried woman’s right to AI).
104. See Kritchevsky, supra note 103, at 4. Some unmarried women prefer to select a man based on particular genetic attributes.
child's life and assert his paternity, sometimes against the wishes of the child's mother.\textsuperscript{105}

Many of the early cases involving a child born of AID arose as part of divorce actions between the artificially inseminated mother and her husband: the husband attempted to avoid support obligations on the ground that the child was illegitimate. Most courts held that the wife's participation in AID was adulterous, and, as a result, the AID child was illegitimate.\textsuperscript{106} By the late 1960s, however, courts were beginning to hold that husbands who had consented to their wives' AI could not avoid child support obligations on grounds of the child's illegitimacy. Without any statutory authority governing AID, the courts relied on theories of implied contract of support\textsuperscript{107} and equitable estoppel,\textsuperscript{108} both based on the husband's consent. Some courts rationalized their decisions on the grounds that a child should have a father as well as a mother, and that a husband's consent to fatherhood brings with it responsibilities to that child.\textsuperscript{109}

Because these issues were litigated within divorce proceedings, the courts decided only the issue of the husband's duty of support, and most courts did not determine that the child was legitimate,\textsuperscript{110} an issue on which an affirmative decision would have established the child as the father's heir.\textsuperscript{111} In \textit{Gursky v. Gursky}, for example, the husband argued that the AID child was illegitimate. The court agreed because no statute legitimated the child, but held that because the husband had consented to the AID, he had impliedly contracted to furnish child support.\textsuperscript{112} The court also applied equitable estoppel because in having the child, the wife

\begin{itemize}
\item \textsuperscript{108} See People v. Sorensen, 437 P.2d 495, 499 (Cal. 1968) (in bank); Gursky, 242 N.Y.S.2d at 412.
\item \textsuperscript{110} See K.B. v. N.B., 811 S.W.2d 634, 637 n.6 (Tex. Ct. App. 1991).
\item \textsuperscript{111} Unless mandated by the decree, a parent's child support obligation in a divorce decree does not survive the parent's death. See KRAUSE, supra note 23, at 1072.
\item \textsuperscript{112} See Gursky, 242 N.Y.S.2d at 411.
\end{itemize}
relied on her husband's consent to be the primary source of the child's support. In People v. Sorensen, the court also found no authority to legitimate the child, saying that the issue was for the legislature. However, the court labeled the father as a "lawful father" for purposes of support.

By contrast, in In re Adoption of Anonymous, another New York court held that "a child born of consensual AID during a valid marriage is a legitimate child entitled to the rights and privileges of a naturally conceived child of the same marriage." In that case, the wife's first husband had consented to her insemination and supported the child after the couple divorced. He later refused to consent to the child's adoption by the mother's second husband. The second husband argued that the first husband's consent was not required because the first husband was not the child's father. Rejecting this argument, the court required the first husband's consent, relying on the strong public policy favoring legitimacy. That policy also controlled a decision that an AID child born to a married couple before enactment of the New York statute was the father's legitimate issue for purposes of a class gift. The parents had not executed a written consent to the insemination as required by the statute in force at the time of distribution.

B. Artificial Insemination by Donor Legislation

A majority of states now have legislation that applies to AID, several of which have enacted section 5 of the UPA. Most, but not all, of the other states have enacted legislation based on the UPA pattern.

113. See id. at 412.
114. See Sorensen, 437 P.2d at 501.
115. Id. at 498.
117. Id. at 435-36.
118. See id. at 435.
120. See id. at 970.
Two states have adopted the USCACA.\(^\text{123}\)  

Under section 5 of the UPA, if a married woman is inseminated by AID "under the supervision of a licensed physician," the husband "is treated in law as if he were the natural father of an [AID-conceived] child,"\(^\text{124}\) and the man who donates semen to a physician for use by a married woman "is treated in law as if he were not the natural father."\(^\text{125}\) The statute does not distinguish between anonymous donors and known donors, nor does it consider whether the parties have agreed otherwise regarding paternity. To support a designation as the natural father, the UPA requires the husband's written consent, signed by both spouses, certified by the physician, and filed with the State Department of Health.\(^\text{126}\) The latter condition does not affect the father-child relationship.\(^\text{127}\) However, if all of the other conditions are not satisfied, the child has no legal father under the statute, and a court presumably would apply the common law to determine paternity.\(^\text{128}\)  

Unlike the UPA, the USCACA applies to both married and unmarried women. If the woman is married, section 3 of the USCACA applies a rebuttable presumption that, except in a surrogacy situation, the husband of a woman who bears a child conceived through assisted conception is the father of the child.\(^\text{129}\) Unlike section 5 of the UPA, the USCACA does not require written consent.\(^\text{130}\) The husband may

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\(^{125}\) Id. § 5(b).  
\(^{126}\) See id. § 5(a).  
\(^{127}\) See id.  
\(^{128}\) When a husband and wife comply with an AID statute, the legislation, in effect, supplies its own presumption of legitimacy. In the case of State ex rel. H. v. P., 457 N.Y.S.2d 488 (App. Div. 1982), the husband petitioned for custody and visitation of a child whom he claimed was conceived by AID and whom his wife claimed was a nonmarital child conceived coitally. The wife had participated in an AID program for several months with her husband's written consent, and the child was born sometime after she discontinued the program. The husband was named on the child's birth certificate, he had supported the child, and he had treated the child as his own. The wife alleged that the husband had no right to custody or visitation and sought to have him ordered to take a blood test. The court refused to order the blood test because of its potential to illegitimize the child, while still not settling the issue of paternity. See id. at 490. This result, the court said, would offend the strong policy behind the presumption of legitimacy. See id. The husband's sterility would not rebut the presumption because the court treated the situation as one that complied with the New York AID statute which legitimized the child. See id. at 491. In addition, the court estopped the wife from disputing the husband's paternity because she had held him out as the child's father and had encouraged the development of their parent-child relationship. See id. at 493.  
\(^{129}\) See USCACA, supra note 89, § 3, 9B U.L.A. 165.  
\(^{130}\) See id.
rebute the presumption by personally bringing an action within two years of learning of the child's birth to determine whether he consented.\textsuperscript{131} Thus, if the husband dies within that two-year period without bringing an action to determine whether he consented, he is the presumed to be the father, and the child would inherit from his estate.

If, however, the husband proves that he did not consent, or if the recipient is unmarried, the child has no legal father. This is because section 4(a) of the USCACA provides that "[a] donor is not a parent of a child conceived through assisted conception."\textsuperscript{132} The statute "opts for the broader protection of donors"\textsuperscript{133} in order to provide certainty to the donor that he will not bear the legal responsibility to support the child, and that the child will not inherit from the donor's estate.\textsuperscript{134} The statute does not address whether it overrides a private agreement between sperm donor and recipient that the donor will play a parental role toward the child, although the Prefatory Note provides that a sperm donor is not the child's parent "unless there has been some agreement beforehand."\textsuperscript{135}

In addition, the statute does not ensure anonymity of the donor. The statute does provide, however, that under certain circumstances the child will have access to the financial resources of only one parent.

The purpose of these statutes is to shield the sperm donors from the legal consequences of fatherhood, that is, to ensure that the biological father is not the legal father of the child conceived by AID and has no duties toward that child.\textsuperscript{136} By doing so, the statutes prevent disincentives to donating sperm. The statutes also ensure that the husband of the inseminated woman is protected from unwanted paternity.\textsuperscript{137} These statutes may be interpreted as imposing a modern version of the presumption of legitimacy, one which a husband who has consented to his wife's insemination cannot rebut. One may also interpret the statutes as determining a child's paternity by effectuating private agreements and by permitting a biological father to do what a parent cannot otherwise do: unilaterally relinquish parental rights, including the obligation to support a genetic child.\textsuperscript{138} The AID statutes have been criticized for

\begin{footnotesize}
\begin{enumerate}
\item See id.
\item Id. \textsuperscript{9}§ 4(a), 9B U.L.A. 166.
\item Id. \textsuperscript{9}§ 4 cmt.
\item See id.
\item Id. Prefatory Note, 9B U.L.A. 163.
\item See Capron, supra note 121, at 693.
\item See id.
\item In Estes v. Albers, 504 N.W.2d 607 (S.D. 1993), the father of a nonmarital child who was conceived coitally unsuccessfully claimed that he was not liable for child support because he acted,
\end{enumerate}
\end{footnotesize}
these results by potentially valuing these private arrangements over the best interests of the child and ignoring "the relevance of legitimacy, lineage, and individual identity tied up in kinship." Very few states' inheritance statutes provide specifically for inheritance by children born of AID. In those statutes that do, legitimization of the child occurs only if the mother's husband has consented to the AID.

C. Artificial Insemination by Donor Litigation

Two sets of issues have been litigated concerning AID-conceived children: first, litigation involving children born to married women whose husbands did not comply with statutory requirements and dispute their paternity and second, litigation involving an unmarried recipient whose known sperm donor or lesbian partner wishes to obtain parental rights. Decisions in these cases have important implications for inheritance.

1. Married Women and Artificial Insemination by Donor

These cases involve divorce litigation in which the husband denies paternity and liability for child support for a child born of AID to his wife. Since the husband had not consented in writing to his wife's insemination, the AID did not comply with the state's AID statute, and, thus, the husband should have no parental rights to the child, nor should he owe child support. Although the courts have strictly interpreted the statutory requirement of written consent, most courts have held that the

in effect, as an anonymous sperm donor. See id. at 609. The defendant had fathered the child at the woman's request, and they had agreed that he would not be financially responsible for the child. The court held that an agreement must be secured by adequate support and receive court approval. See id.; see also Surrogate Parenting Assocs. v. Commonwealth ex rel. Armstrong, 704 S.W.2d 209, 213 (Ky. 1986) (holding that private contracts regarding custody are voidable); Walter Wadlington, Artificial Conception: The Challenge for Family Law, 69 VA. L. REV. 465, 494 (1983) (discussing the right of the mother and the donor to negotiate private agreements to release the donor from parental responsibilities). Of course, if a woman does not reveal who fathered her child by coitus, the child, in effect, has no legal father and no paternal support.

139. See ELIAS & ANNAS, supra note 94, at 227.

140. Id.

141. See ARK. CODE ANN. § 28-9-209(a) (Michie 1987); CONN. GEN. STAT. ANN. § 45a-774 (West 1993); MD. CODE ANN., EST. & TRUSTS § 1-206(b) (1991); MICH. COMP. LAWS ANN. § 700.111(2) (West 1995 & Supp. 1996).

The Arkansas inheritance statute presumes that the husband consented unless he rebuts the presumption by clear and convincing evidence. The Arkansas family code, however, requires that the husband consent in writing in order to legitimate the AID child. See ARK. CODE ANN. § 9-10-201(a) (Michie 1993).
statutes are not the exclusive means of determining paternity. If a husband has not consented in writing, and the AID statute does not apply, courts place the couples in the same position they would have been had there been no statute. Although the husband could rebut the presumption of legitimacy on the ground of his sterility, courts order child support if the husband orally consents to the insemination and estop the husband from denying his obligation. These cases, however, establish only that the husband is liable for support.

For example, in R.S. v. R.S.,142 the husband had given oral consent to the physician. The applicable Kansas statute provided that a child born of AI would be considered “at law in all respects the same as a naturally conceived child of the husband and wife,”143 if the husband and wife had consented in writing.144 The court held that because of the husband’s oral consent he was “estopped to deny that he is the father of the child,” and had “impliedly agreed to support the child and act as its father.”145

In Anonymous v. Anonymous,146 the court also required strict compliance with the AID statute. It concluded that a child born of AID, but without the required written consent, did not come within the New York statute which provides that a child born to a married woman by AI “shall be deemed the legitimate, natural child of the husband and his wife for all purposes.”147 Although the court could not find the child legitimate, and the wife could not establish the elements of estoppel, the court held that the husband was bound by a written agreement to support the child—which the court would enforce because of the strong public policy of ensuring support for children.148

By comparison, without deciding the question of the statute’s exclusivity, the Illinois Supreme Court, in In re Marriage of Adams,149 noted that the Illinois statutory requirement of written consent is a mandatory one. The Illinois statute is patterned after section 5 of the

144. See id. § 23-130.
145. R.S., 670 P.2d at 928.
147. N.Y. DOM. REL. LAW § 73(1) (McKinney 1988).
149. 551 N.E.2d 635, 638 (Ill. 1990); see also In re Marriage of Witbeck-Wildhagen, 667 N.E.2d 122, 125 (Ill. App. Ct. 1996) (holding that the husband was not the legal father of an AID-conceived child and not liable for child support, where the wife underwent AID without his knowledge and consent and filed for divorce before the child was born).
In *Adams*, the couple had not consented in writing, but the Illinois court held that Florida law applied because the child was conceived and born in Florida. The only connection to Illinois was that the couple litigated the divorce in Illinois. Under the Florida statute, a child born to a married woman is "irrebuttable presumed to be the child" of both parents if they "consented in writing." The court opined that the Florida statute, unlike the Illinois statute, might not be the exclusive means of determining legitimacy. Lacking her husband's written consent, the wife lost the advantage of the irrebuttable presumption. The court provided, however, that she could still establish the child's legitimacy outside of the statute or, at least, the husband's support obligation, since the husband had been involved in the decision to use AID, had been supportive of his wife during her pregnancy, and was designated as the child's father on the birth certificate.

Another legal shading appears in a Texas decision that a divorcing husband not only owed child support but had a parent-child relationship with a child conceived by AID because he had ratified that relationship. The husband knew about and participated in the AID process, acknowledged the child, and held him out as his own child from the time of birth until the divorce. Under these circumstances, the court held that he was the child's legal father even without complying with the AID statute. The court's ratification theory was determined, in large part, by the husband's conduct towards the child.

There is no litigation concerning an AID child's inheritance rights from the mother's deceased husband. If the state has an AID statute, and that statute has been complied with, the child should inherit from the husband as the husband's legal issue. If the state has no statute, or if the couple has not complied with the statute, the inheritance situation is uncertain. The courts, in applying estoppel and implied contract theories, have held only that the husband must pay child support, not that the child is legitimate. Thus, the child most likely could not inherit from

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150. See 750 ILL. COMP. STAT. ANN. 40/3 (West 1993).
151. See *Adams*, 551 N.E.2d at 639.
152. FLA. STAT. ANN. § 742.11 (West Supp. 1997).
153. See *Adams*, 551 N.E.2d at 638.
154. See id.
155. See id. at 636.
157. See id.
158. See supra text accompanying notes 110-11. But see *Brashier*, supra note 57, at 186 ("Under the reasoning of such opinions, it seems clear that the child would also qualify as an
the mother’s husband. In K.B. v. N.B., the court held that the child established a parent-child relationship with the mother’s husband, despite the couple’s failure to comply with the AID statute’s requirement of written consent. In that case, however, the father had been a social parent to the child. Yet, even under this decision, the child would not have inherited from the husband if he had died soon after the child’s birth. Only the language in In re Baby Doe may support the child’s inheritance rights if the father had died before becoming a social parent. There, the court said that the husband, who had orally consented to his wife’s AID “with the understanding that the child [would] be treated as their own,” was the “legal father” of the child with “all the legal responsibilities of paternity.”

Without an AID statute, there is no law that terminates the sperm donor’s paternity. The resulting child is the nonmarital child of the donor unless the mother is married and the state’s presumption of the husband’s paternity is not rebutted. A nonmarital child conceived by coitus may inherit from a deceased biological father if the child proves paternity (or establishes a parent-child relationship) under state law. Those inheritance statutes are not limited by their terms to children conceived by coitus and could apply to an AID child if the child is considered a nonmarital child. However, many statutes require either an adjudication of paternity or some affirmative acts by the biological father acknowledging his paternity. If the sperm donor and the recipient had privately agreed that the donor would not play a parental role, the agreement would likely not be enforceable as to child support; however, the agreement could determine inheritance from the father.

160. See id. at 637-39.
161. See id. at 639.
163. Id. at 878.
164. See Welborn v. Doe, 394 S.E.2d 732 (Va. Ct. App. 1990). In Welborn, the court interpreted the Virginia statute, which is specific as to inheritance, as establishing a presumption “that the husband is the natural father for purposes of inheritance,” but as not otherwise cutting off the rights of a sperm donor or establishing a parent-child relationship with legal certainty. Id. at 733. The court approved a married couple’s adoption of the child born to the wife through AID. Although the husband had complied with the statutory requirement of consent, the couple wanted to adopt the child in order to completely cut off the sperm donor’s paternity. See id. at 733-34.
165. See Wadlington, supra note 138, at 490-91.
166. See supra text accompanying notes 38-44.
167. See supra notes 41-42 and accompanying text.
168. See Wadlington, supra note 138, at 494 & n.113.
because the contract would acknowledge the donor's biological paternity. Yet, the agreement would also demonstrate that the donor did not publicly hold out the child as his own. If no party had litigated the donor's paternity during the donor's life, however, in many states that issue could not be litigated after the donor's death.169

Realistically, it is unlikely that an AID child would be able to inherit from a sperm donor since most sperm donors act anonymously.170 The child's chances of identifying the donor and claiming an interest in his estate are remote, unless the child has access to the physician's or the sperm bank's records, or unless state laws are amended to otherwise permit identification. It is also likely that not only has the donor's identity remained a secret, but also that the child's conception by AID was a secret. Therefore, the child's paternal inheritance may never be questioned. Parents can easily conceal the circumstances of the child's conception. The mother has gone through pregnancy and childbirth, the child's birth certificate most likely names the husband as the father of the child, and neither the child nor anyone else may have been told that the woman's husband is not the child's genetic father.171 The issue of inheritance from the sperm donor will arise only if the child knows that he or she was conceived through AID, or the parents know of the donor's death and no longer wish to keep secret the means of the child's conception.

2. Artificial Insemination by Donor and Anonymity

The issue of anonymity within the AID context has recently come into focus because secrecy in AID births has become increasingly controversial, especially with respect to the anonymity of the donor. Under current practice, sperm banks buy sperm from men, often medical students, and agree to preserve the donor's anonymity.172 Indeed, a 1983 presidential commission recommended that the donor's confidentiality be protected "to the greatest extent possible."173 Similarly, several

170. See Blank & Merrick, supra note 101, at 86, 93-94.
173. President's Comm'n for the Study of Ethical Problems in Med. and Biomedical and Behavioral Research, Screening and Counseling for Genetic Conditions 70 (1983)
states' statutes require that the recipient's and the husband's consent and the physician's records be kept confidential. 174 Not all AID statutes require that doctors or sperm banks keep medical information, and many physicians performing insemination on their own do not keep adequate medical records. 175 Yet, there is general agreement that the best interests of AID children require that the child learn at least nonidentifying relevant medical information about its male genetic parent and its family history, which may be needed for future diagnosis and treatment. 176

There is much less agreement, however, over whether AID children should learn their biological father's identity for psychological and social reasons in order to know their roots and place themselves within their genetic families. The phrase "genealogical bewilderment," used to describe adopted children's identity confusion resulting from not knowing their genetic origins, 177 is also used to describe possible consequences of AID. 178 Some studies indicate that genealogical confusion causes psychological problems in adopted children. 179 As some commentators have explained, "[o]ur sense of who we are is bound up with the story we tell about ourselves." 180 If the biological parents are not known, it "is like a novel with the first chapter missing." 181

The legal controversy has its basis in the historic secrecy of adoption law, effectuated through sealed record acts that require courts

(emphasis omitted).


175. See LORI B. ANDREWS, MEDICAL GENETICS: A LEGAL FRONTIER 171-72 (1987); Capron, supra note 121, at 691; Kern & Ridolfi, supra note 103, at 253. Professor Wadlington has written that the "lack of donor recordkeeping is perhaps unparalleled anywhere in medical practice." Wadlington, supra note 138, at 500, which "reflects a near obsession with confidentiality, particularly with regard to donor identity," id. at 472. The American Fertility Society guidelines recommend that confidential medical records be kept about all donors and made available on a nonidentifying basis. See Ethics Committee of the American Fertility Society, Ethical Considerations of the New Reproductive Technologies, 53 FERTILITY & STERILITY 18, 44S (Supp. 2 1990).

176. See ANDREWS, supra note 175, at 171-72; Capron, supra note 121, at 691; Ethics Committee of the American Fertility Society, supra note 175, at 44S.


179. See Gibson, supra note 177, at 16-20 (discussing the findings of researchers of adoptees and their psychological development).


181. Id.
to seal birth and adoption records so that the child’s biological parents cannot be identified, unless for good cause. One purpose of the sealed record acts is to protect the privacy of the biological birth parents. That protection is considered especially important if the child was a nonmarital child. The sealed record acts also shield the adoptive parents from intrusion by the biological parents or others and provide the child with a fresh start within a new family unit—the adoptive home.

Recent criticism of secrecy in adoption law has led rather swiftly to important changes in parental anonymity. Over the past few decades, adoption policy has undergone a significant, if not seismic, change in favor of disclosure. Adoptive parents are advised to tell their children that they were adopted, and many adopted children have sought to learn the identity of their genetic parents. Although many states still do not allow adopted persons of any age to access sealed adoption records without good cause, several recent statutes provide guidelines for determining when sealed records may be opened. Access is most often granted for medical reasons. Nonmedical reasons for access, which tend to be disfavored, include the following: the prevention of psychological harm which may result from being denied access to family information or permission from the natural parents for the child to identify them after the child has reached the age of twenty-one. Beyond opening sealed records, a new paradigm in adoption law is open adoption, the antithesis of the traditional secret adoption. Open adoption encompasses “a range of possibilities from open records and exchange of identifying information to birth parents visiting the adoptive family after the adoption, whether by agreement or court order.”

In states where adopted children still inherit from their natural parents, some have claimed the need to identify their natural parents in order to determine if they were heirs to their estates. Only in one case, however, did a court open sealed records to reveal the parents’

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185. See, e.g., HAW. REV. STAT. § 578-14.5 (1993); IOWA CODE ANN. § 600.16A (West 1996).
186. See GLOVER ET AL., supra note 180, at 37.
names. The court held that the child’s statutory right of inheritance from the biological parents would have otherwise been thwarted. 190

The similarities between AID and adoption have led to analogous issues in AID literature: whether children should be told of the nature of their conception, and whether those children who learn that they are AID children should be able to learn the identity of their genetic father. According to a recent article, a number of adult AID offspring are intensively searching for their genetic fathers 191 and are speaking out against the practice of keeping secret the means of their conception. 192

Some factors, however, may make identification of the sperm donor less compelling than identification of the birth parents of an adopted child. In AID, the child knows the identity of one biological parent, the mother, who has participated in raising the child. 193 In adoption, the birth parents of the adopted child may feel more need for contact with the child than does a sperm donor because they have experienced the birth and then the loss of their child. Conversely, the sperm donor most likely does not know if a child was born from his sperm. 194 An adopted child may feel rejected by his or her biological parents and may want to establish contact with them in order to alleviate those feelings of rejection. AID children, however, were not rejected by their biological mothers and rearing fathers, if any. It is also much easier to keep AID a secret than is adoption because the mother is actually pregnant and gives birth to the child. Indeed, the mother may not tell her obstetrician how the baby was conceived. 195 Other reasons that AID may be kept secret are that the woman’s husband may fear being stigmatized as sterile, or the couple may wish secrecy for their child’s sake so that he or she does not feel like the product of a commercial and uninspired

191. The stories of a few AID children are told in Peggy Orenstein, Looking for a Donor to Call Dad, N.Y. Times, June 18, 1995, § 6 (Magazine), at 28. One person born an AID child, now 49 years old, describes his search as “obsessive.” Id.
192. See id.
193. See Smith, supra note 178, at 92; see also Mason, supra note 93, at 197 (discussing the arguments in favor of disclosure in the context of AID).
194. See Smith, supra note 178, at 93.
195. See Andrews, supra note 175, at 168 (stating that the mother is “often expressly advised by the infertility specialist not to tell the obstetrician that the child is a product of artificial insemination”). The little empirical data available discloses that a large majority of AID parents do not intend to tell their children about the circumstances of the children’s conception. See Lori B. Andrews & Lisa Douglass, Alternative Reproduction, 65 S. Cal. L. Rev. 623, 638 n.54 (1991).
contractual act performed by the biological father. Rather temporarily obtain contact sperm & about country U.L.A. consequences, J.M. FAM.

196. See Stephen Rodrick, Upward Motility, NEW REPUBLIC, May 16, 1994, at 9 (describing a sperm bank that solicits Harvard and MIT donors). One donor was quoted as describing his relationship with the sperm bank as “a business deal.” Id. at 10.

197. See John Eekelaar, Parenthood, Social Engineering and Rights, in CONSTITUTING FAMILIES: A STUDY IN GOVERNANCE 80, 94 (Derek Morgan & Gillian Douglas eds., 1994); see also J.M. Eekelaar, Reforming the English Law Concerning Illegitimate Persons, 14 FAM. L.Q. 41, 57-58 (1980) (“[W]here it is doubtful whether revelation or suppression of truth has the more desirable consequences, one should choose the practice which involves revealing the truth.”).

198. See Gibson, supra note 177, at 25-26; see also USCACA, supra note 69, § 4 cmt., 9B U.L.A. 166 (describing the protection state statutes offer to sperm donors); ELIAS & ANNAS, supra note 94, at 233 (describing the protection of sperm donors as almost “obsessional”).

199. See Gibson, supra note 177, at 30-32. Gibson surveyed a few empirical studies in this country and abroad and concluded that the studies “suggest that most donors have serious misgivings about their legal responsibility for AID offspring that might cause them to stop donating if their identities were revealed.” Id. at 31-32. However, another study found that 60% of the donors surveyed would donate even if their identity was to be revealed to the resulting children. See ELIAS & ANNAS, supra note 94, at 234. Andrews and Douglass report that 75% of donors to a California sperm bank agreed to make their names and addresses available so that the resulting children could contact them after the children reached the age of eighteen. See Andrews & Douglass, supra note 195, at 661. A 1985 Swedish law requires that AID children over the age of eighteen be able to obtain identifying information about their biological father. As a consequence, the number of donors temporarily declined. The type of donor then changed to a larger number of older married men, rather than younger men. See DOUGLAS, supra note 171, at 134.

200. See Gibson, supra note 177, at 34.
3. Unmarried Women and Artificial Insemination by Donor

The other group of AID cases involves unmarried women who conceived children by AID in order to raise the child as a single parent or with a lesbian partner. The mothers in these cases receive semen from known donors, and either successfully inseminate themselves or are inseminated by a doctor.\(^{201}\) If donors initiate litigation to establish their paternity of the child, it is usually for the purpose of achieving visitation rights. The cases often turn, first, on whether the state’s statute applies to unmarried women in addition to married women.\(^{202}\) If the state’s AID statute applies only to insemination of married women, then the statute does not cut off the donor’s paternity. If the statute applies to unmarried women, the dispute is whether the statute also applies to a known donor, and if so, whether it bars the donor’s parental status if the parties had previously agreed on the sperm donor’s parental role. Second, some cases turn on whether the court treats the sperm donor analogously to an unmarried father by coitus. In states without an AID statute, the courts rely on a variety of theories to determine the donor’s parental status. Unlike the divorce cases, these decisions directly adjudicate the donor’s paternity which, if established, would determine the child as a potential heir to the donor’s estate.

Courts have had great difficulty interpreting the AID statutes that include unmarried women. In *Jhordan C. v. Mary K.*,\(^{203}\) the court held the California AID statute inapplicable and found the donor to be the child’s legal father because, although the statute includes unmarried women, the donor provided semen to a woman who was not under a physician’s supervision.\(^{204}\) Under the California Civil Code, only a donor who provides semen to a licensed physician is not the child’s natural father.\(^{205}\) In *Jhordan C.*, the parties did not know about the statute and did not have a preconception agreement regarding the donor’s

\(^{201}\) In *In re R.C.*, 775 P.2d 27 (Colo. 1989) (en bane), the sperm donor gave his semen to the recipient, who then took the semen to her doctor and was artificially inseminated by the doctor.


\(^{203}\) 224 Cal. Rptr. 530 (Ct. App. 1986).

\(^{204}\) See id. at 535.

\(^{205}\) See CAL. CIV. CODE § 7005(b) (West 1983) (current version at CAL. FAM. CODE § 7613(b) (West 1994)).
role. The donor, who had visited the baby several times soon after he was born, filed a paternity action nine months later when the mother refused more visitation. The donor had been supporting the child pursuant to a separate support action initiated by the county, which had been providing the mother public assistance.206

By contrast, in McIntyre v. Crouch,207 an Oregon court held that state's AID statute208 applicable but proceeded to hold that the statute could be unconstitutional as applied to the donor if certain facts were established. The mother had inseminated herself with the semen of a known donor and had not used a physician.209 The court declared that the statute's provisions, that the donor had "no right, obligation or interest" with respect to the AID child210 and that the child had no "right, obligation or interest with respect to [the] donor,"211 applied to a known donor as well as to an anonymous one. The court then explained that, because the statute would have overridden the agreement that the donor allegedly gave him a parental role with the child,212 the statute was unconstitutional as applied to the donor because it imposed an absolute bar to his assertion of paternity in violation of due process—denying him the opportunity to assert the rights and responsibilities of fatherhood.213 The court reversed summary judgment for the mother and allowed the donor the opportunity to prove the existence of the alleged agreement that he would be involved with the child and would be given a definite visitation schedule.

However, in Leckie v. Voorhies,214 another Oregon court held that a sperm donor was not a parent where he had explicitly waived in writing all parental rights and reaffirmed that waiver when the child was three years old. Although the donor had maintained a visitation schedule with the child and had provided child support, the court enforced the waiver and did not apply the Oregon AID statute or McIntyre. Instead, the court permitted the biological father to relinquish parental rights

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206. See Jhordan C., 224 Cal. Rptr. at 532-33.
209. The Oregon statute permits AI to be performed by physicians only. See id. § 677.360.
210. Id. § 109.239(1).
211. Id. § 109.239(2).
212. See McIntyre, 780 P.2d at 243.
213. See id. at 244. The court relied on Lehr v. Robertson, 463 U.S. 248 (1983), which involved a child conceived by coitus. See McIntyre, 780 P.2d at 244-45.
through a private agreement.\textsuperscript{215}

In an Ohio case, \textit{C.O. v. W.S.},\textsuperscript{216} the donor alleged that he and the mother had agreed that he would establish a relationship with the child. The Ohio statute applied to unmarried women.\textsuperscript{217} Given the agreement, the court held that a parent-child relationship existed between the donor and child; however, it was not clear whether the court would have held as such if there had been no agreement.\textsuperscript{218} The court said that "[t]he statute does not prevent a paternity adjudication where an unmarried woman solicits the participation of the donor, who was known to her, and where the donor and woman agree that there would be a relationship between the donor and child."\textsuperscript{219}

In states where AID statutes apply only to married women, or where the state has no statute, known donors of semen to unmarried women who petitioned to establish paternity have been successful, regardless of whether there existed a preconception agreement. In \textit{C.M. v. C.C.},\textsuperscript{220} the donor successfully sued for visitation based on what he thought was an agreement by which he would assume parental responsibility. The state had no AID statute at the time. The court likened the donor to an unwed father by coitus and concluded that since an unwed father is entitled to visitation with his illegitimate child, so too should the sperm donor.\textsuperscript{221}

In \textit{Thomas S. v. Robin Y.},\textsuperscript{222} the petitioner sperm donor, Thomas S., supplied sperm to Robin Y. to conceive a child who would be raised by Robin and her lesbian partner. The New York AID statute applied only to married women.\textsuperscript{223} The parties orally agreed that Thomas would not have a parental role, and he was not listed on the child's birth certificate.\textsuperscript{224} He saw the child only a few times for the three years after the

\textsuperscript{215} \textit{See id.} at 522. It is doubtful, however, that the waiver would have freed the father of his support obligation. \textit{See} Wadlington, \textit{supra} note 138, at 494 & n.113.

\textsuperscript{216} 639 N.E.2d 523 (Ohio Ct. C.P. 1994).

\textsuperscript{217} \textit{See} OHIO REV. CODE ANN. § 3111.37(B) (Anderson 1996).

\textsuperscript{218} \textit{See} C.O., 639 N.E.2d at 525; \textit{see also} \textit{In re} R.C., 775 P.2d 27, 35 (Colo. 1989) (en banc) (concluding that the AID statute yielded to an agreement between the donor and recipient as to the donor's parental role).

\textsuperscript{219} \textit{C.O.}, 639 N.E.2d at 525.


\textsuperscript{221} \textit{See id.} at 824-25. New Jersey has since enacted a statute providing that the donor of sperm to a physician is, in law, not the father of the child unless the donor and the recipient woman had contracted otherwise. \textit{See} N.J. STAT. ANN. § 9:17-44(b) (West 1993); \textit{see also} N.J.M. STAT. ANN. § 40-11-6(B) (Michie Supp. 1994); WASH. REV. CODE ANN. § 26.26.050(2) (West 1986).


\textsuperscript{223} \textit{See} N.Y. DOM. REL. LAW § 73(1) (McKinney 1988).

\textsuperscript{224} \textit{See Thomas S.}, 618 N.Y.S.2d at 358.
child's birth, and he did not contribute child support. When the child was five years old, her mother arranged for visits with Thomas, which occurred somewhat frequently over the next six years, even though Robin and her family lived in New York and Thomas lived in San Francisco. When Thomas asked to take the child to visit his family and revealed his wish to establish himself as the child's legal father, Robin stopped the child's visits. Thomas then filed for an order of filiation and visitation, which the family court denied on grounds of equitable estoppel. However, the appellate court reversed. Deciding only the filiation issue, the court held that Thomas had established his biological paternity as required by statute, and that Robin was estopped from denying legal recognition of his relationship with the child which she had initiated and encouraged. The court ordered an entry of filiation and left the issue of petitioner's visitation rights for further determination.

If the child had been conceived through coitus, Thomas would have had standing to seek visitation, and his involvement with the child would likely have afforded him due process protection against termination of his parental status. An unwed father's due process rights are weakened, however, where the child is already part of a family unit. In Quilfoil v. Walcott, the biological father could not prevent the child's adoption by the child's mother and her husband, with whom the child lived. The child had never lived with the biological father, and the father had never played a parental role in the child's life. In addition to this distinction from Thomas S., is the fact that the New York court did not consider Robin's lesbian partnership as a family unit. In this instance, Jhordan C. is analogous. In that case, the child's mother and her lesbian partner were also raising the child. Although the court stressed that its decision was not based on a preference for the traditional family or for providing a father for a child born of a single woman, the court rejected the mother's constitutional argument that the father, Jhordan, infringed on the

225. See id.
226. See id.
227. See id. at 362.
231. See id. at 249, 255-56.
232. See Jhordan C. v. Mary K., 224 Cal. Rptr. 530, 537 (Ct. App. 1986). According to the court, the California legislature had determined that issue by including unmarried women in the AID statute. See id.
family autonomy of her family unit. Instead, the court included Jhordan within the family unit because of his social relationship with the child, but the court never referred to the lesbian partnership as its own unit.

Supporting these views is the consideration that filiation is an advantage for the child, both in terms of providing the child with a male parent and bringing the child increased financial support and a potential inheritance. In Thomas S. and C.M., the courts expressed approval of the donors as financially capable people. Thomas S. offered an additional potential of a substantial inheritance. In C.M., the donor, who was a teacher, could help the child's development. In C.O., the court rationalized that it would have held the AID statute unconstitutional if it were applied in such a way that it denied the father an opportunity to establish paternity since it was against public policy to deny a child the right to child support and an inheritance.

In Anonymous v. Anonymous, however, the court recognized the increasing number of single women head households. It saw no particular detrimental consequences to the child besides a possible loss of inheritance, which it noted is always possible if the child is disinherited by a parent's will. Indeed, the court recognized that a single-parent unit has some advantages over a two-parent family; for example, it is not subject to interference from the other adult who could prevent the custodial parent from moving to another state.

4. Adoption by a Same-Sex Couple

An important development for inheritance law appears in the rules governing adoption by homosexual adults. The lesbian couples in Thomas S. and Jhordan C. could not have constituted a family unit under traditional law. If the couple is a lesbian couple, one or both of whom has had a child by AI, or if the couple is a homosexual couple that has used a female surrogate to provide them with a child from the sperm of one of the couple, parental rights and inheritance issues will depend upon the very volatile state of the law regarding adoption, custody, and

233. See id. at 536.
234. See id.
239. See id. at *9 & n.32.
240. See id. at *4 & n.21.
visitation rights of same-sex households.

Where a lesbian couple in an ongoing relationship raises a child, the child has two social parents, both of whom are women, but only one of whom is the biological and legally recognized parent. The nonbiological mother often seeks to adopt the child, wanting to establish a legal relationship in addition to a social one, in order to protect her right to custody or visitation if the couple separates and to give legal recognition to her de facto parental status. Adoption, however, normally extinguishes the parental rights of the biological parent.

Therefore, in order for the biological mother not to lose her parental status, the adoption must be treated as a second-parent adoption, similar to stepparent adoption. In stepparent adoption, the stepparent and the biological parent adopt the child, but the biological parent retains her status as the child's legal parent. Unless a statute provides otherwise, adoption cuts off the child from inheritance from or through the child's other biological parent (the deceased or divorced first spouse of the remarried biological parent) and that parent's blood line.

However, a few courts have recently held that the domestic partner of a biological parent could adopt the other partner's child without severing that parent's legal status. In Adoption of Tammy, the Massachusetts Supreme Judicial Court held that a lesbian couple could jointly adopt the daughter of one of the partners who had been inseminated with the sperm of a cousin of the other partner. The court held that the Massachusetts statute, which provided that "a person" may petition for adoption, included the plural term "persons," so that the statute did not terminate the natural parents' legal relationship to the child.

Tammy presented compelling facts supporting the view that adoption would be in the best interests of the child. Both women were doctors, members of the Harvard Medical School faculty, and committed parents in a long-term relationship. First, the court emphasized that the child's

241. No case has yet arisen in which both women are biological mothers, in that one woman provides the egg and the other gestates the child.
243. See In re Angel Lace M., 516 N.W.2d 678, 683 & n.9 (Wis. 1994).
244. See, e.g., UNIF. PROBATE CODE § 2-114(b) & cmt., 8 U.L.A. 107 (Supp. 1996).
245. See Angel Lace M., 516 N.W.2d at 683 & n.9. But see, e.g., In re Jacob, 660 N.E.2d 397, 404 (N.Y. 1995) (concluding that section 117 of New York's Domestic Relations Law does not require termination of a biological parent's rights in all cases of adoption).
248. See Tammy, 619 N.E.2d at 319.
legal relationship with the mother’s partner would bring significant practical financial advantages. The child would be eligible to inherit from the new parent and from class gifts in her family trusts, and she would be entitled to financial support, including benefits from insurance and social security. Second, the court emphasized the stable family unit that the three had formed, pointing out that adoption would allow the child and the nonbiological mother to retain their ties if the women were to terminate their relationship. The court cited evidence from psychiatric and psychological literature that “children raised by lesbian parents develop normally.”

Analogously, a divided New York Court of Appeals held in In re Jacob, in two consolidated cases, that both the domestic partner of an unmarried heterosexual woman and the domestic partner of a lesbian had standing to adopt under New York Domestic Relations Law. In the first case, the heterosexual woman’s child had been born in a previous marriage. In the second case, the child was conceived by AI using an unknown sperm donor. The court concluded that each petitioner came within the statutory language: “[a]n adult unmarried person or an adult husband and his adult wife together may adopt another person.” The court analogized the two cases to other situations in which New York law does not sever the parental bond of the consenting biological parent upon adoption by the second party.

The court remanded the cases to determine whether adoption was in each child’s best interests. That policy would be furthered by permitting a child’s social parent (the domestic partner of the child’s biological mother in this instance) to become a legal parent so that the child would be advantaged socially by having two permanent parental figures and economically by benefits from the second parent such as social security and inheritance. In addition, the court recognized the realities of the large number of nontraditional families. It stated that a

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249. See id. at 320.
250. See id. at 317, 320.
251. Id. at 317. In In re K.M., 653 N.E.2d 888 (Ill. App. Ct. 1995), another court also held, as a matter of statutory interpretation, that a lesbian coparent had standing to petition to adopt the AI conceived child of her partner. See id. at 898-99; see also id. at 898 (citing cases holding that second-parent adoption by same-sex couples is permissible).
253. N.Y. DOM. REL. LAW § 110 (McKinney Supp. 1997); see also Jacob, 660 N.E.2d at 400-01.
254. See Jacob, 660 N.E.2d at 403-04.
255. See id. at 399.
256. See id.
result that would not give standing to domestic partners would mean that thousands of children in homes headed by unmarried partners would not have the advantage of a second legal parent, even if the second parent wanted to establish a legal relationship.\textsuperscript{257}

Thus, Massachusetts and New York cases provide the means for a nonbiological social parent to become a legal parent and fulfill not only a continuing rearing role, but also to undertake financial responsibilities to the child that are not available under present law. It is not clear, however, whether the child would be able to inherit from both parents, at least under a statute like that of the UPC for stepparent adoption.\textsuperscript{258} That section preserves the child's potential inheritance from the natural parent, but only when the parent's spouse adopts the child.\textsuperscript{259} The lesbian partner, however, is not the natural parent's spouse.

If a gay man wants to raise a child for whom he is the biological father, he must contract with a woman who will bear the child for him and agree to relinquish the child after its birth. In other words, he wants to enter a form of surrogacy agreement in which a woman is artificially inseminated with his sperm and agrees to relinquish the child to him.\textsuperscript{260} Their agreement would change the typical legal result of AI so that the sperm provider becomes the sole legal and social parent. If this result were accomplished, the child would inherit only from the father.

The legal status of children conceived in this manner, however, is unclear.\textsuperscript{261} In many states, surrogacy contracts are illegal, or at least unenforceable.\textsuperscript{262} Even where a surrogacy contract is enforceable, under some state statutes the man would have no parental rights because the intended parents must be a married man and woman.\textsuperscript{263} An Arkansas

\textsuperscript{257} See id. at 398.

\textsuperscript{258} See UNIF. PROBATE CODE § 2-114(b), 8 U.L.A. 107 (Supp. 1996).

\textsuperscript{259} See id.

\textsuperscript{260} This situation has been called a “surro-gay” arrangement. See Marla J. Hollandsworth, Gay Men Creating Families Through Surro-Gay Arrangements: A Paradigm for Reproductive Freedom, 3 AM. U. J. GENDER & L. 183, 200 (1995). It is one method used by the “gay-by boom”—gays and lesbians who are increasingly arranging for the birth of children to raise “through adoption, artificial insemination and surrogate motherhood.” Id. at 186 n.8.

\textsuperscript{261} See id. at 207-08; see also Fred A. Bernstein, This Child Does Have Two Mothers . . . And a Sperm Donor with Visitation, 22 N.Y.U. REV. L. & SOC. CHANGE 1, 16-17 (1996) (pointing out that some gay men consider surrogacy “morally unacceptable” because it involves “exploitative relationships” and would prefer instead a coparenting relationship with the child’s mother).

\textsuperscript{262} See discussion infra Part VI.B.

\textsuperscript{263} For example, Virginia permits the formulation of surrogacy contracts by “[a] surrogate, her husband, if any, and [the] prospective intended parents.” VA. CODE ANN. § 20-159(A) (Michie 1995). Intended parents, however, are defined as “a man and a woman, married to each other.” Id. § 20-156; see also USCACA, supra note 69, § 1(3), 9B U.L.A. 164 (employing a similar definition
statute, however, uniquely provides that a child born as a result of a surrogacy agreement is the child of the biological father even if he is unmarried.\textsuperscript{264}

Only if the agreement is enforced and the surrogate’s parental rights (and those of her husband, if she is married) are terminated will the legal results be as the participants intended. The case law indicates that the courts will not terminate the donor’s parental rights where he and the recipient were in agreement as to their preservation. In these cases, however, the inseminated woman did not agree to be a surrogate but, instead, intended to be the child’s parent, and the issue was whether she and the sperm donor had agreed that the donor would play a parental role. No case has yet decided that the woman’s parental role would be cut off, leaving the child with no mother. In addition, underlying some of the decisions on this issue was the policy that the child’s best interests lay with having two parents, each of a different sex. Thus, under statutes and common law, a woman, but not a man, may be the sole legal parent of a child conceived by AID, unless the woman relinquishes her status by putting the child up for adoption. If the woman dies before the adoption, the child should inherit from her estate.\textsuperscript{265}

IV. IN VITRO FERTILIZATION

Another principal reproductive technology is IVF. Where a couple would use AID if the male is infertile or suffers from a genetic disease, it would use IVF if the woman suffers reproductive dysfunction, genetic disease, or if the male has a low sperm count.\textsuperscript{266} IVF involves fertiliza-
tion of eggs with semen in an environment outside the woman’s body, usually a laboratory dish. For the IVF procedure, physicians remove eggs from a woman’s ovaries which previously were hormonally stimulated to superovulate, that is, to produce several eggs. The eggs are fertilized in vitro, and after they have started to divide, typically after two or three days, the early embryos are transferred to a woman’s uterus where they must implant in order for pregnancy to occur. Thus, women undergo drug therapy, invasive procedures, and the risk of multiple pregnancies in the hopes of successfully bringing a child to term. Unlike AID, the IVF procedure is technically difficult, expensive, and cannot be performed without the services of a physician.

The first IVF child was born in England in 1978. Since that time, it is calculated that over 30,000 children worldwide have been born using IVF, with over 8,230 being born in the United States between 1986-1990. Nationwide, IVF success rates are estimated at one in five couples. More than 300 clinics in the United States now perform more than 40,000 in vitro and similar procedures a year.

A. Egg Donation

IVF can involve several combinations of genetic and gestational contributors. For example, IVF can be accomplished with the gametes of a husband and wife and gestation by the wife. Legally, this is the simplest IVF procedure. It is used for women who produce healthy eggs but cannot conceive because of damaged or diseased fallopian tubes preventing eggs from traveling to their uterus, or because the

267. See id. at 98-99.
268. See id. at 98.
269. See Davis v. Davis, 842 S.W.2d 588, 591-92 (Tenn. 1992) (describing the procedures that Ms. Davis underwent in the couple’s six attempts at IVF).
270. See ROBERTSON, supra note 266, at 98.
271. See id. at 99.
273. See Gabriel, supra note 272, at 1.
274. An estimated five percent of infertile couples include women that produce healthy eggs. See Michael Kirby, Medical Technology and New Frontiers of Family Law, in LEGAL ISSUES IN HUMAN REPRODUCTION, supra note 6, at 3, 6. Thirty percent of infertile women in marriages result from a defect in the fallopian tubes. See MASON, supra note 93, at 204; PETER SINGER & DEANE
husband’s sperm count is low. However, IVF becomes more legally complicated if conception is accomplished using IVF with gametes from one or more donors and gestation by a woman who did not provide the egg. Where this occurs, IVF not only allows reproduction divorced from sex, but conception divorced from birth, and genetic contribution divorced from gestational contribution. Where an egg “donor” provides eggs for another woman who cannot produce healthy eggs, and the recipient woman gestates the fetus, the resulting child has two mothers: a genetic mother who is the egg donor and a gestational mother. Often, in this situation, the donated eggs are fertilized with sperm from the gestational woman’s husband, and the parties usually intend that the gestating woman and her husband will keep and rear the child. Their intent creates the difference between IVF with donor eggs and surrogacy arrangements. In egg donation, at the time of implantation, the gestational mother intends to raise the child; in surrogacy, the gestational mother does not. In egg donation, the child is genetically the child of the husband and the egg donor, but is biologically, by pregnancy, also the child of the wife. The first pregnancy from IVF of a donated egg was achieved in 1983.

Egg donation has been described as creating the most “stable rearing and family situation” of any noncoital reproduction because each rearing parent has a biological relation to the child, the woman by

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275. See Robertson, supra note 266, at 98.
276. Egg “donors” are paid approximately $3000, although the fees are increasing. See Gabriel, supra note 272, at 1. Egg donation has become an increasingly commercial enterprise. Donors are sought through advertising, including college and university newspapers, seeking donors in their twenties and early thirties. The recipients tend to be older in their less fertile years. See Jan Hoffman, Egg Donations Meet a Need and Raise Ethical Questions, N.Y. Times, Jan. 8, 1996, at 1.
278. An alternative procedure is gametic intrafallopian transfer (“GIFT”), in which a mixture of sperm and egg are inserted into a woman’s fallopian tubes for fertilization in vivo. A related procedure is zygote intrafallopian transfer (“ZIFT”) in which eggs are fertilized in the laboratory and the resulting embryo is transferred to a woman’s fallopian tubes. See Andrews & Douglass, supra note 195, at 642-43.
280. See infra Part VI.
282. See Andrews, supra note 175, at 163.
283. Robertson, supra note 281, at 12.
gestation and the man by genetics. However, egg donation has, for the first time, made possible a separation of the female genetic role from the gestational one. Two women may each be considered the biological mother, although this fact need not be publicly known because the birth mother will register the child as hers, and, because of her pregnancy, is usually perceived as the natural mother of the child. If the donor is a known donor, however, there may be a contest between the two women, each claiming to be the mother. This issue is not analogous to the more common question of who is a child’s father that may arise with a nonmarital child; the issue of who is a child’s father is a question of fact whereas the issue of who is the mother is one of law.

Unlike sperm donation, egg donation is a difficult and painful procedure that requires treatment of both the donor and the recipient, whose reproductive cycles must be chemically synchronized. The donor receives daily hormonal injections in order to overstimulate her ovaries to produce a large number of eggs; the recipient receives daily injections to prepare her uterus. The donor then must undergo a procedure under anesthesia to remove her eggs. Extra eggs may be donated to others or may be fertilized in vitro to conceive an embryo. Extra embryos, often called preembryos, may be donated to others or frozen for later use by the couple or for later donation.

B. Embryo Donation

If IVF occurs using both donor eggs and donor semen and the resulting fertilized egg is then implanted in a woman, the process is known as embryo donation. Embryo donation, where the gestating woman and her husband intend to raise the child, is used where both intending social parents are either infertile or carry a genetic disease, but the woman is able to gestate the embryo. In embryo donation, the only rearing parent that the child is biologically related to is the gestating mother. The child has no genetic relationship to that woman or, if she is married, to her husband. A donated embryo may have been created for

284. See id.
285. See id. at 4.
286. See Andrews & Douglass, supra note 195, at 653. Eggs may also be nonsurgically removed by using ultrasound. See id.
287. See id.
288. See id. at 654-55.
289. See ROBERTSON, supra note 266, at 9.
290. See MASON, supra note 93, at 219.
particular recipients or may be an extra embryo from another couple’s IVF procedure given to unknown recipients. Embryo donation could also be used by unmarried women, for example, lesbian couples, if they want to raise a child together, each as a biological parent. One of the women will donate eggs to be fertilized in vitro with donor sperm. The fertilized eggs will then be implanted for gestation into the other woman of the couple.

An alternative procedure not involving IVF is embryo transfer, accomplished by uterine lavage. In this method, the egg donor conceives by AID or coitus and the embryo is flushed out of the donor’s womb. The embryo is then implanted in the womb of another woman who is physically unable to conceive but is capable of gestating the embryo and intends to raise the resulting child. If this woman is married, her husband’s sperm may have been used to impregnate the donor woman. Thus, in effect, the donor woman acts as a surrogate for conception. The first birth after lavage occurred in 1984.291

C. Statutes and Precedents

There is little law settling the legal status of the parties to IVF, egg donation, and embryo donation and transfer. Most commentators suggest that egg donation and sperm donation should be treated similarly: the donor should have no parental rights or obligations towards the resulting child, and the gestational mother and her consenting husband should be the legal parents.292 This result is supported not only on the ground that a gestational mother should always be the presumed mother,293 but also because she intends to raise the child.294 The few statutes that apply to IVF designate the gestational mother and her husband as the child’s legal parents.295 Yet, the situations may not be completely analogous.296 A woman donor, unlike a male donor, undergoes invasive, lengthy

291. See Andrews, supra note 175, at 163.
293. See Elias & Annas, supra note 94, at 238-39 (stressing that the legal mother should be easily identifiable at the child’s birth).
294. See, e.g., Robertson, supra note 266, at 125. Professor Robertson bases this choice on the grounds of procreative liberty. See id. at 126.
295. See, e.g., Fla. STAT. ANN. § 742.11(2) (West 1997); Tex. Fam. Code ANN. § 151.102(b) (West 1996); see also USCACA, supra note 69, §§ 2-3, 9B U.L.A. 165; infra text accompanying notes 319-28.
296. See Andrews & Douglass, supra note 195, at 679 n.275.
treatment with possible physiological side effects. Consequentially, it may be more likely that some egg donors undergo the treatment intending to play a parental role. Embryo donation also may not be completely analogous to sperm donation because it involves two gamete donors whose intentions regarding parenting may differ. In addition, the progenitors of the embryo may have been unsuccessful at procreating a child themselves or may have lost a child and may want to play a parental role to the child born of their embryo. The IVF statutes do not take account of these differences between donors, and, as described below, they leave other issues unanswered.

1. In Vitro Fertilization Statutes

AID statutes do not apply to IVF or to egg or embryo donation unless the statutes explicitly include them because, unlike AID, conception does not occur by insemination in IVF. For example, while section 5 of the UPA applies only to AI, the USCACA applies to IVF as well as AID. In the USCACA, “assisted conception” means any pregnancy (except by fertilization of egg and sperm of husband and wife) that results from fertilizing an egg with sperm other than by coitus, or pregnancy resulting from implanting an embryo. The USCACA includes in the definition of donor, “an individual . . . who produces [the] egg . . . used for assisted conception.” Like a sperm donor, an egg donor is not a parent. Instead, the birth mother is the child’s legal mother, and the birth mother’s husband is the father unless, within two years of learning of the birth, he proves that he did not consent to the assisted conception. Under the USCACA, if the birth mother is not married, then the child has no legal father since the sperm donor is not considered a parent. Only a handful of states have enacted IVF statutes in order to legitimize the IVF child and sever the legal relationship between the

297. See id. at 635-36.
298. But see Emily McAllister, Defining the Parent-Child Relationship in an Age of Reproductive Technology: Implications for Inheritance, 29 REAL PROP., PROB. & TR. J. 55, 69 (1994) (“There is a strong case for construing ‘artificial insemination,’ as used in these statutes, as encompassing other methods of assisted conception.”).
300. USCACA, supra note 69, § 1(1), 9B U.L.A. 164.
301. Id. § 1(2).
302. See id. § 4(a), 9B U.L.A. 166.
303. See id. § 2, 9B U.L.A. 165.
304. See id. § 3.
305. See id. § 4(a), 9B U.L.A. 166.
donors and the child. The Florida and Texas IVF statutes purport to apply only to married couples. The Florida statute, which extends to both AI and IVF, provides that a child born in wedlock, conceived by donated gametes or preembryos, is "irrebuttably presumed to be the child of the recipient gestating woman and her husband, provided that both . . . consented in writing." The donor, however, may not automatically lose his or her parental rights. Section 742.14 of the statute provides that the donor "shall relinquish" all parental rights and obligations, but does not explain if the donor must perform some affirmative act in order to do so. Further, it does not limit donation to a married couple.

Thus, like AID statutes, the Florida IVF statute leaves gaps in determining parenthood. First, if both members of the recipient couple have not consented in writing, the statute's irrebuttable presumption that the child is the child of the recipient wife and her husband does not apply. Yet, the donor may still relinquish all parental rights and obligations. This may leave the child without legally recognized parents. The Florida code also does not require that the recipient be married in order for the donor to relinquish parental rights. Marriage is required only for the recipient to be irrebuttably presumed as the parent. Thus, an egg donor may relinquish parental rights, but under the statute, if the recipient is an unmarried gestating woman, she is not irrebuttably presumed to be the mother and will have to prove her maternity under the common law.

If the recipient is not married and has received a donated embryo, the statute's irrebuttable presumption again does not apply. The donors of the donated embryo may still relinquish parental status. If so, the child will have one legal parent under common law: the gestational

306. See Schiff, supra note 95, at 272.
309. See id. § 742.14.
310. This latter section of the Florida legislation does not apply if the donor is one of a "commissioning couple." Id. A commissioning couple is the intended father and mother, not limited by the statute to married couples, who conceived by assisted reproduction using the eggs or sperm of one of them. See id. § 742.13(2).
311. See id. § 742.11(1).
312. See id. § 742.14.
313. See id. § 742.11(1).
314. For an interpretation of the Florida statute, see In re Marriage of Adams, 551 N.E.2d 635, 638 (Ill. 1990).
mother. 316 If the donors do not relinquish parenthood, the child has three potential legal parents.

The Texas egg donation and embryo donation statutes apply only to married couples who receive the donation. The Texas legislation, however, is not consistent regarding its consent requirements. It provides that the egg donor is not the parent of the child if the egg is fertilized with the sperm of the husband of the recipient woman. 317 The husband, whose sperm was used, and his wife, who receives the fertilized egg, are the parents of the resulting child if each consents in writing. 318 Under section 151.102(b), however, the child is not the child of the egg donor and does not first require the recipient and her husband’s written consent to the IVF and implantation as a condition precedent to extinguishing the donor’s parental status. Even if neither spouse consents in writing, the donor’s parental status is still extinguished, and the child has no legal parents under the statute. Presumably, the common law presumptions of paternity and maternity would then apply.

The Texas statute may also produce some difficult situations concerning embryo donation. One section provides that a child born of a donated embryo that had been implanted into the uterus of a woman, who with her husband consents in writing, is the child of that husband and wife. 319 Under another subsection, the child is not the child of the embryo donors if the recipient husband and wife consent to the implantation, 320 though such consent is not required to be in writing. The wife most likely would have consented in writing to the implantation procedure, but if her husband did not consent, it is possible that both donors, along with the recipient woman, would be the parents of the resulting child. If the husband consented orally, then the parental status of the donor is extinguished but the husband would still not be considered the child’s parent under the statute since that requires written consent. It is also possible that if each member of each couple is treated as replacing the one of the same gender, then the sperm donor and the consenting gestating mother would be the child’s parents, thereby rendering the child illegitimate.

316. See Hill, supra note 64, at 370.
317. See TEX. FAM. CODE ANN. § 151.102(b) (West 1996).
318. See id. § 151.102(a). The husband consents to provide sperm to fertilize a donated egg and the wife consents to the implantation of the fertilized egg in her uterus.
319. See id. § 151.103(a).
320. See id. § 151.103(b).
2. Parenthood of In Vitro Fertilization Children Under Common Law

Without a statute determining parenthood for egg or embryo donation to a married woman, a court would probably apply the common law presumptions that the woman who gives birth is the child’s mother, and her husband is the father.\(^{321}\) This would clearly be so if the husband’s sperm were used. However, where the wife gestated a donated embryo, or if donated sperm were used for IVF of her ovum, her husband may raise the same issues regarding the child’s legitimacy as have been raised when married women conceive by AID. In such a case, the husband was under a duty to furnish child support, but was not declared the child’s legal father.\(^{322}\) If an IVF statute does not provide otherwise, and state law permits the husband to rebut the presumption of the child’s legitimacy, and the sperm donor is unknown so that the child cannot establish its paternity, the child could be left fatherless. However, if the husband dies before or just after the child’s birth, and the presumption of the child’s legitimacy was not rebutted, the husband should be considered the child’s legal father.

In embryo donation, if a male provides sperm for IVF for the benefit of an unmarried woman, without a statute providing otherwise, the male provider of sperm should be the legal parent. In addition, if he is known, he should be subject to a parent’s obligations, and his estate subject to the child’s inheritance if the child can prove paternity. Of course, if the sperm donor had donated anonymously to a sperm bank, the bank would have had to keep records in order to trace the donor. The law in some states would treat sperm donors differently depending on whether their sperm were used for AID or for IVF. The sperm bank would have to inform all donors of these differing results and comply with their instructions for using their sperm for either procedure.

Differing results may also occur between the sperm and egg donors to the donated embryo. The egg donor would not likely be considered the child’s parent because the gestational woman would be the presumed mother.\(^{323}\) However, if the sperm donor could be designated the legal

\(^{321}\) See Hill, supra note 64, at 370, 372-73.

\(^{322}\) See supra notes 107-15 and accompanying text. But see supra notes 116-20 and accompanying text.

\(^{323}\) There are no precedents for this situation since the egg source and the gestator have, in the past, always been the same woman. See John A. Robertson, In the Beginning: The Legal Status of Early Embryos, 76 VA. L. REV. 437, 478 (1990). There exist precedents in which the woman who
parent of an embryo donated to an unmarried woman but the egg donor could not, then the two gamete donors to a donated embryo would be treated differently in terms of whether either was the child's legal parent. This would mean, for example, that the child might inherit from the sperm donor if his identity were known and proven, but not from the egg donor to the same embryo.

In the only case to deal with the issue of IVF and egg donation, the court did not apply the presumption of maternity but, instead, determined maternity by the parties' intent. In McDonald v. McDonald, 324 a married couple conceived using the husband's sperm and donor eggs. The fertilized eggs were implanted in the wife, who bore twins. The husband later sued for divorce and sought custody of the children as their sole natural parent. 325 New York does not have an IVF statute. The husband based his claim on a California surrogacy case, Johnson v. Calvert, in which the California Supreme Court held that where the genetic parent (the egg donor), and the gestational surrogate could each claim to be the child's mother under California law, the genetic parent was the child's legal mother. 326 The California court based its decision on the parties' intent before conception took place, deciding that the genetic mother was the woman who intended to bring about the birth of the child and raise the child as her own. 327

McDonald, however, did not involve surrogacy, but, instead, egg donation for which the parties have the opposite intent than they do when they enter a gestational surrogacy agreement. Since the gestational woman, not the egg donor, intends to rear the child, the McDonald court distinguished the case from the surrogacy situation in Johnson. The McDonald court used Johnson's own distinction of egg donation—that in an egg donation situation, the gestational mother, whose intent was to raise the child as her own, is the child's "natural" mother. The court concluded that Ms. McDonald was entitled to temporary custody during the divorce proceedings. 328

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supplied the egg and the woman who gestated the child under a surrogacy contract contest the maternal designation. See infra text accompanying notes 582-614.


325. See id. at 478.


327. See Johnson, 851 P.2d at 782.

328. See McDonald, 608 N.Y.S.2d at 479-80.
husband and wife for child custody. If the court had held that the defendant wife was not the child’s mother, the child would have had no mother because the egg had been donated anonymously. Yet, the defendant had not only gestated the twins, but was their social parent, having raised them from birth through the time of the divorce proceedings.329

Even if the egg donor had been known and had been the contesting party, the court could have resolved the issue of maternity without relying solely on the parties’ intent, but according to the legal consequences of its decision. If the egg donor were the legal mother, then the child would have been the illegitimate child of the egg donor and the sperm donor, the gestational woman’s husband. The egg donor would have had to agree to the child’s adoption by Ms. McDonald, unless Mr. McDonald’s consent to his wife’s adoption would have been enough. The father’s consent might be enough if the egg donor were analogous to an unmarried father by coitus, who had played no role in his nonmarital child’s upbringing or in the child’s family unit. In that situation, the U.S. Supreme Court has said that the father is not entitled to a hearing before the child is adopted by others.330 In circumstances such as those in McDonald, the egg donor would not have developed any relationship with the child. If the situation instead were analogized to AID, where the consenting husband of the genetic mother is treated as the child’s father, the gestational woman who is the wife of the genetic father should be presumed the child’s mother.331

3. Anonymity

The problem of a donor’s anonymity may generate issues in egg donation and embryo donation. It has been speculated that children born of egg donation will not feel either the same genetic bewilderment attributed to children of sperm donation and to adopted children, or the sense of abandonment attributed to adopted children because their female rearing parent was their birth mother and their male rearing parent is their genetic father.332 Children of embryo donation, however, may feel

329. But see supra text accompanying note 93.
331. See Freeman, supra note 330, at 278.
332. See id. at 280; Robertson, supra note 281, at 15. But see Kathryn D. Katz, Ghost Mothers: Human Egg Donation and the Legacy of the Past, 57 ALB. L. REV. 733, 780 (1994) (concluding that, because of the importance of genetic ties, identifying information should be
more impact because they do not know either of their genetic parents. Although they are raised by their gestational mother, they are otherwise more like adopted children whose rearing parents are not their genetic parents. There is, however, no conclusive information about the impact of donation on any of the parties. The importance of genetic information for health reasons, however, remains the same as in sperm donation and adoption. The importance of identification of the sperm donor remains the same as in AID with respect to the child’s ability to inherit from the biological father.

V. CRYOPRESERVATION OF GAMETES AND EMBRYOS

Along with the increased use of IVF procedures to conceive children, there has been a large number of cryopreserved human gametes and embryos that are extracorporeal while they await fertilization or implantation. Many IVF programs cryopreserve early embryos that were not implanted in the woman of the couple undergoing IVF. Sperm banks also routinely freeze sperm from donors, and more recently, IVF clinics freeze human eggs. A man may freeze his sperm at a clinic for his own use if he anticipates becoming sterile because of

available to the children, and gamete donors should know that the children born of their gametes may eventually find them).

333. See Katz, supra note 335, at 737.

334. See Ann T. Lamport, Note, The Genetics of Secrecy in Adoption, Artificial Insemination, and In Vitro Fertilization, 14 AM. J.L. & MED. 109, 110 (1988) (“It is time . . . to create a system allowing each person access to his or her own medical records by the age of majority, if not before.”).

335. In cryopreservation, embryos are frozen in liquid nitrogen and stored. The medical term “embryo” refers to the fertilized egg (or conceptus) before eight weeks of gestation. After eight weeks of gestation, the embryo is called a fetus. See Lori B. Andrews, The Legal Status of the Embryo, 32 LOY. L. REV. 357, 358 n.7 (1986). The legal literature often refers to the fertilized egg in its earliest stages as a preembryo. See Davis v. Davis, 842 S.W.2d 588, 594 (Tenn. 1992).


337. Sperm banks freeze sperm for later use because it is the only way to test effectively for HIV infection. See INFERTILITY, supra note 172, at 249. Ova, however, are less successfully frozen and are usually first fertilized, and then the preembryo is cryopreserved. See Andrews & Douglass, supra note 195, at 654.

338. Doctors at the School of Veterinary Medicine of the University of Pennsylvania have announced that they are able to remove the cells that produce sperm (stem cells), freeze them for an indefinite period of time, and implant them in the testes of a laboratory animal such as a mouse, or in a man’s testes to develop into sperm. This procedure allows men who are too ill to produce semen, or young boys who have not yet begun producing sperm, to store cells and later reproduce from those cells. The stem cells would provide a never-ending source of sperm because, unlike the sperm cells, they replenish themselves. See Gina Kolata, Study Finds Way to Produce an Animal's
a disease or a medical treatment such as chemotherapy or a vasectomy." For some of the same reasons, a woman may freeze surplus eggs that have been removed and fertilized by IVF. A woman may also freeze eggs so that she will not have to repeat the procedures for their removal and to permit implantation without hormonal stimulation. The preembryos are frozen at the two, four, or eight cell stage. Many frozen preembryos are thawed and implanted in a woman within a reasonably short period of time; others are kept for years. IVF clinics in this country and abroad now have thousands of embryos in storage. Given the number of embryos now stored and the length of time they are being stored, a pressing problem for clinics is how to keep track of the inventory and avoid implanting preembryos in the wrong people.

Sperm Cells in Another Species, Years Later, N.Y. TIMES, May 30, 1996, at A24. In response to this finding, Professor Robertson was quoted as stating that ""[i]t's the kind of research that sends shivers through people." Id.


341. See Coelus, supra note 340, at 127. Many programs keep fresh embryos for a maximum of two years, believed to be the limits of safe storage. See Davis v. Davis, 842 S.W.2d 588, 598 (Tenn. 1992). A baby girl, however, was born in England to a surrogate from an embryo that had been frozen for slightly more than four years and thought to be the oldest frozen embryo transplanted. See Jill Serjeant, Birth from Frozen Embryo Casts Doubt on British Policy, CHI. TRIB., Apr. 9, 1995, § 6, at 6. British legislation limits storage of embryos to five years, after which they must be destroyed. See Human Fertilisation and Embryology Act, 1990, ch. 37, §§ 14(1)(c), 14(3).


343. Recently, two fertility clinics associated with the University of California at Irvine were closed because, between 1988 and 1992, the clinics used patients' eggs without their consent for IVF and implanted the resulting fertilized eggs or embryos in other women. Approximately thirty women unknowingly received other women's eggs or provided eggs for others, and several couples have raised the biological children of other couples, instead of their own. See Fertility Clinics Scandal Expands, CHI. TRIB., July 7, 1995, § 1, at 6. Some of these patients have filed suits against other patients for custody of children born from frozen embryos that they claim are biologically their
The issue that receives the most attention, and which has been raised in some well-publicized litigation, is who has authority to decide what will be done with extracorporeal embryos or gametes if they are not used by their progenitors. The choices include donating them to another infertile couple, discarding them, or allowing them to be used in scientific research. Most, but not all, storage facilities either ask or require the depositors to designate how to dispose of the embryos or gametes if they are still in storage at the depositor’s death or if other contingencies occur. Disposition issues involve whether the law classifies the extracorporeal preembryos and gametes as property or as persons, or as something other than these traditional categories. The clearly emerging view is that preembryos and gametes are neither persons nor property, but a special category, over which their progenitors have decisionmaking authority.

The new technology permitting extracorporeal storage of gametes and embryos has created two issues specifically involving inheritance. The first of these issues is whether a decedent’s frozen gametes or embryos, to which he or she has genetically contributed, form part of the decedent’s estate if they are still frozen at the time of the decedent’s death. The second is whether a child born of frozen embryos or gametes that were implanted after the genetic parent had died can inherit from the deceased genetic parent’s estate. Resolution of these two issues requires determination of how frozen gametes and embryos are classified.


344. See Robertson, supra note 3, at 1035; Shapiro & Sonnenblick, supra note 339, at 243.

345. See Davis v. Davis, 842 S.W.2d 588, 594-97 (Tenn. 1992); Andrews, supra note 335, at 402; Robertson, supra note 324, at 459. In Professor Robertson’s view, a progenitor can argue that he or she has dispositional authority as a matter of constitutional right. See id. at 460; see also Chester, supra note 57, at 980-82. For a summary of these issues and the consequences of classifying a preembryo as a human life, see Jean Voutsinas, In Vitro Fertilization, 12 Prob. L.J. 47, 50-66 (1994), and Colleen M. Browne & Brian J. Hynes, Note, The Legal Status of Frozen Embryos: Analysis and Proposed Guidelines for a Uniform Law, 17 J. LEGIS. 97, 113 (1990).

346. Although the latter issue involving inheritance by a posthumous child has traditionally arisen with regard to a child conceived before the father’s death, with cryopreservation the issue can also arise with regard to a deceased woman if the recipient of her gametes or embryos either gestates the child or uses a surrogate to do so. However, because eggs are usually fertilized before they are frozen, far fewer women will leave frozen eggs with a storage facility than will deposit frozen preembryos.
A. Classification of Gametes and Embryos

For those who believe that human life begins at fertilization, the preembryo is a life; thus, IVF and cryopreservation raise the same divisive issues as does abortion. There is no specific legal authority, however, for this position. In Roe v. Wade, the Supreme Court held that a fetus in the first trimester is not a person within the Fourteenth Amendment. Yet, after Roe, several states enacted legislation limiting research and experimentation on fetuses, or on fetuses in connection with an abortion, and defined fetus to include an embryo. These statutes could potentially apply to IVF if it is considered experimentation on an embryo or could apply to embryo transfer if it is considered abortion. Moreover, preambles to some states’ legislation include language that life begins at the moment of conception. If the preembryo is a human being, then it has rights and cannot become part of a deceased genetic parent’s estate. Furthermore, if it is implanted and born alive after a parent’s death, it should inherit from its legal parents. This description of an embryo as a human being, however, would not apply to frozen

347. 410 U.S. 113 (1973). One court held that Roe was conclusive as to extracorporeal embryos. See Doe v. Shalala, 862 F. Supp. 1421, 1426 (D. Md. 1994) (holding that an extracorporeal embryo had no standing to seek an injunction against the National Institutes of Health Human Embryo Research Panel).

348. See Roe, 410 U.S. at 158.


In 1990, a federal district court held that the Illinois abortion law was unconstitutionally vague. See Licehez v. Hartigan, 735 F. Supp. 1361 (N.D. Ill. 1990) (interpreting ILL. REV. STAT. ch. 38, § 81-26 (current version at 720 ILL. COMP. STAT. ANN. 510/6 § 6(7) (West 1993))). The statute banned selling or experimenting upon a fetus “produced by the fertilization of a human ovum by a human sperm unless such experimentation is therapeutic to the fetus.” Id. The statute also provided that “[n]othing in this subsection (7) is intended to prohibit the performance of in vitro fertilization.” Id. The court agreed that, despite the last sentence in the statute, the statutory terms “experimentation” and “therapeutic” were vague; moreover, experimentation could apply to newly developed IVF techniques that would not be considered fertilization itself. See id. at 1369. It could also apply to technologies similar to, but not the same as IVF, such as embryo transfer—removal of an embryo from one woman’s uterus and transferral of that embryo to another woman’s uterus for gestation. See id. at 1367.

350. See, e.g., MO. ANN. STAT. § 1.205.1(1) (West Supp. 1997). This statute was held constitutional in Webster v. Reproductive Health Services, 492 U.S. 490 (1989). Justice Sandra Day O’Connor, however, said there was no possibility that the preamble could be applied to prohibit IVF. See id. at 523 (O’Connor, J., concurring).

351. If the extracorporeal preembryo is a life, then it may be a life in being for purposes of the Rule Against Perpetuities. Thus, the Rule would be ineffective as to the preembryo. See McAllister, supra note 298, at 100; Voutsinas, supra note 345, at 56.
sperm since fertilization has not occurred.

There is some support in the case law for considering the embryos as property, although no court faced with the progenitors’ use of the preembryo has so held. In Del Zio v. Presbyterian Hospital,352 a doctor destroyed a culture containing the plaintiffs’ sperm and ovum. The judge left to the jury the question of whether the defendant was liable for conversion.353 The jury, however, awarded damages only for intentional infliction of emotional distress.354 One commentator describes the case as implicitly recognizing the couple’s ownership interest in the in vitro gametes.355 However, another concluded that the lesson from Del Zio is that “the property approach [conversion] has not been accepted as a satisfactory framework within which to analyze the legal status of the embryo.”356

In York v. Jones,357 the couple sued for custody of its frozen embryo from an IVF clinic that refused to release the embryo for transfer to another clinic.358 The court referred to the contract between the couple and the clinic as a bailment, and the clinic’s retention of the embryo as conversion,359 thus, in effect treating the embryo as property. One should note, however, that the consent form between the couple and the clinic effectively treated the embryos as property by requiring that, if the couple divorced, the ownership of the preembryos would be determined in the couple’s property settlement.360

Arguably, a frozen embryo or frozen gametes subject to the procreator’s dispositional authority is, in effect, their property since an aspect of ownership is the right to control and alienate.361 Gametes are routinely sold to sperm banks and fertility clinics by “donors.” Embryos are also sold, except where the practice is prohibited by statute.362 If

353. See id. “Conversion is an intentional exercise of dominion or control over a chattel” of another. RESTATEMENT (SECOND) OF TORTS § 222A (1965).
354. See Del Zio, No. 74 Civ. 3588.
355. See Robertson, supra note 324, at 459.
358. See id. at 422.
359. See id. at 427.
360. See id. at 424.
362. Several states do not permit the sale or transfer of fetuses or embryos for experimentation purposes. See, e.g., MASS. ANN. LAW ch. 112, § 121(a)(IV) (West 1991); N.D. CENT. CODE § 14-02.2-02(4) (1991); R.I. GEN. LAWS § 11-54-1(f) (1994). Some states ban all transfers. See, e.g.,
preembryos and gametes are property, then not only may they be part of a divorcing couple's property settlement, but they may also be divided as community or marital property, held in joint tenancy with the right of survivorship, or held as tenants by the entireties.\footnote{363} At the death of the spouses, they may be part of an estate to be inherited by the progenitors' heirs.\footnote{364} If the frozen preembryo is property and an IVF clinic mistakenly or intentionally transfers a frozen embryo to the wrong woman's uterus, the progenitors could arguably sue for custody or conversion.\footnote{365}

Thus far, most commentators and courts have used a middle ground that considers the preembryo as a potential person entitled to "profound respect" but not entitled to the full legal and moral rights of a person, and not treated as property.\footnote{366} This categorization has not clarified how the progenitors may treat their frozen gametes or preembryos, that is, what is permissibly within their decisionmaking authority over preembryos. The concept of "profound respect" appears in a 1979 report of the Ethics Advisory Board of the Department of Health, Education, and Welfare ("HEW"), which was issued to provide guidelines for research proposals involving human IVF.\footnote{367} While the report does not consider issues involving private agreements to dispose of embryos or inheritance, it recommends that the secretary of HEW encourage the enactment of a uniform law to clarify an embryo's legal status.\footnote{368} The reports of the American Fertility Society\footnote{369} and of committees in other countries studying reproductive technology have also employed this

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FLA. STAT. ANN. § 873.05 (West 1994); LA. REV. STAT. ANN. § 9:122 (West 1991); UTAH CODE ANN. § 76-7-311 (1995). In England, by statute, embryos may be sold by licensed authorities. The controlled trade has been described as treating embryos as chattels. See DOUGLAS, supra note 171, at 34-35.

363. See ROBERTSON, supra note 266, at 105.

364. For a summary of other consequences of classifying the frozen preembryo as property, see George P. Smith II, Australia's Frozen 'Orphan' Embryos: A Medical, Legal and Ethical Dilemma, 24 J. Fam. L. 27, 31 (1985-1986), and Voutsinas, supra note 345, at 64-66.

365. See Voutsinas, supra note 345, at 64; Sims, supra note 343, at A14.

366. See ETHICS ADVISORY BD., U.S. DEP'T OF HEALTH, EDUC. & WELFARE, REPORT AND CONCLUSIONS: HEW SUPPORT OF RESEARCH INVOLVING HUMAN IN VITRO FERTILIZATION AND EMBRYO TRANSFER 101 (1979); see also Davis v. Davis, 824 S.W.2d 588 (Tenn. 1992) (discussing the special status of preembryos); Voutsinas, supra note 345, at 50-66 (same); Browne & Hynes, supra note 345, at 113.

367. See ETHICS ADVISORY BD., supra note 366, at 101.

368. See id. at 113-14.

369. See Ethics Committee of the American Fertility Society, supra note 175, at 498.
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description of the special status of the extracorporeal preembryo with regard to research.\textsuperscript{370}

The Tennessee Supreme Court, in \textit{Davis v. Davis},\textsuperscript{371} adopted this middle ground and described frozen preembryos as neither property nor persons, but as occupying a special status entitled to "special respect because of their potential for human life."\textsuperscript{372} The Davises had frozen and stored several preembryos during their marriage, but had not executed an agreement specifying how to dispose of the unused embryos. The couple divorced and could not agree on who would have custody of the embryos, or how they would otherwise be disposed. At the time of the divorce, the wife wanted custody in order to bear children. The husband wanted to keep the embryos frozen in order to decide their ultimate disposition.\textsuperscript{373} The trial court decided that the embryos were human beings and that their best interest required that they be awarded to the wife so that they could be given life.\textsuperscript{374} The appellate court reversed and awarded joint custody to the couple for them to agree to their disposition.\textsuperscript{375} Yet, as the Tennessee Supreme Court later said, the appellate court's decision "left the implication" that the Davises' interest in the preembryos was "in the nature of a property interest."\textsuperscript{376}

The couple could not agree, and when the case finally reached the Tennessee Supreme Court, the parties had each remarried. The ex-Ms. Davis (then Ms. Stowe) no longer wanted to implant the embryos but, instead, intended to donate them to another couple.\textsuperscript{377} Mr. Davis, however, wanted to discard them.\textsuperscript{378} The court first made clear that it considered the embryos as neither persons nor property but, instead, as possessing a special status. That status gave the progenitors full decisionmaking authority over the use of the embryos, an authority which the court would have enforced if it was exercised by the couple.\textsuperscript{379} Because they had not, and their choices now conflicted, the court

\textsuperscript{370} See, e.g., \textit{ROYAL COMM’N ON NEW REPRODUCTIVE TECHS., PROCEED WITH CARE: FINAL REPORT OF THE ROYAL COMMISSION ON NEW REPRODUCTIVE TECHNOLOGIES} 635 (1993); \textit{MARY WARNock, A QUESTION OF LIFE: THE WARNock REPORT ON HUMAN FERTILISATION AND EMBRYOLOGY} 63 (1985).
\textsuperscript{371} 842 S.W.2d 588 (Tenn. 1992).
\textsuperscript{372} Id. at 597.
\textsuperscript{373} See id. at 591-92.
\textsuperscript{374} See id. at 589.
\textsuperscript{375} See id.
\textsuperscript{376} Id. at 596.
\textsuperscript{377} See id. at 590.
\textsuperscript{378} See id.
\textsuperscript{379} See id. at 597.
balanced, what it labeled Davis's constitutional right not to procreate with Stowe's right to procreation.

The court then concluded that Davis's right outweighed that of his ex-wife, taking into account the facts that Stowe did not intend to gestate the embryos to raise as her children, and that she had, what the court considered, a reasonable possibility of achieving parenthood either by future IVF or by adoption.\(^\text{380}\) The court evaluated Davis's interest in avoiding procreation against the background of his childhood. Davis's parents divorced and he was raised in a boys' home. Davis did not want to have a genetic child who would be raised either by him or his ex-wife as a single parent, or by another couple.\(^\text{381}\) The court also alluded to the financial consequences to Davis if a preembryo was brought to term.\(^\text{382}\) Although the court put it in the context if Stowe and not a donee had borne the child, the court indicated that the child would be a child of the Davis marriage.\(^\text{383}\) Thus, Davis would be both the genetic and the legal father—liable for the child's support—despite the fact that the child would have been born within Stowe's second marriage.\(^\text{384}\) Unless Stowe's second husband adopted the child, the child would also be Davis's heir.

In *Kass v. Kass*,\(^\text{385}\) another divorce action, a New York court reached a different result from that in *Davis*. *Kass* differed from *Davis* in that the wife in *Kass* wanted custody of the frozen preembryos for implantation in herself. The court held that the wife's interests were paramount to the husband's and awarded her custody and exclusive decisionmaking authority over the preembryo.\(^\text{386}\) The court equated the male's role in fertilization by IVF with that in coitus, after which the male cannot prevent fertilization, implantation, and birth.\(^\text{387}\) However, if coitus results in pregnancy, the woman bears the risks of the pregnancy, which she does not if the embryo remains frozen. In IVF, unlike fertilization in vivo, the fertilized egg need not be immediately gestated;

\(^\text{380}.\) See id. at 604.  
\(^\text{381}.\) See id. at 603-04.  
\(^\text{382}.\) See id. at 603.  
\(^\text{383}.\) Presumably, the same would apply if a surrogate bore the child for Stowe.  
\(^\text{384}.\) See *Davis*, 842 S.W.2d at 603.  
\(^\text{385}.\) 1995 WL 110368 (N.Y. Sup. Ct. Jan. 18, 1995). The parties had signed a consent form with the IVF clinic which provided that if the parties divorced, ownership of the stored preembryos would be determined in a property settlement, and the clinic would release the preembryos as ordered by the court. See id. at *3.  
\(^\text{386}.\) See id. at *5.  
\(^\text{387}.\) See id. at *3; see also Voutsinas, supra note 345, at 58 n.62.
thus, the Kass court said that in IVF the male impliedly agrees to permit delayed implantation.\textsuperscript{388} Under Kass, the male progenitor would be the child’s legal parent,\textsuperscript{389} presumably subject to the same parental duties, and his estate subject to the child’s inheritance as would a father of a child conceived through coitus. This result would also have been achieved in Davis if the court had awarded the embryos to Stowe and she had gestated one or more of them to raise as her children.\textsuperscript{390}

B. Gametes and Embryos as Inheritable Property

Inheritance issues did not directly arise in either Davis or Kass, but if any progenitor had died during the time that his or her embryos were extracorporeal, then the question could have arisen whether the embryos became an asset of that decedent’s estate. The issue of whether a decedent’s frozen genetic material is part of the estate has been litigated with regard to a decedent’s frozen semen, but not with regard to a frozen embryo. In Hecht v. Superior Court (“Hecht I”),\textsuperscript{391} the decedent-testator, William Kane, had frozen several vials of his sperm and signed a storage agreement instructing the storage facility that, in the event of his death, it should continue storing the sperm or release it to his executor at the executor’s option.\textsuperscript{392} In his will, executed just prior to storing the sperm, he bequeathed his sperm to his companion Deborah Hecht, saying that if she desired, it was his wish that Hecht use the sperm to conceive a child.\textsuperscript{393} He left the remainder of his estate to Hecht and his two adult children. Although Kane named Hecht as the executor of his estate, she was not serving as executor at the time of the litigation and may never have served.\textsuperscript{394} Kane had committed suicide, and his adult children contested the will on grounds that Kane had lacked mental capacity and had been subject to undue influence. Hecht and the children attempted settlement agreements. Eventually, the children sought the destruction of Kane’s frozen sperm, which a lower court ordered but

\textsuperscript{388} See Kass, 1995 WL 110368, at *2.
\textsuperscript{389} See id. at *4-5.
\textsuperscript{390} Israel’s Supreme Court recently awarded custody of a couple’s frozen embryos to the wife, against the husband’s wishes. The wife planned to use a surrogate for gestation. The husband had initiated divorce proceedings and presumably will contest whether he must support whatever children are born of their embryos. See Joel Greenberg, Israeli Court Gives Wife the Right to Her Embryos, N.Y. TIMES, Sept. 13, 1996, at A10.

\textsuperscript{391} 20 Cal. Rptr. 2d 275 (Ct. App. 1993).
\textsuperscript{392} See id. at 276.
\textsuperscript{393} See id.
\textsuperscript{394} See id. at 276 n.1.
an appellate court reversed.395

The appellate court first determined that the probate court had jurisdiction because, although the frozen sperm was not personal property, Kane had decisionmaking authority over the sperm. The court characterized the decedent’s authority over his frozen sperm as “in the nature of ownership.”396 Thus, the sperm constituted the decedent’s property for purposes of jurisdiction for the probate court.397 The court noted, however, that Kane’s ownership interest was not a property interest that allowed him to transfer his sperm as an inter vivos gift or a gift causa mortis.398 Indeed, the court later held in Hecht v. Superior Court (“Hecht II”) that the sperm was not an asset of the estate subject to the beneficiaries’ property settlement.399 The court in Hecht I court did not explain why the decedent could transfer his interest in his sperm by means of a posthumous gift in his will or by a storage agreement with the sperm bank, but not by means of a lifetime gift, except to say that the sperm was reproductive material.400 In other words, the frozen sperm occupied a special status. The court likened frozen sperm stored with the intent that it be used for AI to the Davises’ frozen preembryos because of the sperm’s potential to create a child.401

However, in Hecht II, the court did explain that Kane’s sperm was not subject to division under the property settlement because “[a] man’s sperm or a woman’s ova or a couple’s embryos are not the same as a quarter of land, a cache of cash, or a favorite limousine” but, instead, must be used only as the decedent intended.402 The court ultimately based this decision on its unsupported view that the decedent, who could have procreated coitally with Hecht while he was alive, had a “fundamental right” to procreate with the woman of his choice.403

It was on those grounds of categorization that a Louisiana court, in Hall v. Fertility Institute,404 treated a decedent’s frozen sperm more like property than did the court in Hecht I and Hecht II. The decedent, Hall, had frozen several vials of sperm before he underwent chemotherapy. His

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395. See id. at 279-80.
396. Id. at 281.
397. See id.
398. See id. at 283.
400. See Hecht, 20 Cal. Rptr. 2d at 283.
401. See id. at 281.
402. Hecht, 59 Cal. Rptr. 2d at 226.
403. Id. at 227.
intended donee, St. John, began preparations for AI before Hall died, but then discontinued them, and the sperm remained on deposit. After Hall’s death, St. John claimed ownership of the sperm as the donee of Hall’s inter vivos gift by a written act of donation.\textsuperscript{405} Hall’s executrix claimed the sperm as property of the estate.\textsuperscript{406} The lower court granted a preliminary injunction which prevented release or use of the sperm, and St. John appealed.\textsuperscript{407} The court did not classify the sperm as holding a special status\textsuperscript{408} and accepted the framing of the issue as whether the sperm had been given to St. John by inter vivos gift or whether it was part of the probate estate. The court affirmed the preliminary injunction preventing the use and release of the sperm to St. John.\textsuperscript{409} It referred to the fact that Hall had left nothing in his will to St. John, nor had he made other financial arrangements for a future child, as possible evidence of his lack of donative intent.\textsuperscript{410}

Except for the Hecht II decision, the consequences of classifying frozen gametes as a status different from a person or property, deserving special respect, do not seem significantly different from labeling them as property. That may also be the case as to preembryos, at least if experimentation is not involved. If progenitors can transfer frozen preembryos at their deaths by a dispositional agreement with a clinic, then they also should be able to bequeath their frozen embryos. Like Kane’s frozen semen, the frozen embryos would have to be considered property of the decedent’s estate. In both Hecht decisions, the court likened Kane’s frozen semen to frozen embryos when it labeled the semen as deserving special status.\textsuperscript{411} In Davis, the court awarded the frozen preembryos to the husband, in effect treating them as property that could be destroyed.\textsuperscript{412}

Thus, it is not impossible that frozen embryos be classified as property of a decedent’s estate, although there exist important differences

\textsuperscript{405} See id. at 1349.
\textsuperscript{406} See id.
\textsuperscript{407} See id.
\textsuperscript{408} In Louisiana, viable embryos are considered persons and they may not be discarded. See LA. REV. STAT. ANN. § 9:129 (West 1991). However, the court did not analogize the decedent’s sperm to an embryo.
\textsuperscript{409} See Hall, 647 So. 2d at 1351.
\textsuperscript{410} See id. at 1351-52.
\textsuperscript{412} The ABA Journal reported that, on June 10, 1993, Davis removed the frozen embryos from the IVF clinic, “took them home and disposed of them,” but would not say what he did with them. Mark Curriden, Embryos’ End, A.B.A. J., Aug. 1993, at 42, 42.
between gametes and embryos. Without fertilization, gametes are one
very important step back from a preembryo, not yet containing the
chromosomes to develop into a particular person and not capable of
being gestated. Several states recognize the distinction between gametes
and embryos, assigning higher value to the embryo in that they forbid the
sale of embryos, but not the sale of gametes. Gametes are more
analogous to renewable body tissues like blood, which is often sold.
Embryos, however, are closer to human life, and their sale may be
considered analogous to baby selling. Yet, the American Fertility Society
guidelines treat gametes and embryos identically, although recom-
mending that “donors” not receive substantial payment, but only
compensation for their expenses and time, including inconvenience.

Another difference between preembryos and gametes is that the
frozen preembryos are the creation of two gamete donors and cannot be
divided. The donors’ interests would be difficult to sever if the decedent
had not bequeathed his or her interest in the embryos to the other
progenitor, or if the progenitors had not executed contractual joint or
mutual wills bequeathing the embryos. Yet, testators who had
thought about executing contractual wills would most likely also have
thought to make arrangements for post-death disposition with the storage
facility. If not, the survivor should succeed to sole dispositional authority.
A court’s options here could include viewing the embryos as the
progenitors’ joint property or as tenants by the entirety’s property that
passes to the survivor.

If both progenitors die, however, without arranging for disposition

413. See Andrews, supra note 175, at 166. Professor Andrews argues that a ban on payment
to embryo donors may be unconstitutional as an infringement on potential recipients’ rights of
procreation. See Lori B. Andrews, Regulation of Experimentation on the Unborn, 14 J. LEGAL MED.
25, 45 (1993). But see Annas, supra note 49, at 51-52 (posing arguments against a commercial
market in human embryos).

414. See Ethics Committee of the American Fertility Society, supra note 175, at 498.

415. See id. at 478; see also Andrews, supra note 361, at 32 (referring to embryos as
regenerative bodily products arguably similar to blood, sweat, and semen); John Dwight Ingram, In
Vitro Fertilization: Problems and Solutions, 98 DICK. L. REV. 67, 75 (1993) (discussing the privacy
interest in the “use and disposition” of in vitro embryos).

416. See Ethics Committee of the American Fertility Society, supra note 175, at 498.

417. Contractual wills, usually entered into by a husband and wife, are executed pursuant to a
contract not to revoke. They may take the form of a joint will, which is one instrument signed by
two (or more) testators as the will of each, or of mutual wills, which are separate wills that contain
almost identical provisions. See Dukeminier & Johnson, supra note 37, at 306-07. Where the
wills are contractual, the courts will enforce their provisions even if the survivor has revoked and
executed a new will. See id. at 291.

418. See Djallela, supra note 53, at 358.
of the embryo or embryos, the executor would have to determine the embryos' disposition. *Hecht* II is limited to the situation in which the progenitor names the beneficiary who is alive at his death and willing to accept the gift.\(^{419}\) If both progenitors of a frozen embryo die, and neither has left instructions that the embryo be donated to a willing recipient, or have left no instructions so that the executor or facility can give the embryo to others, the embryo is then considered donated. Although at the time of cryopreservation the progenitors may have intended to raise the child, like a sperm donor who makes a posthumous gift, the progenitors of the embryo would not have intended to raise the child if the conditions of the gift occurred. Most commentators would analogize the situation to embryo donation so that the recipients would be the child's parents.\(^{420}\)

If a decedent's frozen gametes and preembryos are property of a testate decedent's estate for purposes of a probate court's jurisdiction, then the question arises whether they should also pass by intestate succession or to a testate decedent's residuary beneficiary. The *Hecht* I court decided the jurisdictional issue on the basis that the decedent had decisionmaking authority over his frozen sperm.\(^{421}\) On that basis, frozen sperm would be property, for jurisdictional purposes, in an intestate estate, as well as a testate one. As a result, the frozen reproductive material of any person who died, who had not otherwise provided for their disposal, would be distributed to the person's intestate heirs or to a testate decedent's residuary beneficiaries. Besides the moral issue involved in treating gametes and preembryos as administered property, this outcome would raise difficult valuation and division issues and could require the administrator of any estate to determine whether the decedent had left frozen reproductive material at any clinic. If both progenitors of frozen embryos died intestate and their embryos were inheritable, the embryos would have to be divided among their heirs, a distribution that would be more difficult if they left only one embryo.\(^{422}\) On these grounds, the *Hecht* I decision might be limited to a decedent who had exercised decisionmaking authority and devised the gametes or

\(^{419}\) See Hecht v. Superior Court, 59 Cal. Rptr. 2d 222 (Ct. App. 1996).

\(^{420}\) See, e.g., Robertson, *supra* note 342, at 377.

\(^{421}\) See Hecht v. Superior Court, 20 Cal. Rptr. 2d 275, 281 (Ct. App. 1993).

\(^{422}\) See Brashier, *supra* note 57, at 211 n.399. There are proposals that if both progenitors die, their embryos still in storage should be destroyed. See Annas, *supra* note 49, at 51; *Developments in the Law—Medical Technology and the Law*, 103 HARV. L. REV. 1519, 1546 (1990). The Warnock Commission, however, recommended that the embryos pass to the storage authority. See WARNOCK, *supra* note 370, at 56.
preembryos to specific beneficiaries.

C. Inheritance Rights of Postmortem Children

If both frozen gametes and preembryos are to be treated no differently from property in terms of their alienability as part of a decedent's estate while they remain frozen, their "special" status must come from the possibility of successful fertilization (for gametes), implantation, gestation, and birth. It is evident that once implanted, the embryo will no longer be property but, instead, a fetus developing during gestation into a person, subject to the gestating woman's right to abort. Thus, the progenitors will have lost their property interest in the embryo; for example, they could not get an injunction against its destruction by the gestator. Since inheritance law recognizes gestation and birth as triggering events, the legal focus then changes from the preembryo as property of the progenitor to the child's property rights in the parent's estate. One type of recognition would be to treat the posthumous child as a potential beneficiary to the decedent parent's estate, even if the child had been implanted after the progenitor's death. Otherwise, the designation of "special status" means only that the reproductive material can be alienated before implantation, but after implantation and birth, the child cannot take from its progenitor's estate. This latter conclusion is the result under current law.

1. Present Law

Under present law, posthumous children of a deceased married man are treated as "in being" and are able to inherit if the child is born alive within either 280 or 300 days after the father's death, and it is to the child's advantage to be treated as "in being" from the time of conception. This rule protects both the posthumous child's inheritance from the deceased parent's estate and the parent who presumably would have wanted all his children to receive support from the estate. The 280-300 day period in utero presumes that the child is the legitimate child of a married decedent. A child born after being cryopreserved as a preembryo falls within the first part of the definition of a posthumous child because the child would have been conceived before the

423. See Voutsinas, supra note 345, at 65.
424. See UNIF. PARENTAGE ACT § 4(a)(1), 9B U.L.A. 298 (1987) (providing that a child born within 300 days of death of the husband is presumed the child of the husband).
425. See Coelus, supra note 340, at 137.
progenitor’s death. However, the embryo may not have been implanted and born until years after the progenitor died. This holds true even if it is the mother who dies, because the embryo could be gestated by a surrogate. However, if the decedent left frozen gametes, rather than embryos in storage, a child born from the gametes would be conceived after the decedent’s death, and thus, could not satisfy any part of the current definition of a posthumous child.\textsuperscript{426}

The 1969 UPC and many state statutes provide for inheritance by the decedent’s relatives who were “conceived before [the decedent’s] death but born thereafter.”\textsuperscript{427} The 1990 UPC changed that language to read the following: “An individual in gestation at a particular time is treated as living at that time if the individual lives 120 hours or more after birth.”\textsuperscript{428} The 1990 UPC, therefore, excludes a child born of the decedent’s embryo implanted after the decedent’s death because the cryopreserved embryo is not then in gestation.

The USCACA also completely excludes posthumously implanted embryos from inheritance. Under section 4(b) of the USCACA, the child would not inherit from the deceased parent because “[a]n individual who dies before implantation of an embryo, or before a child is conceived other than through sexual intercourse, using the individual’s egg or sperm, is not a parent of the resulting child.”\textsuperscript{429} The drafters chose to provide finality in determining parenthood and in closing the decedent’s estate.\textsuperscript{430}

Similarly, citing the USCACA, the \textit{Hecht} I court said that it would

\textsuperscript{426} The most famous story of possible inheritance for children born of frozen embryos is the 1984 Rios episode. Ms. Rios froze two preembryos, conceived of her eggs and sperm from an anonymous donor. The embryos were cryopreserved at an Australian IVF clinic at the time Mr. and Ms. Rios died in an airplane crash. They had left no instructions for the embryos. The couple were residents of California and left no will. Because the Rioses were wealthy, there was speculation that if children were born of the embryos they would be intestate heirs. However, the estate was distributed to other relatives. As to the fate of the frozen embryos, the Victoria legislature rejected a proposal from a specially appointed committee to discard the embryos, and instead required that the embryos be given to a suitable recipient. There was no suggestion that the embryos should form part of the Rioses’ estates. \textit{See} Smith, supra note 364, at 27-29.


\textsuperscript{429} USCACA, supra note 69, § 4(b), 9B U.L.A. 166. This is the only nonsurrogacy section of the USCACA that applies to a child born of both parents’ gametes. \textit{See also} N.D. Cent. Code § 14-18-04(2) (1991) (“A person who dies before a conception using his sperm or her egg is not a parent of any resulting child born of the conception.”).

\textsuperscript{430} \textit{See} USCACA, supra note 69, § 4 cmt., 9B U.L.A. 166.
not have kept Kane’s estate open for the posthumously conceived child.431 The California Probate Code defined posthumous children as those “conceived before the decedent’s death but born thereafter.”432 That definition would not have included a child conceived of Kane’s sperm after he died. Citing the importance of finality in closing an estate for a decedent’s heirs and for the courts, the court opined that if Hecht gave birth to children conceived with Kane’s sperm, they could not be beneficiaries in Kane’s estate.433 Neither the comment to the USCACA, nor the Hecht I court explains why finality should outweigh other concerns regarding the estate of a decedent who intends posthumous reproduction. In that situation, the person very consciously did not opt for finality of lineage.

2. Testate Decedent

Most authorities believe that under present law, if a person provides by will for a posthumously implanted child (“postmortem child”),434 then that gift should be valid.435 The estate could be kept open or the child’s share could be held in a statutory trust until the child’s birth. Indeed, there exists some specific statutory authority for testamentary gifts to postmortem children. The Florida Domestic Relations Code specifies that a postmortem child is not “eligible for a claim against the decedent’s estate unless the child has been provided for by the decedent’s will.”436 The commentary to the USCACA is similar.437

If posthumously conceived children are to be assimilated to children conceived by coitus for purposes of taking from a testate procreator’s estate, they also should be considered pretermitted heirs if they are not mentioned in the will, or as members of a class of the decedent’s children, issue, heirs, or similar terms. Professor Barton Leach, for example, recommends a standard will clause in order to include “sperm-

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431. See Hecht v. Superior Court, 20 Cal. Rptr. 2d 275, 290 (Ct. App. 1993). In Hecht II, however, the court said that it did not decide whether Kane’s potential future child could inherit as Kane’s heir. See Hecht v. Superior Court, 59 Cal. Rptr. 2d 222, 228-29 (Ct. App. 1996). This second decision postdated an amendment to the California Code that may have permitted the child to prove paternity. See infra text accompanying notes 449-50.

432. CAL. PROB. CODE § 6407 (West 1991).

433. See Hecht, 20 Cal. Rptr. 2d at 290.

434. This is a term used by Djallela, supra note 53, at 335.


436. FLA. STAT. ANN. § 742.17(4) (West 1997).

bank children ... in such class designations as ‘children’ or ‘issue.”

One mischief in the pretermitted heir situation is that some pretermitted heir statutes apply to a decedent’s grandchildren, as well as children. Thus, all parents’ estates may have to be kept open awaiting birth of their children’s postmortem children. Therefore, the application of the pretermitted heir statutes may have to be limited to a decedent’s own children. Of course, one other consequence of a rule recognizing the child as a pretermitted heir is that every testator who has stored frozen gametes or embryos would probably be advised to include a statement of intent as to a possible postmortem child’s inheritance or disinheritance in order to avoid the possibility of a postmortem pretermitted heir. Another result of including postmortem children in class gifts is that the gift may then violate the Rule Against Perpetuities.

438. W. Barton Leach, Perpetuities in the Atomic Age: The Sperm Bank and the Fertile Decedent, 48 A.B.A. J. 942, 944 (1962). Professor Robertson, however, would not include postmortem children in class gifts or under intestacy statutes in order to bring finality to estate administration. See Robertson, supra note 342, at 375; see also Brashier, supra note 57, at 220-21 (defining a posthumously conceived child as a child of a surviving parent but having no claim as a postmortem, pretermitted child); Chester, supra note 57, at 984 (maintaining that the law of wills should not be stretched to include postmortem children absent the testator’s express intent to do so); cf. Thies, supra note 435, at 923 (including posthumously conceived children in class gifts only in instruments made by third parties after passage of a uniform act conferring inheritance rights).

439. See Leach, supra note 438, at 944; see also Chester, supra note 57, at 995 (arguing that a testator should not be able to omit postmortem children); Djalleta, supra note 53, at 365 (suggesting amendments to the UPC so that postmortem children would not be pretermitted).

440. The postmortem child may be excluded as a class beneficiary, however, if the gift comes within the Rule of Convenience as to the closing of classes. The rule is that “a class closes to future-born members when any member can call for a distribution of principal (absent expression of a contrary intent by the testator or settlor).” Leach, supra note 438, at 944.

If the child is excluded by the class closing rule, that will avoid another problem with class gifts, namely the Rule Against Perpetuities, a problem foreseen by Professor Leach in 1962. A postmortem child born many years after the progenitor’s death may easily raise the possibility that property will vest in that child after the time period required by the Rule (property can be subject to contingent interests for the period of “lives in being” plus 21 years). Gifts by a donor “to my children” or “to my grandchildren” may be void under the Rule where the parent has cryopreserved gametes or preembryos. For analysis of these issues and suggested solutions, see Leach, supra note 438, at 944. Professor Leach would have defined the duration of a male life in being as “the period of his reproductive capacity, including any post-mortem period during which his sperm remains fertile.” Id. For discussions regarding the Rule Against Perpetuities and its relation to posthumous reproduction, see Brashier, supra note 57, at 214-18; Chester, supra note 57, at 982-83; Carolyn Sappideen, Life After Death—Sperm Banks, Wills and Perpetuities, 53 AUSTL. L.J. 311, 318-19 (1979); and Thies, supra note 435, at 923, 960.

The UPC would disregard the possibility that “a child will be born to an individual after the individual’s death” for purposes of the Rule Against Perpetuities. UNIF. PROBATE CODE § 2-901(d), 8 U.L.A. 208 (Supp. 1996). The comment, however, offers no opinion about the legal status of those children.
3. Intestate Decedent

An Australian court, the Supreme Court of Tasmania, has recently decided that a child born of a frozen embryo, conceived by IVF of the gametes of a husband and his wife while both were alive and intended to be gestated by the wife after the husband had died, would be the decedent’s child and have the same status as would a posthumous child conceived coitally.441 If born alive, the child would be the decedent’s intestate heir.442 In this case, however, the decedent’s estate would not have remained open for a long period of time because the wife intended to implant the embryos immediately.443 The court also held that the child would not have to prove paternity because it was conceived during marriage.444

It seems less likely that a child born postmortem from an intestate decedent’s frozen gametes, rather than a frozen embryo, would be considered a posthumous child. Besides the hurdles that the policy of finality presents from postmortem conception, the child born of a male decedent’s frozen sperm may have difficulty proving paternity unless state law permits proof of paternity after the alleged father’s death. Even a child born to the decedent’s widow may not be a marital child because the child was not conceived during marriage and may have to prove paternity in order to inherit.445 Moreover, if the decedent’s widow is no longer considered his wife, under a state’s AID statute, the decedent could be considered a donor and not the child’s legal father.

In Hecht I, where the recipient of the decedent’s sperm would not have been his widow but, instead, was identified in the decedent’s will, the court pointed out that if the decedent had left property to his children, the postmortem child would not likely have been included.446 The child would not have been able to prove its paternity under the then existing statute—which allowed a nonmarital child to establish a parent-child relationship with the father only by a judgment of paternity during the father’s life or by a father’s openly holding out the child as his own.447 The court saw no policy issues regarding the child’s possible

442. See id. at *10.
443. See id. at *2.
444. See id. at *18-19.
445. See Sappideen, supra note 440, at 312.
need for support. According to the court, it was "entirely speculative" that a child born to Hecht of the decedent's sperm would require public support because its mother might not be able to support the child, and the child had not received any resources from its biological father's estate. 448

The section of the California code determining paternity has since been amended to permit a child to establish paternity if "[i]t was impossible for the father to hold out the child as his own and paternity is established by clear and convincing evidence." 449 This language should now permit a postmortem child to prove paternity even if the child were conceived after the alleged father died. 450 Thus, if frozen gametes could be property of an intestate estate, or if the decedent had left a directive with the clinic naming the intended recipient, the administrator of the estate would have to investigate extensively, not only to determine whether the decedent had left frozen gametes, but also whether the decedent might become the posthumous biological father of future claimants.

4. Survivor Benefits

Despite the Hecht I court's dubiety about the economic vulnerability of children in those circumstances, children of single parents are often in need of public support or, at least, are economically disadvantaged. A recent decision of the Social Security Administration may encourage states to examine the issue of whether a postmortem child is an heir of the deceased biological parent so that the child will be eligible for social security survivor benefits. The Social Security Act provides survivor benefits for an insured decedent's marital children and nonmarital children if they would take as heirs under the state's inheritance law; the decedent had been the child's regular source of support; or the decedent had openly acknowledged the child. 451 The situation at issue involved a Louisiana law which did not determine whether a posthumously conceived child born to a decedent's widow of the decedent's frozen sperm was entitled to social security survivor benefits as the decedent's child.

448. Hecht, 20 Cal. Rptr. 2d at 290.
450. See Dukeminier & Johanson, supra note 37, at 91. But see Chester, supra note 57, at 986 (arguing that section 6407 of the California Probate Code could still be interpreted to require the child to be conceived before the decedent's death).
The child, Judith Hart, was conceived by GIFT performed on her mother three months after the husband’s death, using the deceased husband’s frozen sperm. Under Louisiana law, Judith was not considered her father’s intestate heir but, instead, was an illegitimate child. The mother’s application for social security benefits for Judith was initially denied. Judith’s mother pursued her claim through agency procedures, as well as by filing suit in federal court to declare the Louisiana statute unconstitutional.

An administrative law judge ruled that Judith was the legitimate child of her deceased father. An appeals panel reversed, but the Social Security Commissioner (“Commissioner”), stating publicly only that the Administration is reviewing the issues, awarded the child survivor benefits, and the suit was withdrawn. Even though the child could not have been conceived by Ms. Hart’s “husband’s” sperm because she was then a widow, the Commissioner must have determined that the child was the Harts’ marital child and not illegitimate since the statute’s requirements for survivor benefits for a nonmarital child had not been met: Mr. Hart had not been a regular source of support for his postmortem child, and the child was not his intestate heir under Louisiana law.

If the Commissioner’s decision holds, it may carry important implications for future legislation and creates an incentive for states to enable postmortem children to receive survivor benefits. It may permit...
all children conceived of posthumously implanted embryos, or embryos conceived posthumously of gametes of a married couple, and perhaps of the sperm of an unmarried man, to collect social security survivor benefits of an insured decedent if they can prove biological paternity or maternity under state law. The child may be entitled to benefits regardless of the decedent’s intent to be a parent. Indeed, if the sperm or eggs were surgically removed from a dead person, the decedent may not have intended to freeze his or her gametes for later use. A postmortem child also may be entitled to benefits if the state has redefined posthumous children to include embryos either conceived or implanted after the insured’s death. As a result, a decedent’s biological child born more than 300 days after the decedent’s death may take from the decedent’s estate. Lastly, any amendments should specify how the statute relates to other statutes, especially the state’s AID and IVF legislation, under which a male decedent who left frozen sperm may be considered a donor, and not the child’s parent.

VI. SURROGATE CONTRACTS

Surrogate motherhood, another seedbed of issues for inheritance law, is not itself a reproductive technology. Rather, it is a term used to describe a private contractual arrangement by which a woman agrees, before pregnancy, to gestate a child whom she will relinquish for adoption by the other contracting party or parties. In the typical surrogacy arrangement, termed traditional surrogacy, a woman, who is usually designated a surrogate or a surrogate mother, contracts with a married couple, the wife of which cannot produce eggs or bear a child. The surrogate undergoes AI, using the semen of the husband of the contracting couple, and if she becomes pregnant, the contract provides that she is obligated to relinquish the child to its biological father after childbirth. In addition, she must consent to the child’s adoption by the father’s wife. The surrogate is, in effect, a surrogate wife and the child’s biological mother.

An alternative form of surrogacy, gestational surrogacy, may be used when the wife of the commissioning couple is able to produce eggs but cannot gestate a child. The wife’s eggs are fertilized in vitro by her husband’s sperm, and a fertilized egg is transferred to the surrogate for

461. See In re Marriage of Moschetta, 30 Cal. Rptr. 2d 893, 894 (Ct. App. 1994). This type of surrogacy has also been called partial surrogacy. See DOUGLAS, supra note 171, at 142.
gestation.\textsuperscript{462} This form of surrogacy may also be accomplished by embryo transfer, where the wife conceives by coitus and the embryo is taken by lavage and transferred to the surrogate. In both of these situations, the child has two different mothers: a genetic mother and a gestational mother. People may also arrange surrogacy with donated gametes or a donated embryo from other parties.

Surrogacy is often arranged through commercial surrogacy brokers who recruit women and match them with intending parents for a fee.\textsuperscript{463} Some of these services are staffed with medical and psychological personnel, as well as with lawyers, to screen and counsel the surrogate.\textsuperscript{464} A surrogacy contract provides for payment to the surrogate, usually about $10,000 plus expenses,\textsuperscript{465} which is now frequently designated not as payment for the child but, instead, as payment for her services, time, expenses, and inconvenience. Typically, most of the payment is not due until after the surrogate relinquishes the child to the biological father’s custody and consents to the adoption of the child by the father’s wife.\textsuperscript{466} Some contracts also limit the surrogate’s activities while she is pregnant, such as requiring that she not smoke or drink alcohol, or that she undergo medical procedures such as amniocentesis or electronic fetal monitoring.\textsuperscript{467}

If the surrogate is married, her husband is often a party to the contract.\textsuperscript{468} His participation, however, may take different forms depending upon the particular state’s laws. For example, the surrogate’s husband may consent to the surrogacy arrangement; however, if the state has an AID statute, but no surrogacy statute, he may also explicitly not consent to his wife’s AID.\textsuperscript{469} This is so because under an AID statute, a consenting husband is considered the child’s legal father, and the contracting male remains only a sperm donor who is not considered the

\begin{itemize}
  \item \textsuperscript{462} This type of surrogacy has been called full surrogacy. See DOUGLAS, supra note 171, at 142.
  \item \textsuperscript{463} See id. at 152-54.
  \item \textsuperscript{464} See INFERTILITY, supra note 172, at 270.
  \item \textsuperscript{465} See id. at 275.
  \item \textsuperscript{466} See id. at 276; see also Surrogate Parenting Assocs. v. Commonwealth ex rel. Armstrong, 704 S.W.2d 209, 210-11 (Ky. 1986) (“The surrogate mother receives a fee from the biological father, part of which is paid before delivery of the child and the remainder of which is paid after entry of a judgment terminating the parental rights of the surrogate mother.”).
  \item \textsuperscript{467} See INFERTILITY, supra note 172, at 278.
  \item \textsuperscript{468} See USCACA, supra note 69, § 5 (Alternative A), 9B U.L.A. 167 (providing that the surrogate’s husband may enter into the agreement, but must join in the petition for the court’s approval of the contract).
  \item \textsuperscript{469} See, e.g., Syrkowski v. Appleyard, 362 N.W.2d 211, 212 (Mich. 1985) (per curiam).
\end{itemize}
child’s natural father. If the state has neither a surrogacy nor an AID statute, the surrogate’s husband may be the presumed father and would then be required to rebut the presumption that the child is his marital child.

The primary statutory hurdles to enforcement of a surrogacy contract are adoption laws. These statutes typically forbid an adopting parent to pay for the adopted child; they forbid preconception adoption agreements; and they require a waiting period after the child’s birth, during which the child’s mother may revoke her decision to place her child up for adoption. Most litigated surrogacy disputes have arisen when the surrogate changes her mind and does not relinquish the child. However, even in cases where the surrogate relinquished the child, litigation has sometimes been required in order to effectuate the intended result.

A. Arguments For and Against Surrogacy

Besides the legal problems related to surrogacy, there exist profound ethical issues related to the question of whether the state should permit a woman to contract and receive payment for gestating a baby whom, before conception, she agrees to relinquish to other people. Advocates of surrogacy would enforce the agreements by contract remedies such as specific performance against the surrogate. Because the literature on this topic is enormous, only a brief summary follows.

The strongest support for surrogacy comes from those who argue that an essential aspect of a couple’s procreative liberty, a liberty which may be infringed upon only to protect against overriding harms, is the

470. For a discussion of AID legislation, see Part III.B.

471. Baby selling is a crime in every state. See MARTHA A. FIELD, SURROGATE MOTHERHOOD 17 (1990).

472. See id. at 84.

473. See id. at 90-91.


475. See, e.g., Jaycee B. v. Superior Court, 49 Cal. Rptr. 2d 694 ( Ct. App. 1996) (designating paternity where contracting male is not the biological father); Belsito v. Clark, 644 N.E.2d 760 (Ohio Ct. C.P. 1994) (ruled on which woman’s name should appear on the child’s original birth certificate).


477. For a more complete discussion of all these issues, see generally FIELD, supra note 471, and SURROGATE MOTHERHOOD: POLITICS AND PRIVACY (Larry Gostin ed., 1990).
ability to use and to pay for another woman’s gestational services. Since the harms attributed to surrogacy have yet to be proven, state regulations prohibiting compensation to the surrogate would unconstitutionally infringe upon that couple’s liberty. A more limited view of the constitutional rights involved is one that recognizes that commercial surrogacy potentially involves harms such as commodification of the surrogate’s reproductive services and its resulting violation of human dignity. Advocates of this position restrict a person’s procreative liberty to utilizing noncommercial surrogacy where payment is limited to the surrogate’s expenses. Criticisms abound of the position that procreative liberty extends to noncoital, assisted reproduction, and constitutional arguments in favor of surrogacy have not met with success in the courts.

A different constitutional argument favoring surrogacy is one based on equal protection principles which equate a surrogate with a sperm donor. Just as a donor substitutes for an infertile male, a surrogate substitutes for an infertile female. Under this theory, a state that permits AID, but either does not enforce or heavily regulate surrogacy contracts, denies equal protection to those to whom surrogacy remains their only means of reproduction. However, this argument minimizes the considerable differences between a man’s single act of masturbation to produce semen and a pregnant woman’s nine-month process of gestation, followed by childbirth and recovery.

The opposition to surrogacy takes many different forms. Some commentators argue that surrogacy commercializes childbearing and results in the view that children are consumer goods for those who can


480. See id. at 170-72.


482. See Comment, Surrogacy Contracts in the 1990’s: The Controversy & Debate Continues, 33 DUQ. L. REV. 903, 918 (1995). But see Surrogate Parenting Assocs. v. Commonwealth ex rel. Armstrong, 704 S.W.2d 209, 212 (Ky. 1986) (noting that neither surrogacy nor AID violate the state’s prohibition on baby selling and suggesting that both are constitutionally protected as a choice of whether to beget or bear a child); see also Hecht v. Superior Court, 59 Cal. Rptr. 2d 222, 226 (Ct. App. 1996) (discussing procreative liberty as a “fundamental right”).

483. See Hollandsworth, supra note 260, at 3.
afford to buy them. Critics, including Professor Margaret Jane Radin, describe surrogacy as degrading to women because it values them only for their reproductive capacities. By creating "a market in reproductive services," surrogate contracts treat people as "monetized units in a marketplace" rather than as "intrinsically valuable."

For critics of commercial surrogacy, unpaid surrogacy may be an acceptable practice if effected through the same requirements as applied to adoption. Under this view, the surrogate may be paid her expenses. She would be irrebutably presumed to be the child's legal mother from the moment of birth, and she would be given a grace period after birth to reconsider her agreement to relinquish custody of the child. The state would be involved in supervising the process, just as it is in adoption, for example, by requiring that a court approve the contract. This family law model presumably recognizes the biological father's paternity. Although the surrogate may change her mind and decide not to relinquish custody of the child, the contract will always be enforceable against the contracting couple. If the surrogate relinquishes custody of the child, the couple assumes parental responsibilities.

Those who disagree with this description of surrogacy contracts argue that the agreements cannot involve baby selling because the child is genetically the child of the contracting male, or, in gestational surrogacy, of the contracting couple. Thus, a child cannot be "sold" to his or her own parent or parents, and the payments involved are for the


485. A.M. Capron & M.J. Radin, Choosing Family Law over Contract Law as a Paradigm for Surrogate Motherhood, 16 L. MED. & HEALTH CARE 34, 36 (1988); see also Margaret Jane Radin, Market-Inalienability, 100 HARV. L. REV. 1849 (1987) (developing a theory for determining what should or should not be eligible for purchase and sale in reproductive technology).

486. Professor Radin calls this a form of market inalienability. See Radin, supra note 485, at 1933. "Things that may be given away but not sold are market-inalienable." Id. at 1849 (emphasis omitted).

487. See Annas, supra note 484, at 32; Capron & Radin, supra note 485, at 37.

488. Surrogacy arrangements should be governed by "the usual provisions of the parentage and adoption laws." Capron & Radin, supra note 485, at 38.

489. Radin calls this "incomplete commodification." Radin, supra note 485, at 1934.

490. See id. at 1935.
surrogate’s expenses and time. Moreover, because a surrogate enters into the agreement before she becomes pregnant, the agreement differs from a pregnant woman’s consent to adoption. The surrogate faces none of the coercion involved in giving up a child that a pregnant woman may face when she either cannot or does not wish to raise a child.

Nevertheless, some commentators disapprove of noncommercial or “gift” surrogacy in addition to paid surrogacy, contending that this practice may be as coercive and exploitative to the surrogate as childbirth by commercial contract. For example, a woman may be coerced into carrying a baby for a close relative. Gift surrogacy, not unlike commercial surrogacy, also may intrude into a woman’s reproductive autonomy and privacy by imposing conditions on the woman’s pregnancy and monitoring her lifestyle. Particularly vulnerable are low income women and women from underdeveloped countries who use gestation to escape poverty. The response to this argument employs a corresponding logic: surrogacy contracts enable low income women to earn money without engaging in oppressive or difficult types of employment.

Feminists disagree as to whether surrogacy contracts should be enforced and whether surrogacy is empowering or disempowering. The contracts raise the issue of whether the state can “protect people from the harmful effects of their own decisions.” Feminists disagree about whether the contracts have harmful effects and whether surrogates’ decisions are, in fact, voluntary. Many feminists criticize surrogacy contracts as demeaning to women because the contracts allow others to exploit them and control their bodies. However, others contend that refusal to enforce surrogacy contracts is demeaning to women because

491. This explanation has been criticized as presupposing that the baby is already the father’s property, and he need only purchase services to complete production of his child. See id. at 1929.
493. See Narayan, supra note 492, at 179-80. Professor Uma Narayan’s article explores gift and commercial surrogacy “within the confines of patriarchal heterosexual relationships within and outside of marriage.” Id. at 178.
494. See id. at 180.
495. See Johnson v. Calvert, 851 P.2d 776, 785 (Cal. 1993) (en banc); cf. Michael Freeman, Is Surrogacy Exploitative?, in LEGAL ISSUES IN HUMAN REPRODUCTION, supra note 6, at 164, 169.
496. For summaries of these arguments, see BLANK & MERRICK, supra note 101, at 118-20, and Joan Mahoney, An Essay on Surrogacy and Feminist Thought, in SURROGATE MOTHERHOOD: POLITICS AND PRIVACY, supra note 477, at 184-90.
497. GLOVER ET AL., supra note 180, at 19.
498. See Mahoney, supra note 496, at 185.
nonenforcement denies women the right to enter contracts and make decisions about their bodies. One response to this view is that all female experience occurs within a generally patriarchal society, so that none of those choices can be entirely voluntary and freely chosen. Those who hold this belief see surrogacy as imposing male control over women in order to provide males with their biological children. Consequently, women who think that they act altruistically or find self-fulfillment from giving a child to others are instead being deceived.

Feminists also disagree about the implications of elevating gestation over other determinants of parenthood. Some feminists criticize those who have not celebrated the gestational role, its duration, its health risks, and the bonding effect it encourages with the gestating child. They criticize some court decisions which have determined parenthood by genetics as utilizing a male model of parenthood and ignoring the uniquely female role of gestation. However, others fear the “other side of the gestational coin,” which views women as limited to their gestational role. They fear that this view would shackle them with special responsibilities of pregnancy, for example, unconsented Caesarean section operations. Moreover, there is disagreement over the potential psychological harms of surrogacy: to the surrogate who has bonded with the developing fetus over nine months of pregnancy and then must relinquish the child; to the child who later learns of the circumstances of its conception and birth; and to the contracting couple whose desire to raise a child may be thwarted if the agreement is not enforced.

499. See id. at 186.
501. See Radin, supra note 485, at 1923.
504. See, e.g., Rothman, supra note 272, at 44; Goodwin, supra note 2, at 281-85.
506. See id.
507. See id. at 171-78.
B. Surrogacy Statutes

Because of the profound disagreements over the issues involved in surrogacy, the USCACA provides two alternative approaches to the enforceability of surrogacy contracts. Alternative B of section 5 provides that a surrogacy agreement is void, and that the surrogate is the mother of the child whom she gestates.\(^\text{508}\) If she is married and her husband was a party to the surrogacy agreement, then her husband is classified as the father.\(^\text{509}\) If her husband had not agreed to her surrogacy, the child's paternity would be established by state law.\(^\text{510}\) In other words, the surrogate is treated either as a woman who has conceived through AID, with her husband's paternity dependent upon whether he consented to the insemination, or as a woman who received a donated preembryo fertilized from the contracting couple's gametes.

Under Alternative A, by contrast, a surrogacy contract is enforceable if it is approved by a court before conception.\(^\text{511}\) If the agreement is approved, the contracting couple is classified as the child's parents and their names appear on the child's birth certificate.\(^\text{512}\) If the agreement is not approved, it is void with the same results as in Alternative B.\(^\text{513}\) The USCACA requires that the contracting couple be married,\(^\text{514}\) the surrogate be an adult,\(^\text{515}\) and the intending contracting parents provide one or both gametes.\(^\text{516}\) The USCACA does not address surrogacy contracts involving couples or individuals who have no biological connection to the planned child but who intend to raise a child conceived from donated gametes and gestated by a surrogate.

In part, Alternative A employs an adoption model requiring that the court order a home study of the couple and the surrogate. The parties must meet the state's standards of fitness applied to adopting parents.\(^\text{517}\) In addition, the parties must also undergo counseling.\(^\text{518}\) The model, however, is unlike adoption in that the surrogate contracts before her


\(^{509}\) See id.

\(^{510}\) See id.

\(^{511}\) See id. § 5(b) (Alternative A), 9B U.L.A. 167.

\(^{512}\) See id. § 8(a)(1), (b), 9B U.L.A. 172.

\(^{513}\) See id. § 5(b) (Alternative A), 9B U.L.A. 167.

\(^{514}\) See id. § 1(3), 9B U.L.A. 164.

\(^{515}\) See id. § 1(4).

\(^{516}\) See id. § 1(3).

\(^{517}\) See id. § 6(b)(3)-(4), 9B U.L.A. 168.

\(^{518}\) See id. § 6(b)(7), 9B U.L.A. 169.
pregnancy to relinquish the child. Further, she has no grace period after the child is born to change her mind. If the surrogate is a gestational surrogate, she can terminate the agreement only before her pregnancy.\(^{519}\) A traditional surrogate, however, may terminate the contract without liability to the couple if she files notice with the court within 180 days after the last insemination.\(^{520}\) The court must vacate its previous order if it finds that the surrogate knowingly and voluntarily terminated the contract.\(^{521}\) One of the two states that has adopted the USCACA has adopted Alternative B and voids the surrogacy contract;\(^{522}\) the other enforces a surrogacy contract under terms similar to Alternative A, but with some differences—including the requirement that the contract not provide compensation to the surrogate.\(^{523}\)

Other states’ statutes exhibit the same lack of consensus as to how surrogacy arrangements should be treated, although most statutes limit surrogacy in some way.\(^{524}\) Several jurisdictions prohibit surrogacy contracts;\(^{525}\) some impose criminal or civil sanction.\(^{526}\) However, most of these statutes do not determine the parentage of a child who was born as a result of the prohibited contract.\(^{527}\) Those that do name the surrogate as the legal mother and her husband as the father, if she is married.\(^{528}\) The paternity of the surrogate’s husband may be established either as a rebuttable presumption\(^{529}\) or as a result of his consent\(^{530}\) to the surrogacy. Unless the surrogate voluntarily relinquishes the child for

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519. See id. § 7(a), 9B U.L.A. 171.
520. See id. § 7(b).
521. See id.
523. See VA. CODE ANN. § 20-162(A) (Michie 1995).
524. Statutory and judicial limits on surrogacy have been described as “fueled by a similar interest in preserving the family in its traditional forms.” Janet L. Dolgin, Just a Gene: Judicial Assumptions About Parenthood, 40 UCL A L. REV. 637, 677 n.170 (1993). However, when a child has been born and the contract is not enforced, the result is that the child is a nonmarital child of the biological father and the surrogate, resulting in a nontraditional family.
526. See, e.g., D.C. CODE ANN. § 16-402(b) (1997); N.Y. DOM. REL. LAW § 123(2)(b) (McKinney Supp. 1997); UTAH CODE ANN. § 76-7-204(1)(d).
527. But see ARIZ. REV. STAT. ANN. § 25-218(B) (establishing the surrogate as the legal mother of a child born as a result of an illegal surrogacy contract).
528. See, e.g., UTAH CODE ANN. § 76-7-204(3)(a).
529. See ARIZ. REV. STAT. ANN. § 25-218(C).
530. See N.D. CENT. CODE § 14-18-05.
adoption, if either the presumption of the husband’s paternity is rebutted or the husband did not consent, the child is the nonmarital child of the surrogate and the biological father. The court must then determine custody based on the child’s best interests. No statute includes the genetic mother, if she is a different woman from the surrogate, as a legal parent entitled to custody.

A number of statutes invalidate only surrogacy contracts involving compensation to the surrogate or to a facilitating agency, although some statutes permit payment for expenses. A handful of other states use an adoption model and impose restrictions, such as screening the participants, requiring court approval, and permitting the surrogate to change her mind. For example, under the New Hampshire statute, a surrogacy contract is voidable by the surrogate up to seventy-two hours after she gives birth, or up to one week if extenuating circumstances require more time. However, the Virginia statute adopts the USCACA terms that a gestational surrogate may terminate the contract only before she becomes pregnant and after required court approval, but a traditional surrogate may terminate the contract within 180 days of the last performance of assisted conception.

Only three states, Nevada, Florida, and Arkansas, enforce the parties’ contract to recognize the intended parents as the child’s legal parents. These statutes, however, each apply to only one type of surrogacy. The Nevada statute enforces gestational surrogacy contracts if the gametes are supplied by married intending parents and if the contract contains certain terms. However, the statute does not apply to traditional surrogacy. The Florida statute also enforces gestational

531. In Arizona, the presumption of paternity is rebuttable by clear and convincing evidence. See ARIZ. REV. STAT. ANN. § 25-814(C) (West Supp. 1996).

532. See infra text accompanying note 545.


535. See, e.g., NEV. REV. STAT. ANN. § 126.045(3).


538. See NEV. REV. STAT. ANN. § 126-045(1), (4). The contract must specify the child’s parents, the child’s custody in case of changed circumstances, and the parties’ rights and responsibilities. See id. § 126-045(1)(e)-(o).
surrogacy contracts.\textsuperscript{539} A traditional surrogate, however, may rescind her consent to adoption,\textsuperscript{540} and any party may terminate the agreement.\textsuperscript{541} The Arkansas Code also enforces surrogacy contracts and names the intended parents as the child's legal parents, regardless of whether the intended parents are married. The statute, however, applies only to surrogacy by AID.\textsuperscript{542} Thus, no state will enforce all private surrogacy agreements for which the surrogate is compensated.

If a child is born of a surrogacy agreement that cannot be enforced, few statutes determine the child's legal parentage. With few exceptions, the surrogate as the birth mother will always be the child's legal mother. Subject to the state's rules regarding whether the presumption of legitimacy is rebuttable, her husband would be the father, or if the presumption was rebutted, the child would be the nonmarital child of the surrogate and the biological father. If, however, the state has an AID statute and the surrogate conceived by AID, then paternity would depend on whether her husband had consented to his wife's insemination.\textsuperscript{543} The child's paternal inheritance would be subject to those rules. Unless the surrogate (or the father) were to voluntarily consent to the child's adoption by the other parent and his or her spouse, a court would determine custody and visitation issues based on the child's best interests.\textsuperscript{544}

If a statute provides that the contract was voidable at the option of the surrogate, and the surrogate died within the designated time period after giving birth, the outcome as to the child's inheritance may depend on specific statutory language. The New Hampshire statute, for example, provides that the child is "[i]f the child of the intended parents from the moment of the child's birth unless the surrogate gives notice of her intent to keep the child."\textsuperscript{545} Thus, the child would not inherit from the surrogate's estate if she died before she relinquished the child for adoption. Moreover, the child would not inherit from the intended mother's estate if she died while the child was in gestation, and, depending on proof of paternity, the child might not inherit from the

\footnotesize{\textsuperscript{539} See FLA. STAT. ANN. § 742.15(1)-(2) (West Supp. 1997).  
\textsuperscript{540} See id. § 63.212(1)(i)(1)(6). These provisions are part of the Florida Adoption Code and are called "preplanned adoption." Id. § 63.212(1)(i)(1).  
\textsuperscript{541} See id. § 63.212(1)(i)(2)(i).  
\textsuperscript{542} See ARK. CODE ANN. § 9-10-201 (Michie 1993).  
\textsuperscript{543} See supra text accompanying notes 117-41.  
\textsuperscript{545} N.H. REV. STAT. ANN. § 168-B:9(I)(a) (1994).}
biological father’s estate if he died while the child was in gestation. In those states in which a gestational surrogate cannot terminate an agreement, the child’s legal parents would be the genetic parents. Under the Florida statute, however, the gestational surrogate relinquishes parental rights at the child’s birth, and the contracting couple assumes full parental rights at that time.  

It follows that if one or both of the genetic parents died while the child was in utero, under that statute, the child would not inherit from the decedent.

C. Judicial Precedents

The judicial precedents distinguish between traditional surrogacy and gestational surrogacy in terms of determining the child’s legal mother. According to the most recent decision of a California trial court, however, under some surrogacy arrangements, a child may be born without legal parents.  

The most well-known surrogacy decision, In re Baby M, involved a traditional surrogacy contract between Mary Beth Whitehead and William Stern. New Jersey had no surrogacy statute. After she bore the child and gave her to the Sterns, Ms. Whitehead changed her mind and retrieved the baby from the Sterns. Mr. Stern then sought to enforce their agreement and successfully gained permanent custody of the child in the trial court. The New Jersey Supreme Court held, however, that the surrogacy contract was void in New Jersey. It reasoned that the agreement violated the state’s adoption and child placement laws and violated the state’s public policy regarding a child’s best interests.

The court held that the surrogacy contract violated the state’s adoption statutes on several grounds. The court classified the contractual

547. See supra notes 91-92 and accompanying text.
549. A New Jersey statute, however, may apply to surrogacy. See N.J. Stat. Ann. § 9:17-44 (West 1993). That statute applies to AI, but permits the sperm donor and the recipient woman to agree that the donor will be treated in law as the father. Unless the drafters intended the term “sperm donor” not to apply to the contracting male in a surrogacy arrangement, the section would extend parental rights to the male. However, this would not extend to the second part of a surrogacy contract, the surrogate’s relinquishment of her parental rights and consent to the donor’s wife adopting the child.
550. See Baby M, 537 A.2d at 1237-38.
551. See id. at 1240.
552. See id. at 1246.
payment to Ms. Whitehead, although framed in terms of payment for her services, as a prohibited payment in connection with the planned adoption. The court characterized the requirement that Ms. Whitehead relinquish her parental rights as coercive and invalid, since New Jersey law terminates a parent’s rights only according to statutory requirements for voluntary surrender of a child, or if a court finds the parents were unfit or had abandoned the child. Finally, the surrogate’s irrevocable consent to surrender the child conflicted with New Jersey law that allows a mother to revoke her consent to her child’s adoption within a specified time.

The court also concluded that the surrogacy agreement violated the New Jersey public policy which determines child custody according to the child’s best interests rather than a parental preconception agreement. The surrogacy contract also violated the New Jersey policy that encourages both natural parents to raise their child by guaranteeing the child would be completely separated from one of them. The court declared that the surrogacy arrangement also ignored both Ms. Whitehead’s and her child’s needs because it did not provide Ms. Whitehead with independent psychological and legal counseling. In addition, the agency had not investigated the adopting parents as an adoption agency would have done.

Thus, the New Jersey court viewed the surrogacy arrangement as the “sale of a child,” not effectively mitigated by the fact that the biological father was one of the purchasers, and as potentially degrading to women. It answered Mr. Stern’s constitutional argument that the

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553. See id. at 1241. In Anonymous v. Anonymous, No. P-8572/91, 1991 WL 228555 (N.Y. Fam. Ct. Oct. 1, 1991), a New York family court refused to issue a filiation order to the contracting male in a surrogacy agreement because the agreement included a fee to the surrogate payable at the child’s birth. The court held that the contract violated New York law forbidding compensation for children, and that issuing an order of filiation would assist the parties’ violation. See id. at *1; see also In re Adoption of Paul, 550 N.Y.S.2d 815 (Fam. Ct. 1990) (holding that contracts providing for the termination of parental rights in exchange for payment are void).

554. See Baby M, 537 A.2d at 1240-41.
555. See id. at 1240.
556. See id. at 1242-44.
557. See id. at 1245.
558. See id. at 1246.
559. See id. at 1246-47.
560. See id. at 1247-48. The agency psychologist had reported that Ms. Whitehead might have difficulty surrendering the child. See id. at 1247.
561. See id. at 1248.
562. Id.
563. See id. at 1250.
contract was protected by his right to procreate by identifying that right as one guaranteeing a person “the right to have natural children” either coitally or by AI, which Mr. Stern had accomplished.564

Finally, the court treated the case as a custody dispute between the child’s natural parents to be judicially determined by the child’s best interests.565 Making such a judgment, the court awarded primary custody to Mr. Stern based on the stability that his family could provide566 and remanded the case to the lower court to evaluate Ms. Whitehead’s right to visitation.567

The inheritance consequences of the Baby M decision are that the child was a nonmarital child, born of a married woman by a man not her husband, a classification not commented on by the court. The child’s parents, the birth mother and the genetic father, were identifiable at birth, and the child, thus, could inherit from either parent, if one had died at that time. Of course, this result would be contingent upon rebutting the presumption of the paternity of Ms. Whitehead’s husband and proving Mr. Stern’s paternity.

The Kentucky Supreme Court took a different approach to surrogacy contracts, making them voidable rather than void,568 a decision with interesting inheritance consequences. The court distinguished surrogacy contracts from adoption, removing surrogacy contracts from the coverage of the Kentucky statute, which forbids the purchase and sale of children for the purpose of adoption.569 The court explained that surrogacy agreements are formed before, rather than after, the child is conceived. Their purpose is to aid an infertile couple in their wish to raise a child genetically related to at least one of them.570 The purpose of the baby selling statute, the court observed, is to protect a woman who is undergoing an unwanted pregnancy and suffering the pressures of the impending financial burdens.571 Despite this distinction, however, the court held that the contract was not legally binding because it did not comply with the statutory five-day period after the birth of the baby, during which parental consent to adoption and voluntary termination of

564. Id. at 1253.
565. See id. at 1256.
566. See id. at 1258.
567. See id. at 1261.
569. See KY. REV. STAT. ANN. § 199.590(2) (Michie 1995).
570. See Surrogate Parenting Assocs., 704 S.W.2d at 211-12.
571. See id.
parental rights are invalid.\textsuperscript{572} Until that time period has expired, the surrogate may reconsider her decision to relinquish the child. Thus, her previous consent to relinquish the child and any consent given within those five days are not legally binding.\textsuperscript{573}

The inheritance implications of this decision are that if the genetic father or the surrogate were to die during that five-day period, the child’s inheritance would be the same as under Baby M, that is, the child would inherit from either of their estates. Unlike the consequences of Baby M, the child would inherit from the father’s wife if she died after the five-day period and the surrogate had not renounced the contract. The five-day period, rather than the child’s adoption by the contracting couple, would determine the child’s maternal inheritance.\textsuperscript{574}

Some case law, like some statutory law, distinguishes the situation of a gestational surrogate from that of a traditional one. However, the courts have had a difficult time resolving this problem, regardless of whether a surrogacy statute was in force and whether the surrogate refused to relinquish the child. Where the surrogate did relinquish the child, but the statute did not afford the genetic mother the opportunity to prove her maternity, an Arizona court, in \textit{Soos v. Superior Court},\textsuperscript{575}

\begin{itemize}
\item \textsuperscript{572} See id. at 212-13. A Kentucky statute now prohibits intermediaries from being a party to a contract involving payment to a woman who becomes a surrogate by AID. See KY. REV. STAT. ANN. § 199.590(4).
\item \textsuperscript{573} See Surrogate Parenting Assocs., 704 S.W.2d at 212-13.
\item \textsuperscript{574} The reported cases that involve a contracting couple who successfully adopted a child pursuant to a surrogacy agreement, in which the surrogate was artificially inseminated with the contracting husband’s sperm, are \textit{In re Adoption of K.F.H.}, 844 S.W.2d 343 (Ark. 1993), and \textit{In re Adoption of Baby A and Baby B}, 877 P.2d 107 (Or. Ct. App. 1994). In \textit{Baby A}, the trial court had denied the couple’s petition to adopt the baby because the contract provided payments to the surrogate. \textit{See Baby A}, 877 P.2d at 107-08. On appeal, the court held that the payments did not violate Oregon’s adoption statute, \textit{see id.} at 108, which requires written disclosure and accounting of payments relating to the adoption, and which forbids payments for locating children or adopters. \textit{See OR. REV. STAT § 109.311(1), (3)} (1995). The couple’s petition included the required disclosures, and they had paid no fees for locating any of the parties. In addition, there were no objections to the petition. The court also held that adoption was in the child’s best interests. \textit{See Baby A}, 877 P.2d at 108. However, the court failed to mention a 1989 Opinion of the Oregon Attorney General, which concluded that a surrogacy contract is not enforceable, inter alia, because payment invalidates the surrogate’s consent. \textit{See 8202 Op. Or. Att’y Gen.} (1989).
\item \textit{K.F.H.} involved a contested adoption. Although the surrogacy contract had previously been held void under Michigan law by a Michigan court, the Arkansas court approved the adoption by the child’s father and his wife without the consent of the child’s mother, the surrogate. \textit{See K.F.H.}, 844 S.W.2d at 345-47. An Arkansas statute permitted adoption without a noncustodial parent’s consent if the parent had not communicated with the child for at least one year. \textit{See ARK. CODE ANN. § 9-9-207(a)(2)} (Michie 1993).
\item \textsuperscript{575} 897 P.2d 1356 (Ariz. Ct. App. 1994).
\end{itemize}
declared the statute unconstitutional. The Arizona statute at issue voided surrogacy contracts and declared that the surrogate was the child's legal mother entitled to custody. The statute also contained a rebuttable presumption that a married surrogate's husband was the child's legal father. In Soos, the husband and wife entered into a gestational surrogacy agreement. During the surrogate's pregnancy, the wife filed for divorce. After twins were born, the surrogate relinquished them to their father who then filed for an adjudication of paternity. At that time, his wife challenged the statute's constitutionality. The court held that the statute denied her equal protection by denying her the ability to prove her genetic maternity, although her husband, also genetically related to the child, was given the opportunity to prove paternity.

By contrast, a New York court held constitutional the state's Family Court Act, which granted jurisdiction to the family court to determine a child's paternity but not maternity. Behind the court's decision may have been the fact that the gestational surrogate had relinquished the child so that the genetic mother could adopt the child. Thus, the child would not have been without a mother. In addition, the New York legislature had recently enacted legislation voiding surrogacy contracts.

The best known and most controversial case involving a gestational surrogate is the California case of Johnson v. Calvert, in which the court held that the genetic mother, rather than the surrogate, was the child's legal mother. The gestational surrogate had threatened to keep the child she was still carrying, and the genetic parents (the contracting couple) sued to be declared the child's legal parents. There was no dispute over the paternity of the contracting husband. The novel issue, instead, was whether the child's mother was the birth mother or the genetic mother. California had no surrogacy statute, and the court

576. See id. at 1361.
578. See Soos, 897 P.2d at 1359-61. These statutory presumptions have been suggested by Annas, supra note 49, at 50.
580. See id. at 950.
582. 851 P.2d 776 (Cal. 1993) (en banc).
583. See id. at 778.
584. See id. at 777-78. The court did not accept the proposition that the child had two mothers because "[t]o recognize parental rights in a third party with whom the Calvert family [the genetic parents who had custody of the child] has had little contact since shortly after the child's birth would diminish [the genetic mother's] role as mother." Id. at 781 n.8.
purported to decide the case under California’s UPA.585

Under the court’s interpretation of the state’s UPA, both women had proven their maternity. The UPA establishes maternity by proof that a woman has given birth to the child,586 the traditional determinant of maternity. However, it also permits a woman to establish maternity otherwise under the UPA.587 The court interpreted this last phrase as permitting a woman to establish maternity by the same means that a man could establish paternity, including blood tests,588 which proved the wife’s genetic maternity. The court held that where both women could prove their maternity under the UPA, “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.”589

The Johnson court relied on several law review articles, whose authors argue that the law should recognize as parents those people who, before the child is conceived, intend to be the parents.590 The court recognized the couple’s intent to establish their parentage, because but for their arranging the steps leading to the child’s birth, the child would not have been born. The court also enforced the contract because the parties had voluntarily bargained for that outcome. Lastly, the court honored the couple’s “mental concept” of the child, treating that mental concept as a determinant of procreation.591 The mental concept of a child has been identified as “the desire to create a child” formed by the initiating party or parties prior to conception.592 According to this view, those persons’ mental concepts entitle them to recognition as the

585. See id. at 778-79.
586. See CAL. CIV. CODE § 7003(1) (West 1983) (current version at CAL. FAM. CODE § 7610(1) (West 1994)).
587. See id.
588. See Johnson, 851 P.2d at 781.
589. Id. at 782.
591. Johnson, 851 P.2d at 783 (quoting Stumpf, supra note 590, at 196).
592. Stumpf, supra note 590, at 195.
conceivers of the child and as the designated legal parents. Their use of reproductive technology is "an unambiguous indicator" of their intent.

As a policy matter, the California court in Johnson disagreed with several conclusions of the New Jersey court in Baby M. It distinguished surrogacy contracts from adoption laws because the surrogate was paid for her services, not for producing a baby, and the parties had entered into the contract before the surrogate conceived the child. It also rejected the New Jersey court's criticisms of surrogacy as exploiting women, treating children as commodities, and oppressing lower class women.

The single dissenting judge criticized the majority's intent-based analysis as devaluing a pregnant woman's contributions and as more suitable for determining tort liability, contract claims, and intellectual property claims. The dissent also criticized the majority decision because it provided no protection to the surrogate. This judge would have applied the more traditional family law test which determines maternity according to the best interests of the child.

In California, parenthood by intent has been limited to gestational surrogacy agreements, and perhaps to agreements under which the child would have no identifiable parent under the UPA. In In re Marriage of Moschetta, the court held that a traditional surrogacy contract was not enforceable because it did not comply with the state's adoption law. The court did not apply the Johnson test of parenthood by intent because in Moschetta there was no question that, under the UPA, the child's only mother was the surrogate and the father was the contracting husband. The surrogate began repudiating the agreement after the baby was born when she learned that the Moschettas had separated. Mr. Moschetta, however, had custody of the child, and the issue of parental

593. See id. at 196. Ms. Stumpf also characterizes the initiating parties' mental concept as affording the child's existence. See id. at 205.
594. See id. at 207.
595. See id. at 196. Of course, the other parties to the assisted conception have also used reproductive technology in order to conceive.
596. See Johnson, 851 P.2d at 784.
597. See id. at 785.
598. See id. at 795-96 (Kennard, J., dissenting).
599. See id. at 798.
600. See id. at 798-800.
601. 30 Cal. Rptr. 2d 893 (Ct. App. 1994).
602. See id. at 900-01.
603. See id. at 900.
rights was litigated within the divorce litigation. The parties agreed that the contract was unenforceable (this part of the litigation had occurred before Johnson), and the trial court held that the surrogate and the genetic father were the legal parents entitled to joint custody.604

On appeal, Mr. Moschetta argued that the contract was enforceable, and that he and his soon-to-be ex-wife were the child’s parents under the UPA.605 His wife, however, seemingly did not want the child, so her brief supported the lower court’s decision.606 The court held that only the surrogate, and not Ms. Moschetta, was the mother under the UPA.607 According to the court, the parties’ intent to be parents is irrelevant if the statute clearly designates the mother.608 The court interpreted Johnson as holding, not that surrogacy contracts were enforceable, but only that the contracts did not offend public policy.609 Because the surrogate had not formally consented to the child’s adoption by the means required in the adoption statute,610 the court said it could not enforce the contract.611 It remanded the case for the lower court to reevaluate its decision regarding custody and visitation.612

California law, thus, distinguishes between traditional and gestational surrogacy with respect to the determination of maternity. The Moschetta court pointed out that the result of this distinction is that a couple that can afford IVF, and the wife of whom ovulates “can be reasonably assured of being judged the legal parents of the child, even if the surrogate reneges on her agreement”\(^\text{613}\), those who use AI will not necessarily both become parents if the surrogate reneges.\(^\text{614}\) For traditional surrogacy, in fact, the results are the same as those in Baby M.

The same court applied the intent analysis in Johnson to a recent case in which a child was conceived by gametes from anonymous donors and gestated to term by a surrogate. In Jaycee B. v. Superior Court, the husband and wife contracted with a surrogate to gestate a fetus which

604. See id. at 895.
605. See id.
606. See id. at 895-96.
607. See id. at 896-97.
608. See id.
609. See id. at 899.
610. See CAL. FAM. CODE § 8814 (West Supp. 1997). That section requires the parent to consent in the presence of a social worker.
611. See Moschetta, 30 Cal. Rptr. 2d at 900-01.
612. See id. at 902-03.
613. Id. at 903.
614. See id.
615. 49 Cal. Rptr. 2d 694 (Ct. App. 1996).
had no genetic connection to any of the parties. Before the child was born, the contracting couple separated and initiated divorce proceedings. The wife, who was the intended mother and who, after the child's birth, had taken custody of the child, sought child support. The husband argued that the family court lacked jurisdiction to award even temporary support because the child had not been a "child of the marriage." 616 Although it did not decide the issue, the court held that, for purposes of awarding temporary support, the wife had made a sufficient showing that the child would legally be a child of the marriage. 617

Interpreting the Johnson court's use of a surrogacy contract, the court used the surrogacy contract, not as an enforceable document, but as the "basis on which to ascertain the [parties'] intent." 618 The court also analogized the case to a situation hypothesized in Johnson in which neither of the biologically involved women, that is, the ovum provider and the gestator, would take custody of the child. 619 In Johnson, the court's dictum stated that the child's parent would be determined by the parties' intentions. 620 At the time of this writing, however, the trial court to which the case was remanded has held that the child was not the child of the marriage, and that neither the husband, nor the wife was the child's parent. The court thus placed the child in the status of a nonmarital child under medieval law, filius nullius, or inheritance from no one.

The Jaycee B. court extended the circumstances in which to designate an intended parent as the legal parent to the situation in which there is no known genetic parent. In Jaycee B., the appellate court reasoned that, as a result of his express intent in the surrogacy contract, the contracting husband would most likely be determined to be the child's father. 621 Under the UPA, this child's only legal parent would have been the surrogate, since the identity of both genetic parents was unknown. 622 Although the surrogate was married and her husband was a party to the contract, the court did not mention his possible paternity. The most likely reason was that he would have been able to rebut that

616. Id. at 696 (quoting CAL. FAM. CODE § 2010 (West Supp. 1994)).
617. See id. at 696-97.
618. Id. at 701 (quoting In re Marriage of Moschetta, 30 Cal. Rptr. 2d 893, 900 (Ct. App. 1994) (emphasis omitted)).
619. See id. at 701-02.
620. See Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993) (en banc). The court must have meant preconception intent.
621. See Jaycee B., 49 Cal. Rptr. 2d at 702.
622. See id. at 701.
If the surrogate and her husband had been declared the child’s parents, the child would have been considered their heir, although they likely would have put the child up for adoption. That decision also would have disrupted the already-formed family unit of the contracting woman and the child. The appellate court determined parenthood by the terms of the contract rather than by biological parenthood. The trial court seems to have rejected intent as the means to determine parenthood. Whether that court would have designated the surrogate as the child’s mother cannot be determined because the issue arose as a question of the husband’s child support. The court also could not have designated the genetic progenitors as parents because their identities were not known.

Different results between gestational surrogacy and traditional surrogacy could also occur under Ohio law. An Ohio court, in Belsito v. Clark, held that the genetic parents in a gestational surrogacy arrangement were the child’s natural parents, but on different grounds from those used by the Johnson court. In Belsito, the genetic mother’s sister gestated the baby without a fee, and without contesting her sister’s and brother-in-law’s parenthood. In order to ensure that the child’s birth certificate would identify the genetic parents as the child’s mother and father so that the child would not be identified as the nonmarital child of the gestational sister and her brother-in-law, the genetic parents sought a declaratory judgment of their parenthood.

The Belsito court disagreed with the Johnson court’s analysis, saying that the Johnson court had ignored important public policies opposed to parties privately contracting to surrender parental rights, as well as policies underlying state regulation of adoptions. The Belsito court held, instead, that the genetic parents are the natural parents when a child is conceived by IVF of a gestational surrogate. The court evidently reached its decision for the genetic parents, not because they intended to be the parents, but seemingly as a result of the importance of genetics to

623. See CAL. FAM. CODE § 7612 (West Supp. 1997). California’s AID statute would not have applied because the surrogate did not undergo AI, but had received a donated embryo.
624. See Jaycee B., 49 Cal. Rptr. 2d at 701-02.
626. See id. at 767.
627. See id. at 762.
628. See id. at 765.
629. See id. at 765-66.
630. See id. at 766-67.
a child’s conception. Consequently, under Belsito, the child would inherit from the genetic parents. This rationale can be problematic where the parents might not be identifiable at the child’s birth. For example, as in the trial court’s decision in Jaycee B., the child would have had no known legal parents because the genetic progenitors’ identities were not known.

Thus, inheritance consequences of surrogacy vary depending upon whether state law enforces the agreement, permits the surrogate to change her mind and not relinquish the child, or declares the agreement void. Where the agreement is enforced, the child should inherit from the contracting couple if either died at the child’s birth. If the contract is void, the child should inherit from the surrogate and from either her husband or the genetic father, depending upon whether the husband is the presumed father and whether an AID statute applies. In In re Baby M, for example, the court determined that the contract was unenforceable and that the child’s parents were the surrogate and the genetic father, rendering the child illegitimate and the subject of custody and visitation litigation. If the surrogate is given a time period within which to decide not to relinquish the child, the child’s inheritance depends upon how the particular state’s law determines parental rights during that interim period. In addition, some states’ laws distinguish between gestational and traditional surrogacy in determining parenthood and between parents and biological parents. Where the child has both a known genetic and a gestational mother, the genetic mother, who is the wife of the genetic father and who, by contract, intends to raise the child, has been recognized as the child’s legal mother. However, the wife of the genetic father who enters into a traditional surrogacy agreement has not been so recognized, and a child conceived by donated gametes and born to a gestational surrogate may have no legal parents at all. The existing statutes and judicial decisions provide differing conclusions, and most states have not clearly identified the child’s parents at the child’s birth, making inheritance decisions difficult.

631. See id. at 766. Although the rule in Belsito prevented the child from being born as a nonmarital child, a child of traditional surrogacy would be illegitimate under that rule. See Goodwin, supra note 2, at 291. Goodwin designates the gestational mother as the legal mother in intrafamily surrogacy, “requiring the genetic parents to adopt the child.” Id.
633. See id. at 1234-35.
VII. PARENTHOOD BY INTENT

One method put forward by several academicians and some courts is to determine the parents of children born of reproductive technologies based on their intent to be a parent. In this perspective, the child's legal parents are those whose preconception intent was to raise the child, that is, those who intended to be the child's social parent or parents. The legal parents may have no biological connection to the child, either genetically or gestationally, and they may not be married to a person with a biological connection. Further, they need not establish themselves as the child's social parents at the time that they are recognized as the legal parents.

Intent clearly has important consequences in determining parenthood when reproductive technology is involved. For example, a sperm donor usually does not intend to be the legal father of a child conceived by AID, but he does intend to be the father of a child conceived by AID accompanied by a surrogacy contract. Similarly, the recipient of a donated egg or embryo usually intends to be the legal and social mother of the child born of those gametes, but usually does not intend to be regarded as such if she gestated the child pursuant to a surrogacy contract.

Intent-based theories of parenthood do not necessarily aim to reshape the American family. Indeed, intent-based parenthood tends to support the traditional family since the principal users of noncoital reproduction are married couples who want to raise a child genetically related to at least one of them.634 Moreover, commentators argue that intent-based parenthood serves the resulting child’s best interests by placing the child with adults who clearly want to raise him or her.635

A. Rights-Based Theories

Some theories of parenthood by intent are rights-based. Professor John Robertson is probably the best known advocate of a right of procreative liberty, which includes the right of access to reproductive technology. Robertson’s concept of procreative liberty includes the decision to have offspring,636 the freedom to rear offspring,637 and

634. See ROBERTSON, supra note 266, at 144-45.
635. See Shultz, supra note 590, at 343.
636. See ROBERTSON, supra note 266, at 16; see also Baby M, 537 A.2d at 1253 (“The right to procreate . . . is the right to have natural children, whether through sexual intercourse or artificial
"the freedom to enlist the assistance of willing donors and surrogates." He identifies this right as an important component of individual self-determination and well-being. In his view, noncoital reproduction deserves protection where its use implicates the same core procreative values as does coital reproduction. Robertson assigns a strong "presumptive priority" to the right of procreation and concludes that government cannot regulate or ban reproductive technologies without strong justification based on a technology's harmful effects. However, he does not identify any harms to any of the participants involved in the procreative process that would justify limiting a person's access to, or use of reproductive technologies and concludes that the harms that others have identified are symbolic and speculative.

Robertson includes within procreative liberty AIH, AID, IVF, egg and embryo donation where a rearing parent gestates the child, and surrogacy where a rearing parent is a genetic progenitor of the child. One challenge to Robertson's approach is that the more novel uses of reproductive technologies stray from core values of coital reproduction. For example, where neither intended parent has a biological tie to the child, but instead has orchestrated the child's procreation by enlisting sperm and egg donors and a gestational surrogate, Robertson might not enforce the parties' preconception intentions on the grounds of procreative liberty. Although Robertson recognizes the logic in the
position that the orchestrating parties who intend to raise the child should be the child’s legal parents, he never has committed himself to that conclusion.\textsuperscript{647} More recently, he has written that his theory of procreative liberty requires a biological tie to the child. He characterizes his earlier discussion as one in which he “note[s] speculatively the possible lessening of the importance of genetic connections, but do[es] not recommend immediate legal change.”\textsuperscript{648}

Further, Robertson’s view of procreative liberty does not encompass an unmarried man or woman’s intent to raise a child where that person orchestrates conception and gestation by others, because that situation is too different from current “understandings of why reproduction is valuable and protected.”\textsuperscript{649} Procreation is “something more than a means to obtain children for rearing.”\textsuperscript{650} There is further uncertainty as to whether Robertson limits procreative liberty to married couples, even where an unmarried intended parent has biologically contributed to the child.\textsuperscript{651} He describes the core values of procreative liberty as those involving a decision by a couple whether to produce a child,\textsuperscript{652} and most of his discussion involves married couples. Yet, he also describes procreative liberty as an individual right to choose whether to procreate.\textsuperscript{653} Ultimately, he concludes that procreative liberty is often realized by a couple, but “it is first and foremost an individual interest.”\textsuperscript{654}

Professor John Hill’s somewhat different approach also identifies a right to procreate, which he defines as “the right to bring a child into the world in an effort to have a family.”\textsuperscript{655} Unlike Robertson, Hill clearly separates the right of procreation from biological capacity. Professor Hill also describes it as a right enjoyed by individuals as well as married couples.\textsuperscript{656} The right to procreate is a “normative safeguard to protect

\textsuperscript{647} See ROBERTSON, supra note 266, at 143-44. Within his discussion of procreative liberty in this context, Robertson was commenting on the views of Professor John Hill, whose work is cited supra note 64.

\textsuperscript{648} Robertson, supra note 640, at 237 n.13.

\textsuperscript{649} Id. at 240.

\textsuperscript{650} Id.

\textsuperscript{651} This issue is discussed in Symposium on John A. Robertson’s Children of Choice, supra note 481.

\textsuperscript{652} See ROBERTSON, supra note 266, at 18.

\textsuperscript{653} See id.

\textsuperscript{654} Id. at 22. Robertson later wrote that although there may not yet be a constitutional right for unmarried people to conceive, “legally or morally . . . a procreative liberty interest is implicated in unmarried reproduction.” Robertson, supra note 640, at 239.

\textsuperscript{655} Hill, supra note 64, at 385.

\textsuperscript{656} See id. at 385-86.
the intention to create and raise a child,"657 encompassing the decision of how and with whom to procreate. Where procreation is by noncoital means, the legal parents of the resulting child are the child’s “intended parents,” that is, “the person or couple who initially intended to raise the child,”658 and who caused the child to be born.659 That person, or couple, must have made preconception plans to “have” a child. They must have taken “morally permissible measures, not limited to biological procreation, to bring a child into the world,” and they “must meet certain minimally adequate conditions” to ensure that they are able to raise a child.660 This classification includes those who orchestrate a child’s conception and birth using the gametes and gestational capacity of others.661 Thus, Professor Hill appears to advocate an intended parent’s absolute right to procreate rather than a strong presumption of an intended parent’s parenthood. In this view, once a person exercises his or her right to procreation, the law should deem that person the legal parent of the child from the time of the child’s birth.662

B. Contractual Theories

Other commentators have employed a contractual, rather than constitutional, approach to assign parenthood to those who intended to be parents. They would enforce preconception private agreements in which the parties to the conception determine who will be the child’s parents. Parenthood by contract emphasizes the importance of planning, negotiating, and protecting a person’s expectations in becoming a legal parent and in raising a child.663 For example, Professor Marjorie Shultz, a proponent of private ordering to determine parenthood, has written that “[w]here [a person’s] intentions are deliberate, explicit and bargained for, where they are the catalyst for reliance and expectations, as is the case in technologically-assisted reproductive arrangements, they should be honored.”664 Private ordering and protection of an individual’s expectations are not absolute.665 Indeed, Professor Shultz recognizes the need

657. Id. at 385-86.
658. Id. at 356 n.12.
659. See id. at 357.
660. Id. at 356 n.12.
661. See id. at 419.
662. See id. at 387.
663. See Anne Reichman Schiff, Frustrated Intentions and Binding Biology: Seeking AID in the Law, 44 DUKE L.J. 524, 527 (1994).
664. Shultz, supra note 590, at 302-03.
665. See id. at 325-71.
for certain restrictions, such as a state ban of commercial entrepreneurs that promote reproductive technology.666

Professor Anne Schiff also proposes a contract-based legal theory to determine parentage for children conceived by AID and by egg donation.667 Schiff defines a parent as the person who manifested a commitment to raise the child: the mental or psychological conceiver whose efforts initiated the process of conception.668 Schiff explains that when a husband and wife each consent to the wife’s AID, that couple should be the resulting child’s legal parents because they have mentally conceived the child.669 If a woman is not married but inseminates with sperm from a known donor and plans to raise the child herself, that woman is the sole mental conceiver and parent because the woman’s intent and efforts brought about the child’s conception. Schiff criticizes the case law as imposing a model of coital reproduction on reproduction by means of AID.670 A prime concern of Schiff is to ensure a legal regime that recognizes a single woman who conceives by AID as the child’s sole parent.671 In order to protect an unmarried woman’s reliance on that result, and in order to enforce the parties’ preconception intent, Schiff proposes a registration system for gametic donation, in which the parties would register their agreement with a state agency which designates who will have the rights and responsibilities of parenting the child.672 A married couple using AID would also be required to register, as would their sperm donor if known.673 Sperm banks and IVF clinics would have to inform anonymous donors of their

666. See id. at 370.
667. See, e.g., Schiff, supra note 93; Schiff, supra note 663; see also Sheila M. O’Rourke, Family Law in a Brave New World: Private Ordering of Parental Rights and Responsibilities for Donor Insemination, 1 BERKELEY WOMEN’S L.J. 140, 142 (1985) (discussing increased private ordering as the “most workable model” for the determination of parental rights and obligations).
668. See Schiff, supra note 663, at 552. Andrea Stumpf first referred to the intended parent as the person whose “mental conception” initiated procreation. See Stumpf, supra note 590, at 194. She used this concept with regard to determining the parent of a child born of a surrogacy contract. See id. at 195-97; see also Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993) (en banc) (“A woman . . . 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.”). For a discussion of Johnson, see supra text accompanying notes 582-600.
669. See Schiff, supra note 663, at 552. The wife, of course, has also biologically conceived the child.
670. See id. at 540-41.
671. See id. at 556.
672. See id. at 559-61.
673. See id. at 559 n.128.
legal positions and would file their signed acknowledgements with the state.674

Professor Schiff argues that in order to allow an inseminated woman or the recipient of egg donation to plan a family and rely on preconception agreements, once a gamete donor signs a preinsemination agreement not to assume a parental role, that donor may not later change his or her mind.675 Professor Schiff dismisses arguments that a donor is entitled to a waiting period before deciding whether to relinquish the child, and that the donor should be able to renegotiate the agreement if the donor’s emotional responses regarding parenthood change during the woman’s pregnancy.676 Moreover, she rejects the argument that the law should encourage sperm donors to take responsibility for the children whom they have fathered.677 Although Schiff recognizes that anonymous sperm donation fosters biological parenthood without responsibility, she views financial support from a second parent as less important than protecting a woman’s autonomy to shape her future.678 She maintains that a proper and sufficient response to that problem is not to recognize donors’ parenthood but, instead, for society to recognize “that donating genetic material is an act with important personal, moral, and societal implications.”679

Thus, Professor Schiff would allow children born of AID to have access to information regarding the identity of their biological fathers.680 The donor, however, would have no obligations, including financial ones, to the child.681 The parties’ agreement could be modified only if the child suffers emotionally or psychologically from lack of contact with the missing biological parent or if the child encounters financial difficulties.682 A court could then rewrite the agreement, requiring an “extremely high standard of evidence.”683 Even then, the egg or sperm donor would be given only limited rights to the child and would not be recognized as the legal parent.684

674. See id.
675. See id. at 552-53.
676. See id. at 553.
677. See id.
678. See id. at 553-54.
679. Id. at 562.
680. See id. at 564-65.
681. See id. at 567.
682. See id. at 558.
683. Id. According to Schiff, the burden of proof should be highest if a party seeks to modify the contract on the ground of financial distress. See id.
684. See id.
The courts of two states have used intent to determine parenthood. In *Johnson v. Calvert*, the California Supreme Court adopted an intent-based analysis of parenthood, holding that "the parties' intentions as manifested in the surrogacy agreement" determined legal maternity of a child born of gestational surrogacy. The court, citing three of the articles discussed above, held that the genetic mother, rather than the gestational surrogate, was the legal mother because the genetic mother "intended to bring about the birth of a child that she intended to raise as her own."

California courts' embrace of parenthood by intent, however, may be limited to cases involving gestational surrogacy in which two women can establish maternity under California law, and perhaps to surrogacy in which neither biological mother claims the child. Another California court determined maternity based on the state's UPA, rather than on the basis of the parties' intent where the child was born of a traditional surrogacy. Finally, a New York court determined that a gestational mother was a child's intended and, thus, legal mother where the biological mother was an anonymous egg donor.

C. Inheritance Consequences of Intent-Based Theories

For purposes of inheritance law, intent-based theories should make it relatively easy to identify the child's legal parents during the gestator's pregnancy and at the child's birth and, thus, to identify immediately from whom the child should inherit. The parents are those who, before

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685. 851 P.2d 776 (Cal. 1993) (en banc).
686. Id. at 782.
687. See id. at 782-83 (citing Hill, supra note 64; Shultz, supra note 590; and Stumpf, supra note 590).
689. See id.
690. See Jaycee B. v. Superior Court, 49 Cal. Rptr. 2d 694 (Ct. App. 1996). On remand, however, the trial court decided that the intended rearing mother, who is not the child's genetic or gestational mother, is not the child's legal mother. See supra note 92 and accompanying text.
691. See *In re Marriage of Moschetta*, 30 Cal. Rptr. 2d 893 (Ct. App. 1994).
692. See McDonald v. McDonald, 608 N.Y.S.2d 477 (App. Div. 1994); see also Janet L. Dolgin, *The "Intent" of Reproduction: Reproductive Technologies and the Parent-Child Bond*, 26 CONN. L. REV. 1261, 1309 (1994). Professor Dolgin describes courts as attempting to use the concept of intent to "mediate" between conflicting views of family as based on status and as based on contract, thereby allowing families to be defined by contract and choice. See id.
693. Professor Hill, however, has identified the intended parent as the parent from the time of the child's birth, not while the child is in utero or is extracorporeal. See Hill, supra note 64, at 387; see also Stumpf, supra note 590, at 204 (suggesting that intended parents' rights vest at the birth of the child).
the child was conceived, intended to be the child's social parents; they need not necessarily be the biological progenitors of the child. Their parental claims rest on a cluster of facts and principles underlying intent-based parenthood: (1) the fact that, but for the intended parents' efforts, the child would not have been conceived; (2) the contractual view that parties should be held to their promises because of the importance of enforcing those promises, and the fact that the intended parents have relied on them; (3) the practical imperative that people need certainty to plan their family arrangements; and (4) the importance of ensuring that the child's parents are always identifiable.694

The determination of legal parenthood by intent, however, presents an irony. It seems to complicate some of the simpler inheritance situations under present law. It also creates a lens through which to view more simply some of the more difficult policy problems. This section examines how a theory of intent-based parenthood might influence rulings in the procreative situations already discussed: AID, IVF, and surrogacy.

1. Artificial Insemination by Donor

Advocates of intent-based parenthood presumably would approve the statutes that designate the consenting husband and wife as the legal parents of a child conceived by AID and relieve the sperm donor, whose intent is only to supply sperm, of legal obligation to the child.695 If the husband dies during the inseminated woman's pregnancy, or if the husband or inseminated woman die soon after the child's birth, for inheritance purposes, the child should be considered their child. If the donor dies during that period, the child would not be his heir. These statutes, however, may not require adequate manifestation of intent. Although the insemminated woman and her husband must execute written consent to the insemination, the statutes do not require the contracting couple to specifically consent to be parents and to raise the child.696

Because the statutes require only that the couple consent to insemination, and not to raising the child, the statutory consent may not satisfy the contract-based definitions of parenthood, for example, that the party's

694. See Hill, supra note 64, at 413-18.
695. See ROBERTSON, supra note 266, at 126-27.
intent be “explicit and bargained for”\(^{(697)}\) or that they have manifested commitment to raise the child.\(^{(698)}\)

A problem is that evidence of a specific bargain may simply not be available, and it may be difficult to determine who intended to raise the child. Under these intent-based proposals, the inseminated woman must prove that she intended to gestate and raise the child rather than to relinquish the child to another person; her pregnancy alone should not establish her as the legal parent as it would at common law or under the AID statutes.\(^{(699)}\) If she dies just before or after childbirth without clear written proof of her intent, and the child is born alive, the situation may require litigation for the child to prove heirship from the mother. The same would hold true with respect to her husband. At common law he would have been presumed the father of a child born in wedlock, and under the AID statutes, his consent to AID would establish him as the father.\(^{(700)}\) However, his consent to AID, without consent to raise the child, may not be sufficient to establish his parenthood. Thus, if the husband dies, the child should have to prove that the husband agreed not only to the child’s procreation, but that he had also intended to raise the child.

These statutes do not require the couple to register their intentions with the state or require sperm banks to file the donor’s acknowledgement.\(^{(701)}\) A failure to register, in Professor Schiff’s view, would remit them to existing laws governing coital reproduction.\(^{(702)}\) Under that body of law, if the husband rebuts the presumption of legitimacy with proof of his sterility, the child would be illegitimate and would inherit from the mother and biological father, if his identity could be determined. If the child could not establish paternity, he would inherit only from his mother.

If an inseminated woman is not married and the donor is known (and the parties had not registered their agreement), the result under intent-based proposals should be similar to most of the present case law.

\(^{(697)}\) Shultz, supra note 590, at 302. Professor Robertson, however, argues that the husband’s required consent will yield the correct results. See ROBERTSON, supra note 266, at 127.

\(^{(698)}\) See Schiff, supra note 663, at 552.

\(^{(699)}\) See, e.g., id. at 551.

\(^{(700)}\) See Schiff, supra note 95, at 285.

\(^{(701)}\) See Schiff, supra note 663, at 559; supra note 696. Professor Robertson suggests, in some cases, a contract model of enforcement with review by the judiciary or an administrative panel in order to “assure intelligent, noncoerced contract formation.” ROBERTSON, supra note 266, at 126 & 256 n.17.

\(^{(702)}\) See Schiff, supra note 663, at 560.
That is, if the sperm donor donates sperm, intends to be the child’s parent, and has manifested that intent, then he and the inseminated woman would be the child’s legal parents. Some case law, however, supports the result that the parties’ preconception intent will not, by itself, cut off the donor’s paternity. In *Thomas S. v. Robin Y.*, 703 for example, the court issued a filiation order based, in some part, upon the donor’s post-birth relationship with the child where there was no written evidence of the parties’ preconception agreement.704 This decision is anathema to those who believe that the courts should enforce the parties’ preconception intent, written or otherwise, regarding their negotiated roles in conceiving and raising a child—where such enforcement is needed in order to protect reliance and arguably ensure predictability and autonomous choice.705

2. In Vitro Fertilization

In egg or embryo donation, the legal maternal parent under intent-based parenthood would be the same as in the common law: the woman who gives birth to the child is the legal mother if she gestated the child and intended to raise him or her.706 However, proof would be required as to whether the gestational woman intended to act as a surrogate or whether she received the egg or embryo in order to bear a child whom she would raise. In the case of egg donation, if the woman is married and her husband provided the sperm for IVF, her husband should be the father, if he intended to rear the child. Paralleling the case of consent to AID, the husband’s consent may require his explicit consent to rear the child.707 If that proof is not available, the child could be the illegitimate child of the gestating woman and have no legal father. If the wife gestates a donated embryo, then her husband’s paternity should depend upon his consent to the procedure and to be the child’s father, since he did not supply the sperm.

It would seem that the fact that the gestational woman was unmarried should make no difference to intent. Professor Robertson, however, appears to distinguish between the consequences of egg

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704. See *Thomas S.*, 618 N.Y.S.2d at 362.

705. See, e.g., Schiff, *supra* note 663, at 552-54; Shultz, *supra* note 590, at 377-78.


707. See *supra* notes 696-98 and accompanying text.
donation and embryo donation, and those of sperm donation where the donation is to an unmarried woman. As to egg donation, he would enforce an egg donor’s preconception agreement not to be a parent because the recipient gestator would also be a woman, and the child would already have a mother. This result avoids the complications of recognizing that a child has two mothers, but it prevents the child from having two parents from whom to inherit. With respect to embryo donation, Professor Robertson also would enforce an agreement to exclude the egg and sperm donors as legal parents. He notes, however, that an agreement between donors and the recipient to that effect could be overridden if the embryo were donated to an unmarried woman in a jurisdiction that recognizes a sperm donor’s paternity. It is not clear, however, whether the legal parent would be the embryo’s sperm donor only, or both the egg and sperm donors. Given that both donors made the same genetic contribution, equal treatment of them would have the result that the child at birth would have three parents and could inherit from either donor, in addition to the gestational mother, if either died at that time.

3. Surrogate Contracts

Under an intent-based analysis, legal parentage in a surrogacy situation is easily determined simply by enforcing the surrogacy contract, resulting in consequences that differ from current law. For example, in the Baby M case, Mr. Stern’s right to be the child’s legal parent would be superior to that of Ms. Whitehead, the gestational and genetic mother. This is not because Mr. Stern is biologically more closely related to the child, which he is not, but because he had initiated the process that brought about Ms. Whitehead’s pregnancy, and the parties had agreed that he would rear the child. On those grounds, Ms. Stern’s claim would also be superior to that of Ms. Whitehead and equal to that of Mr. Stern. A wife in Ms. Stern’s position should be recognized as the child’s legal mother even before she adopts the child. Under intent-based parenthood, her claim would be superior to Ms. Whitehead’s, even if Ms.

708. See Robertson, supra note 266, at 129.
709. See id. at 130.
710. See id.
712. Professor Robertson analogizes the infertile wife’s procreative rights to those of the infertile husband whose wife conceives by AID. See Robertson, supra note 266, at 40. Where the wife is the genetic mother, her claim is stronger because the child’s procreation more closely approximates core coital procreation.
Whitehead had been artificially inseminated with donated sperm of another man, or if the Sterns had orchestrated IVF with donated gametes followed by implantation in Ms. Whitehead. In those cases, if one or both of the Sterns had died before the child was born, or before the surrogate relinquished the child, the child would be their heir even though the child was not related genetically and had no social ties to either of the Sterns. Furthermore, if Ms. Whitehead had died during her pregnancy and the child were born alive, the child would not inherit from her estate.

The logic of this position further requires that if a surrogate contracts with an unmarried man, the resulting child should have only that male parent, even if the man was infertile and the child was conceived with sperm of another man. Thus, if the contracting man died during the pregnancy or before the baby was relinquished, that child would inherit from his estate although he had no genetic, marital, or social tie to the child. However, this type of surrogacy arrangement significantly departs from a coital reproduction model and would not come within Professor Robertson's definition of procreative liberty.

In an area where the desire for predictability is especially intense, intent-based theories leave significant areas of uncertainty. First, as explained above, if parenthood is determined on the basis of a constitutionally protected right to procreate, it is not always clear how far the right extends, and whether that right outweighs any identifiable harm that a prebirth contract may have imposed on the child. Second, it is not clear under the case law whether a court will determine parenthood by intent, and if it does so, under what circumstances. Third, conception by contract may well be subject to contract defenses. Therefore, it may not be possible to identify a child's parents without litigation and interpretation of the contract. For example, a surrogate may interpose a defense of excused performance which, if successful, would permit the

713. See Schiff, supra note 95, at 284-85.
714. But see supra text accompanying note 572 (noting a five-day waiting period, rather than the child's adoption by contracting couple, as determinative of the child's maternal inheritance). Professor John Hill, however, locates the intending parents' parenthood at the time of the child's birth. See Hill, supra note 64, at 387.
715. See Schiff, supra note 95, at 285-86. Professor Schiff predicts that a court would declare the egg donor as the child's legal mother, however, in order to strengthen the conventional family model that a child should have one parent of each sex. See id. at 286.
716. See Robertson, supra note 266, at 125-26.
surrogate to retain and raise the child. Professor Shultz argues that one situation where this could potentially arise is if a surrogate’s own children died during her pregnancy.\(^\text{718}\) However, she argues that if a surrogate wants to keep the baby only because she had become emotionally committed to the child during pregnancy and childbirth, her contractual obligation should not be excused since the contract imposes on her the risk of changed feelings.\(^\text{719}\)

Other potential contract defenses are those of unconscionability and duress.\(^\text{720}\) *Doe v. Kelley*\(^\text{721}\) provides an example of a contract that could be challenged under either defense by a surrogate who wanted to keep a baby. In *Doe*, the husband of the married couple entered into a surrogacy contract with his secretary. Their contract provided that the secretary would receive $5,000 plus expenses, time off from work, and company pregnancy disability and health insurance.\(^\text{722}\) Clearly, this situation presented ample opportunity for overreaching by an employer that may have invalidated the contract. Thus, where contract defenses are available,\(^\text{723}\) the designation of a child’s legal parents, and thus the child’s inheritance rights, may not be known until those issues have been litigated.

**VIII. MORE THAN TWO PARENTS**

Another cluster of tests to determine parenthood recognizes that a child could have more than two legal parents or could have more than one legal parent of the same sex. This result should not be precluded

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\(^{718}\) See Shultz, *supra* note 590, at 349.

\(^{719}\) See id. at 349-50.

\(^{720}\) See id. at 353-54; see also Malina Coleman, *Gestation, Intent, and the Seed: Defining Motherhood in the Era of Assisted Human Reproduction*, 17 CARDOZO L. REV. 497 (1996). Professor Coleman proposes a “system of rules” to protect the parties’ intent, but also to protect the surrogate against an unconscionable contract. See id. at 529-30. She suggests legislation that requires specific procedures “which guarantee to the greatest extent possible that the decision to contribute one’s reproductive function was freely made after careful deliberation on the part of all the individuals involved.” Id. at 529. Contracts that comply with these requirements are conscionable and will be enforced. See id.


\(^{722}\) See id. at 440. The issue in *Doe* was whether the Michigan Adoption Code, prohibiting payment in connection with adoption, which the parties assumed applied to the surrogacy arrangement, was an unconstitutional infringement on the parties’ right to privacy. See id.

\(^{723}\) Professor Schiff, however, would not permit the parties to modify their contract once they had registered their intent as to who will be the child’s legal parents, nor would she permit contract defenses or any other defenses, such as conduct and estoppel, to determine legal parenthood. That agreement could be changed only by court order under a high burden of proof, and only on grounds of the child’s best interests. See Schiff, *supra* note 95, at 282.
because under intent-based theories, the criterion for parenthood is a person’s preconception intent to rear a child. If more than two people, or more than one person of the same sex, intend to conceive and raise a child, by contributing genetically or gestationally to the child, or by orchestrating its conception by others, then all parties involved could be recognized as the legal parents of that child. Thus far, however, most proposals for legal recognition of more than two parents have been concerned with ensuring ongoing custody or visitation arrangements for those who have become a child’s social parents, rather than with identifying parental arrangements at the child’s birth. Where more than two people claim to be the legal parents of a child born from artificial reproduction, society’s concepts of legal parenthood would have to become more flexible than they currently are in order to recognize all of them as the child’s parents.

The question of whether a child can have more than two parents has an analogue in adoption law, and those states that have changed from secret adoption to open adoption have modified this traditional rule. In secret adoption, the child’s birth and adoption records are sealed in order to transplant the child into the adopting family. The biological and adopting families do not know each other’s identity. In open adoption, the families know each other’s identity, and the child and his or her adopting parents may maintain some relationship with the biological parents. Open adoption, however, is not joint parenting. The child has only one set of legal parents, the adopting couple or unmarried person. Adoption extinguishes the parental rights of the child’s biological parents. Thus, in almost every state, the adopted child cannot inherit as a child from or through the biological parents, nor can the biological parents inherit from the child.

One of the reasons many states have changed to a policy of open adoption is the importance to adopted children of knowing their genetic

724. See Gillian Douglas, The Intention to Be a Parent and the Making of Mothers, 57 MOD. L. REV. 636, 639 (1994). However, because the experience of a nonbiological parent who coordinates the gamete donors and gestator to produce a child differs significantly from parenting initiated by coitus, Professor Robertson might not recognize the liberty interest of those who coordinate donation and gestation by others. See supra text accompanying notes 638-54.

725. See supra text accompanying notes 182-84.

726. The secret adoption paradigm has never fit adoptions within a family, such as stepparent adoptions or adoption of a child by relatives.

727. See supra note 188 and accompanying text.

728. See Appell, supra note 188, at 1020.

729. See id. at 1001.

730. See supra text accompanying notes 243-45.
heritage. Another basis for the change is that nontraditional extended families have become more accepted. Changing demographics have produced families created from divorce and remarriage, families headed by a close relative, families headed by a single parent, and families that include informal “para-parents,” close friends who act as a child’s social parents. Like these family and nonfamily situations, open adoption also has the potential to provide the child with an extended family.

Another basis for nontraditional parenting in adoption law comes from the small number of states that have recognized that a child may have two parents of the same sex. These states have permitted a nonbiological social parent in a lesbian relationship to adopt the partner’s biological child. For example, in Adoption of Tammy, the child was conceived by AID of a lesbian woman using semen from a known donor, the nonbiological mother’s cousin, who had given written consent to the adoption. If the cousin had intended to play a parental role, however, the child could have had three adults seeking legal protection of their parenthood, two mothers and a father. Because of reproductive technology, pressure for the law to recognize this type of parental arrangement has now increased. Professor Judith Younger has characterized this outcome as “an idea whose time has come.” Other authorities, however, recognize that family harmony may be at stake.

Some limited judicial and statutory authority exists for multiple parenthood. First, Louisiana courts recognize dual paternity where a child is born to a married woman fathered by a man other than her husband. The Louisiana Code applies a presumption of legitimacy that the mother’s husband is “the father of all children . . . conceived during

731. See Appell, supra note 188, at 1009.
733. See supra text accompanying notes 246-60; see also Pamess, supra note 49, at 586 (stating that a “two-parent setting need not inevitably involve at least one man”).
735. See id. at 319.
736. The Massachusetts AI statute applies only to married women and would not have cut off the cousin’s parental status. See MASS. GEN. LAWS ANN. ch. 46, § 4B (West 1994).
737. See Younger, supra note 19, at 913-14.
738. Id. at 913.
the marriage.\textsuperscript{740} The husband can disavow paternity if he does so within 180 days of learning of the child's birth.\textsuperscript{741} Louisiana courts, however, also permit a child to establish biological paternity\textsuperscript{742} and permit a biological father\textsuperscript{743} and the child's mother\textsuperscript{744} to establish the biological father's paternity. These filiation actions do not change the child's status as the legitimate child of the mother's husband.\textsuperscript{745} Instead, the child, in effect, has two fathers who, in addition to the mother, share responsibility for the child. The case law, however, does not settle whether the fathers also share support obligations\textsuperscript{746} and whether the child inherits from both fathers. Although the court in \textit{Durr v. Durr} stated that Louisiana courts have recognized the child's right to inherit from their biological father,\textsuperscript{747} \textit{Morrison v. Griffin},\textsuperscript{748} a precedent to which the \textit{Durr} court referred, involved children born to their biological parents when the mother was still married to another man whose whereabouts had not been known for years.\textsuperscript{749} After the mother divorced her absentee husband, she married the children's biological father. The court held that the children were the heirs of their deceased biological father for purposes of inheriting from his sister.\textsuperscript{750} The decision was based upon the Louisiana Civil Code, which legitimizes the acknowledged children of parents who married subsequent to the children's birth.\textsuperscript{751} The \textit{Morrison} court interpreted the statute as also legitimizing children born out of marriage if their biological parents later married.\textsuperscript{752} Without this section of the Code, and with a legal father whose whereabouts were known, however, it is unclear whether Louisiana courts would permit a child to inherit from both fathers. The \textit{Durr} court also analogized the situation of a child with two fathers to an adopted child who inherits from the

\textsuperscript{741} See id. art. 189.
\textsuperscript{742} See, e.g., \textit{Warren v. Richard}, 296 So. 2d 813, 815-17 (La. 1974) (allowing a child to recover for the wrongful death of its biological father).
\textsuperscript{743} See \textit{Jones}, 566 So. 2d at 409-13; \textit{Finnerty}, 469 So. 2d at 292; \textit{Durr}, 454 So. 2d at 319.
\textsuperscript{744} See \textit{Cole}, 553 So. 2d at 855.
\textsuperscript{745} See id. at 854.
\textsuperscript{746} See id. at 855. The court imposed a support obligation on the biological father, but said that it would defer determining whether the legal father (the mother's husband) was also subject to the duty to support the child. See id.
\textsuperscript{747} See \textit{Durr}, 454 So. 2d at 318.
\textsuperscript{748} 323 So. 2d 451 (La. 1975).
\textsuperscript{749} See id. at 452.
\textsuperscript{750} See id. at 457.
\textsuperscript{752} See \textit{Morrison}, 323 So. 2d at 455.
biological parents as well as from the adopting parents, which is still the law in Louisiana.

The conceptual foundation of these decisions is the Louisiana courts’ view of fathers of children from adulterous conceptions as being equivalent to unwed fathers of children conceived with unmarried women, whose parental rights under Supreme Court precedents may be accorded protection under the Fourteenth Amendment. The Louisiana Supreme Court interpreted those Supreme Court cases as requiring that it recognize the biological father’s paternity when the biological father had established a relationship with his children. The court thus equated men who had fathered nonmarital children with married women to those who had fathered nonmarital children with unmarried women.

Explicit statutory provisions for inheritance from two fathers exist in Michigan inheritance law, which provides that a child born of a married woman and a man not her husband may inherit from an intestate biological father as well as from the presumed legal father, the mother’s husband. The argument in favor of the Michigan statute, to “destigmatize and normalize the status of ‘illegitimate’ children” and treat them equitably, did not explain the decision to recognize the two factors.

The United States Supreme Court, although not declaring that a state cannot recognize more than one legal father, held in Michael H. v. Gerald D. that the Constitution does not require that the state do so. Michael H. involved a biological father’s claim to paternity of a child conceived coitally where the child was born to a woman married to

754. See LA. CIV. CODE ANN. art. 214(c) (West Supp. 1997).
757. See id. at 851-54.
758. See MICH. COMP. LAWS ANN. § 700.111(7) (West Supp. 1997). This section does not apply to children born of AID to a married woman with the consent of her husband. An AID child is considered the child of the married couple “for all purposes of intestate succession.” Id. § 700.111(2). Subsection (7), however, would apply to children such as those conceived by IVF using donated sperm.
another man. A plurality of the Court held constitutional California's statutory presumption, rebuttable only by the husband or wife, that a child born to a married woman living with her husband is a child of the marriage. In an often quoted line, Justice Scalia said, "California law, like nature itself, makes no provision for dual fatherhood." The plurality also held that the child had no due process right to "maintain filial relationships with both [men]." The child asserted that she had two psychological fathers and had a right to have both legally recognized as her father. Justice Scalia dismissed the child's claim as one that "merits little discussion" and was without "support in the history or traditions of this country.

The facts of Michael H. highlight the practical difficulties of a divided authority and a disrupted family unit that may result from more than two legal parents. The child in Michael H. had not had very extensive long-term contact with her biological father. She and her mother "visited" him for three months when the child was about seven months old and then alternated living with the husband and another man. When the child was two years old, she and her mother lived with the biological father for eight months when he was not out of the country on business. By this time, he had filed a filiation action. From the time the child was three years of age and throughout litigation, however, the mother and child were again living with the mother's husband.

Had the biological father succeeded in establishing paternity and visitation, the mother's husband would have been, in essence, a stepfather to an illegitimate child and not a second legal father. If, however, as is the case with Louisiana law, the presumption of the husband's paternity would not have been rebutted by Michael H.'s filiation order, then the child would have had two legal fathers. Although Justice Scalia may have looked favorably on the financial resources that the fathers would provide to the child, these arrangements most likely would not comport

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761. See id. at 113-14.
762. See id. at 129-30. The California code has since been amended to permit other parties to rebut the presumption of legitimacy. See CAL. FAM. CODE § 7541(b) (West 1994).
763. Michael H., 491 U.S. at 118.
764. Id. at 130.
765. Id.
766. Id. at 131.
767. See id.
768. See id. at 114.
769. See id. at 115.
with his view of the family described in *Michael H.* Three parents would have decisionmaking authority for the child with little prospect of agreement and greater prospect of hostility and injury to the mother's marriage.\textsuperscript{771}

Although Michigan and Louisiana law recognize dual fatherhood, the former only for purposes of inheritance, dual motherhood has yet to be legally recognized. In *Johnson v. Calvert,*\textsuperscript{772} the California Supreme Court rejected the ACLU amicus argument that a child had two mothers when the child was conceived by IVF of a married couple’s gametes and gestated by a surrogate.\textsuperscript{773} The court recognized that each woman could prove her maternity, but it decided that only one of them could be considered the legal mother. The court explained its decision not to recognize the surrogate as a third parent on grounds of family harmony: the child’s genetic parents were married and could provide a stable home, whereas the surrogate was an unrelated “third party.”\textsuperscript{774} The court added 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.”\textsuperscript{775}

In an institutional contribution to the dialogue, the New York State Bar Association also rejected the concept of two legal mothers, which had been recommended by its Special Committee on Biotechnology and the Law. In 1993, the Committee recommended that the New York Domestic Relations Law define “parent” of a child born of IVF using embryo implantation to include both the genetic and gestational mothers.\textsuperscript{776} In response to *Johnson,* the Committee had first recommended in 1992 that a child born as a result of AI or IVF “shall be deemed” the child of the gestational mother.\textsuperscript{777} The Bar Association voted against the report, and the New York legislature passed surrogacy legislation declaring surrogacy contracts unenforceable and classifying the birth mother as the child’s legal mother.\textsuperscript{778}

\textsuperscript{770} See id. at 123 n.3.
\textsuperscript{771} See Schneider, *supra* note 19, at 527 (stating that the married couple would have to “share child-rearing with the wife’s former lover”).
\textsuperscript{772} 851 P.2d 776 (Cal. 1993) (en banc). For further discussion of this case, see *supra* text accompanying notes 582-600.
\textsuperscript{773} See *Johnson,* 851 P.2d at 781 n.8.
\textsuperscript{774} *Id.*
\textsuperscript{775} *Id.*
\textsuperscript{776} See Palmer, *supra* note 292, at 26. Professor Palmer was chair of that committee. *See id.* at 18.
\textsuperscript{777} *Id.* at 23.
The Committee then considered the genetic mother’s status and whether bifurcated gestation and egg donation had created a new category of children.\textsuperscript{779} The Committee concluded that a child born to a married woman by AI or IVF, with her husband’s consent and with the services of a physician, should be considered the legitimate child of that married couple for all purposes.\textsuperscript{780} In other situations, however, when a woman gestates a child conceived from another woman’s egg, the child would be deemed the child of both women.\textsuperscript{781} The report does not explain how, or if, the two mothers would share parental responsibilities.\textsuperscript{782} For example, questions of who must consent to the child’s medical treatment, or who would have custody of the child remained unresolved by the proposal. The drafters may have assumed that the dual motherhood status would not continue, and that the parties would determine who would adopt the child. The proposed legislation would give each woman standing to assert her claim.\textsuperscript{783}

The Committee, however, recommended that for maternal inheritance purposes the child be deemed the child of the genetic mother only.\textsuperscript{784} The Committee decided in favor of inheritance from only the genetic mother so as to provide a clear rule for planning estates and for interpreting private donative instruments.\textsuperscript{785} The Committee, instead, could have proposed a rule for class gifts that would interpret instruments executed before the effective date of the recommended legislation differently from those executed after that date.\textsuperscript{786} The latter could be interpreted to provide inheritance from and through both mothers.

Academics who argue for more than two parents view parenthood as more of a social concept than a biological or financial one. The best known academic suggestion to rethink the exclusive nature of legal parenthood is that of Professor Katharine Bartlett. She urges states to recognize parenting alternatives so that adults who have become a child’s psychological parents would be able to maintain a relationship with that

\textsuperscript{779} See Palmer, supra note 292, at 23.
\textsuperscript{780} See id. at 26.
\textsuperscript{781} See id.
\textsuperscript{783} See id. at 38. In addition, the report did not recognize the parenthood of contracting parties who were not biologically related to the child, but who, nonetheless, intended to raise the child.
\textsuperscript{784} See Palmer, supra note 292, at 26-27. The genetic mother could disinherit the child or give the child up for adoption by the gestational mother to avoid this consequence. See id.
\textsuperscript{785} See id. at 27. Of course, maternal lineage has traditionally been presumed from the woman who gave birth, who would traditionally also have supplied the maternal genetic lineage.
\textsuperscript{786} See Thies, supra note 435, at 923.
child outside the nuclear family.\textsuperscript{787} Professor Bartlett, however, does not advocate designating those psychological parents as the child's legal parents. She focuses on a child's need for continuity in relationships with parental figures when the traditional nuclear family has failed and the child has formed relationships with other adults, such as a stepparent. She argues that the law should protect that relationship for purposes of custody and visitation.

Professor Bartlett's concept of multiple parenting first requires that the child's relationship with her legal parent has been interrupted and that the adult petitioning for protected status has been either the child's legal, natural, or psychological parent.\textsuperscript{788} She defines psychological parent as an adult who has had physical custody of the child for at least six months in a relationship based on mutuality (the adult feels care and concern for the child, and the child perceives the adult as a parent) which "began with the consent of the child's legal parent or under court order."\textsuperscript{789} Professor Bartlett admits that the contours of this proposal for nonexclusive parenting are not precise.\textsuperscript{790} One lacuna is the apparent lack of a requirement that the psychological parent assume financial responsibility for the child. Professor Bartlett proposes that a noncustodial parent's visitation access to a child should not depend upon that parent's financial contributions for child support.\textsuperscript{791}

Professor Nancy Polikoff's similar proposal also expands the definition of parenthood to include those who maintain functional parental relationships with a child "when a legally recognized parent created that relationship with the intent that the relationship be parental in nature."\textsuperscript{792} Professor Polikoff's proposal differs from that of Professor Bartlett in that Professor Polikoff advocates the recognition of the psychological parents as additional legal parents.\textsuperscript{793} Thus, a particular child could have more than two legal parents of either gender, and a court would determine custody based on the best interests of the child.\textsuperscript{794}

Both Professors Bartlett and Polikoff are concerned with protecting

\textsuperscript{787} See Bartlett, supra note 52, at 882-83.
\textsuperscript{788} See id. at 946.
\textsuperscript{789} Id. at 946-47; see also Minow, supra note 22, at 284-85 & n.52 (proposing a definition for "parent" that would take into account "psychological evidence and theories").
\textsuperscript{790} See Bartlett, supra note 52, at 961.
\textsuperscript{791} See id. at 950.
\textsuperscript{792} Polikoff, supra note 732, at 464.
\textsuperscript{793} See id. at 473 n.51.
\textsuperscript{794} See id.
an already developed relationship between a child and adults other than the child's legal parents. Neither of these proposals for multiple parenting discusses parenthood for purposes of inheritance, although Professor Polikoff explains that she would redefine legal parenthood to confer "all parental rights and responsibilities on those who meet the definition." 795 Neither proposal is intended to determine legal parenthood at the time of the child's birth. Indeed, Professor Bartlett says that the child's "natural" parents should have "unequivocal and undivided parental authority" at the child's birth. 796

If the child was conceived through reproductive technology, however, the unanswered question is who is deemed the "natural" parents. One commentator, Professor R. Alta Charo, who is also concerned with protecting a child's ongoing relationship with an adult, has linked the concept of identifying multiple biological parents with children of reproductive technologies. 797 However, Professor Charo has not delineated how and when those parents would be identified. She notes that "[s]ome children have three biological parents, not two. Some children have two biological mothers, not one," 798 and some children also have parents by declaration at the time of their birth. Professor Charo would create "a new category . . . somewhere between custodial parent and legal stranger, that captures those relationships." 799 Professor Charo's special-category parent, like Professor Bartlett's custodial parent who has no financial responsibility toward the child, is a limited-purpose parenthood where the combined duties and rights of parenthood are shared among more than two people. However, specifics about that category need to be determined, such as when the child's legal parent or parents will be determined, how to distinguish legal parents and special-category parents, if and how they will share decisionmaking authority, and which ones will be financially responsible for the child. 800

795. Id. at 471 (emphasis omitted).
796. Bartlett, supra note 52, at 882.
797. See Charo, supra note 279, at 305-06.
798. Id. at 305; see also George J. Annas, Using Genes to Define Motherhood—The California Solution, 326 NEW ENG. J. MED. 417, 420 (1992) (stating that the realities of surrogacy demand that "[s]ociety should acknowledge [that the child has two mothers] and take it into account").
799. Charo, supra note 279, at 306.
800. Professor Charo does explain that courts and legislatures may have to determine who will have primary authority to raise the child. See id. Professor Annas also suggested what appears to be a limited-purpose parent when he wrote that the two mothers should be allocated different "rights and responsibilities of parenthood." Annas, supra note 798, at 420. For Annas, however, the gestational mother is the presumed and custodial mother who may choose to relinquish the child to the contracting couple. The egg donor would have visitation rights. See id. He does not say if the
One potential special-category parent might be a sperm donor who wants to be recognized as a parent and will accept financial responsibility for that child, although not as the child’s primary rearing parent of that sex. Those donors could donate under a separately identified category for married couples who wished to involve a third adult in what later could be worked out as a special-category parent in an extended family. This outcome is currently possible under statutes of three states that permit a sperm donor to contract for parental status. The New Jersey, New Mexico, and Washington AI statutes provide exceptions that permit a sperm donor and the recipient to agree in writing to treat the donor as the natural father. None of these statutes limit the exception to sperm donation to unmarried recipients, although they may have been intended for that purpose.

Except for the report of the Committee of the New York State Bar Association, the proposals summarized here have not addressed inheritance consequences, despite the importance of inheritance as a component of parenthood. The Committee recommended dual maternity at the child’s birth, but not for purposes of ongoing psychological parenting, and also recommended that the child’s maternal inheritance at that time be from the genetic parent only.

There exist some obstacles in inheritance law to recognizing more than two parents. A child who is the heir of a biological father and mother and a gestational mother may be thought of as entitled to dual inheritance in the sense of potentially receiving an inheritance from two mothers. A child who is the heir of a sperm donor and a presumed father may inherit from two fathers. To add the “intended parents” who orchestrated the child’s conception and birth to that list may create dual or triple inheritance. However, there is some precedent in intestacy law against dual inheritance, illustrated in the situation of inheritance by an adopted child. For adopted children, however, dual inheritance issues

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father would be the gestational woman’s husband or the sperm donor (the male of the contracting couple), or both.

801. One example, although not involving a birth by noncoital reproduction, is the biological father in Michael H. v. Gerald D., 491 U.S. 110 (1989).

802. It has been suggested that, in order to avoid confusion in decisionmaking authority, the sperm donor should fill a role more like the child’s “uncle” or “godfather.” See Glover et al., supra note 180, at 57.


806. See supra text accompanying notes 784-85.

807. See Billings v. Head, 111 N.E. 177, 177 (Ind. 1916).
arose in situations different from those involving more than two collaborating parents in noncoital reproduction.

First, in some older cases, an issue arose when an adopted child claimed a double share from the same estate in jurisdictions where the adopted child continued to inherit from or through the natural parents. For example, where a grandparent had adopted a grandchild whose parent was deceased, at the grandparent’s death the adopted child could claim one share of the estate as the adopted child and a second share as a representative of the deceased parent. Courts were divided as to whether the adopted child could take these two shares.\textsuperscript{808} Similarly, with respect to reproductive technology, this situation could occur where a woman carries an embryo conceived from the gametes of her daughter (or daughter-in-law) and son-in-law (or son). The woman is the gestational mother of the child and its genetic grandparent. At her death, if her child (the grandchild’s genetic parent) had predeceased her, the grandchild/child could be entitled to two shares. The UPC may provide the best answer to this situation because it now permits only a single inheritance “based on the relationship that would entitle the individual to the larger share.”\textsuperscript{809}

The label of dual inheritance has also prevented a child from inheriting from different estates through two parents in the same relationship to the child.\textsuperscript{810} For example, if a child whose parent has died is adopted by a stepparent in a state where the statute does not clearly save the child’s inheritance through the deceased parent, this issue may arise at the death of an ancestor of the deceased parent, for example, the child’s intestate grandparent. If the child inherits from the grandparent through the deceased parent, the adoption statute would, in a sense, confer potential inheritance rights on the adopted child superior to those held by a natural child, because the adopted child would also be able to inherit through the adopting stepparent.\textsuperscript{811} Yet, unlike inheritance of two shares from one estate described above, the adopted child in this situation would not take more than one share from any one estate. Moreover, the child already has additional rights of inheritance in that she may potentially inherit from three parents, the deceased

\textsuperscript{808}. Compare Billings, 111 N.E. at 177 (holding that a child is not permitted to inherit both as a grandchild and as an adopted child), with In re Bartram’s Estate, 198 P. 192, 193 (Kan. 1921) (holding that an adopted child can inherit in a dual capacity).


\textsuperscript{811}. See id. at 1164.
parent, the other natural parent, and the adopting stepparent. Because the child would still be known to the deceased parent's family (family adoptions are usually not secret) and would likely become part of three extended families, inheritance from the deceased parent's intestate relatives may not be inappropriate. As long as the child does not inherit more than one share from any one estate, precedents against dual inheritance for adopted children need not prevent inheritance by a child conceived by reproductive technology from inheriting from more than two parents on grounds of unfairness.

If a state were to recognize that a child of noncoital reproduction could have more than one legal parent of each sex, it would have to determine the designated multiple parents at birth for inheritance purposes. None of these proposals offers the necessary criteria to do so, except the New York Bar Committee report, which designated only the genetic mother as the child's maternal parent for inheritance.812 As is the case with parenting agreements in open adoption, the multiple parenting possibilities that have been proposed are initially consensual and contractual, that is, they recognize as parents those who want to be the child's parents.813 To accommodate these relationships, they have suggested some form of special status parenthood for purposes of custody and visitation only. Applied to the circumstances of reproductive technology, special status parenthood may enable those who have participated in conceiving and gestating the child to play a role in the child's upbringing, allowing the child to know those who made its birth possible. The state would have to assign the primary parental role in order to identify the child's parents at birth, perhaps enacting the traditional presumptions of the gestational woman as the child's mother and her husband as the father or, if she is unmarried, the sperm donor, the child's biological father, as the father. The child's inheritance could initially be limited to those primary parents.

The other parties might petition the court for special status parenthood, or the state may enable them to contract for enforceable parental rights, as sperm donors have been able to do with unmarried

812. See Palmer, supra note 292, at 26-27.
813. A recently proposed statute, the Parentage of Children of Assisted Conception Act, recognizes three parents when the child is born to a gestational surrogate. See McAllister, supra note 298, at 101, 107-08. Under this proposal, the birth mother is always the child's legal mother until she relinquishes the child for adoption under the contract or by judicial decree. The genetic parents are also the legal parents if the parties expressly agreed to that arrangement. Therefore, until relinquishment, the child has three parents. See id. at 107-08.
women to whom they have donated sperm.\textsuperscript{814} Once the child custody and visitation issues have been determined, however, the court would have to determine all the consequences of special status parenthood. It might decide to designate only two parents as parents for inheritance purposes regardless of custody, as in the New York Bar Committee proposal,\textsuperscript{815} or it might designate the child’s custodial parents as its parents for inheritance. However, the state may treat all the participants as, in effect, holding themselves out as parents, even for purposes of inheritance. As long as the child does not inherit more than one share from a single estate, inheritance consequences of multiple parenthood should present fewer difficulties than do the social consequences of custody and visitation rights, which may disrupt the custodial family unit. For inheritance purposes, the state would not be engaged in ongoing supervision and adjustments among the parties.

\textbf{IX. FOSTERING RESPONSIBILITY}

A final approach to determining parenthood would be to determine it in ways that foster responsibility on the part of those who participate in the conception and gestation of the child. Whereas most proposals previously discussed were concerned with parental rights for those who wish to assume a parental role towards a child with whom they had established a social relationship, the proposals discussed here are more concerned with identifying those adults on whom parental obligations should be imposed because of their roles in conceiving and gestating the child. This part examines the work of commentateurs who take this position, all of whom implicitly or explicitly criticize rights doctrines, especially as they are applied to families and parenthood. These authors often express more communitarian goals, stressing that individual rights must be balanced with social responsibility. Professor Younger, for example, has criticized Supreme Court cases delineating a right to procreate and state cases determining divorce and custody, all of which send the message “that personal interests of the parents take precedence over those of the family.”\textsuperscript{816} She suggests changes in the law in order to encourage stable families\textsuperscript{817} and to treat couples who have children

\begin{footnotesize}
\begin{enumerate}
\item See discussion supra Part III.C.3.
\item See Palmer, supra note 292, at 26-27.
\item Younger, supra note 19, at 900.
\item See id. at 898.
\end{enumerate}
\end{footnotesize}
differently from those who do not.\textsuperscript{818}

The concept of responsibility has always been an important one in determining the boundaries of parenthood. For example, a state may terminate a person’s parental rights if he does not “demonstrate a reasonable degree of interest, concern or responsibility” toward his child in the first thirty days of the child’s life.\textsuperscript{819} The Supreme Court has also required a biological father to demonstrate responsibility towards his child in order to maintain parental status. In comparing the legal parenthood of unwed biological fathers with that of unwed mothers for equal protection purposes, Justice Potter Stewart explained that the law recognizes the legal maternity of an unwed mother, not just because the birth mother is easily identifiable as the legal mother, but because she has already established a relationship and connection with the child.\textsuperscript{820} By contrast, Supreme Court precedent require a biological father to affirmatively establish a parent-child relationship, either by marriage to the child’s mother, or by accepting “some measure of responsibility for the child’s future.”\textsuperscript{821} Inheritance is, of course, linked with responsibility.\textsuperscript{822} By the mechanism of inheritance, individuals provide for their families after their death.\textsuperscript{823}

\textbf{A. Responsibility and Parenthood Using Reproductive Technologies}

The notion of parental responsibility has also been important in litigation involving reproductive technologies. The Tennessee Supreme Court, in \textit{Davis v. Davis},\textsuperscript{824} concerned itself with parental responsibility, although the court did not use this term. When the court decided that Junior Davis’s interest in avoiding unwanted parenthood outweighed the interest of his former wife in the frozen embryos of which they were the

\begin{itemize}
  \item \textsuperscript{818} See id. at 901. In 1981, Professor Younger proposed a category of “marriage for minor children,” a special status for couples who had children for which she would impose different marital property rules and more stringent conditions for divorce. Judith T. Younger, \textit{Marital Regimes: A Story of Compromise and Demoralization, Together with Criticism and Suggestions for Reform}, 67 C\textsc{ORNEIL} L. REV. 45, 90-102 (1981).
  \item \textsuperscript{819} 750 ILL. COMP. STAT. ANN. 50/1(D)(f) (West Supp. 1997); \textit{see also In re Adoption of A.S.V.}, 644 N.E.2d 500, 505 (Ill. App. Ct. 1994) (quoting same).
  \item \textsuperscript{821} \textit{Lehr}, 463 U.S. at 262.
  \item \textsuperscript{822} “[G]iving and bequeathing not only express but beget affection, or at least responsibility.” Halbach, \textit{supra} note 16, at 5.
  \item \textsuperscript{823} See id.
  \item \textsuperscript{824} 842 S.W.2d 588 (Tenn. 1992).
\end{itemize}
genetic procreators, the court accorded heavy weight to his argument that he did not want genetic children to whom he could not be a responsible parent.\textsuperscript{825} The ex-Ms. Davis’s claim to the embryos was weakened because she did not plan to be a responsible parent. Instead, she intended to donate the frozen embryos to another couple, rather than bear and raise the children herself.\textsuperscript{826} Thus, the court awarded the embryos to Junior Davis.

In a frozen sperm case, \textit{Hall v. Fertility Institute},\textsuperscript{827} a Louisiana court remanded the issue of whether the decedent had made an authentic donation of his frozen sperm by written instrument to a woman in order that she might bear his posthumous child. The court enumerated several facts that were relevant to the decedent’s lack of donative intent, one of which was that he had not accepted any responsibility for the financial welfare of his potential future child. He had neither bequeathed property to the purported mother under his will to raise a child nor had he provided for the child’s welfare by any inter vivos transfer.\textsuperscript{828}

Two academic commentators, Professor Katharine Bartlett and Professor Vicki Jackson, would resolve conflicts between disputing potential parents over a child conceived noncoitally on the basis of responsible parenthood.\textsuperscript{829} Professor Bartlett’s thesis is that the law should promote responsible parenthood instead of promoting a view of parenthood grounded in exchange and individual rights.\textsuperscript{830} Professor Bartlett describes responsible parenthood as based on generosity, obligation,\textsuperscript{831} and the “cycle of gift rather than the cycle of exchange.”\textsuperscript{832} To resolve custody disputes over parenthood, she proposes that courts utilize a broad rule imposing a “responsibility-based

\begin{footnotesize}
\textsuperscript{825} See id. at 603-04.
\textsuperscript{826} See id. at 604.
\textsuperscript{827} 647 So. 2d 1348 (La. Ct. App. 1994).
\textsuperscript{828} See id. at 1351-52.
\textsuperscript{830} See Bartlett, supra note 829, at 294. Neither Bartlett nor Jackson reject values based in rights. Rather, each recognizes the importance of both community values and individual choice.
\textsuperscript{831} See id. at 300.
\textsuperscript{832} Id. at 295. Professor Bartlett describes responsibility as “a certain type of connection that persons may experience in their relationships with one another. That connection is one of identification. . . . [seeking] what is good for the other person.” Id. at 299; see also Dolgin, supra note 692 (chronicling the change in family relations from a hierarchical structure that fostered a sense of commitment and responsibility among its members to a family made up of equal autonomous individuals connected through contractual negotiations similar to those of the marketplace).
\end{footnotesize}
standard833 that measures a potential parent’s responsible decision-making and employs presumptions or burdens of proof to reduce judicial discretion.834 Professor Bartlett suggests a presumption that a mother’s pregnancy and childbirth establish the mother’s responsible relationship with the child.835

Professor Bartlett illustrates her proposal with the example of an unmarried woman who conceives a child using AID, intending to be the child’s sole legal parent.836 First, Professor Bartlett values the woman’s intentional unmarried motherhood because it affirms the mother’s deliberate choice and her plan to be a parent, which Bartlett labels as responsible conduct.837 However, she labels recognition of the donor as a legal parent only in order to ensure his rights and his financial support of the child as parenthood based on “exchange” and “entitlement.”838 Thus, Professor Bartlett would protect the woman’s sole custody839 against a claim by the sperm donor where the donor originally agreed not to assume a parental role towards the child but then changed his mind and sought custody or visitation after the baby’s birth.840 Her preference for the unmarried mother rests on two grounds. First, she “prefer[s] a planned relationship over one that was not only unplanned, but affirmatively unwanted.”841 Second, she distinguishes the woman’s relationship with the child from that of the donor’s on the ground that the woman has already developed a relationship of responsibility with the child through nine months of pregnancy and childbirth.842 Because the donor had no relationship with the child at that point, the woman’s more responsible parenthood should be recognized over the donor’s claim. Of course, at that point, the donor could not have developed a relationship with the

833. Bartlett, supra note 829, at 324.
834. See id. at 324-25.
835. See id. at 325. For criticism of Professor Bartlett’s reliance on a woman’s biological connection to a child as encouraging oppression of women, see Janet L. Dolgin, Status and Contract in Feminist Legal Theory of the Family: A Reply to Bartlett, 12 WOMEN’S RTS. L. REP. 103 (1990).
837. See id. at 314.
838. Id. at 315.
839. She would also presumably deny the biological father’s claim to be a legal parent.
840. See Bartlett, supra note 829, at 314-15; see also Leckie v. Voorhies, 875 P.2d 521, 522 (Or. Ct. App. 1994) (denying a sperm donor’s petition to establish paternity because of the donor’s written preconception waiver of paternity). But see Jhordan C. v. Mary K., 224 Cal. Rptr. 530, 536 (Ct. App. 1986) (suggesting that a preconception agreement of a man who donated sperm to an unmarried woman who self-inseminates may not be binding, at least where the man plays a parental role after the child is born).
841. Bartlett, supra note 829, at 315.
842. See id.
child, although he could have demonstrated responsibility by supportive
ducnt towards the pregnant mother.

If, however, the sperm donor had planned to play a parental role and
the mother then contests his claim to paternity, Professor Bartlett’s
reasoning may not decide the issue. On the one hand, the donor planned
his relationship which he affirmatively wanted. On the other hand, he has
not yet formed a relationship with the child, whereas the mother has.
Each wants to participate in a “cycle of gift,”
but the donor has not
yet been given the opportunity. It would seem that the proper decision
is to recognize each as a parent because, unless the presumption of
pregnancy always controls, each has acted responsibly, and the law
should encourage both to take responsibility for a child they brought into
the world.

If a woman who signed a surrogate contract changes her mind and
decides not to relinquish custody of the child to the biological father,
Professor Bartlett would not enforce the contract. The child’s parentage
would instead be decided, not on fairness to the parties, but on broad
rules affirming parental responsibility.

Because Professor Bartlett’s
decision rule is one that recognizes the relationship already formed
between the gestational mother and the child, the surrogate should prevail
each time unless the biological father has somehow demonstrated greater
responsibility and commitment to the child during the woman’s
pregnancy.

Professor Bartlett reasons that a rule not enforcing surrogacy
contracts will affirm that parents do not want to give up their children,
and that changing one’s mind to keep a child one had agreed to
relinquish is a defensible position. However, in surrogacy, the issue
is which biological parent who refuses to give up the child should be
protected. After all, by virtue of his contract and sperm donation, the
father has, in her terms, also engaged in responsible family planning.
Professor Bartlett also does not explain why she would penalize a sperm
donor in an AID situation who changes his mind and decides that he
wants to play a part in raising the child but would not penalize a

843. Id. at 295.
844. See id. at 335-36.
845. See id.; see also PAUL LAURITZEN, PURSUING PARENTHOOD 109-10 (1993) (acknowledging
the importance of the gestational mother as the first person to care for the child by rearing it in her
body).
846. See Bartlett, supra note 829, at 335.
847. Bartlett refers only to a traditional surrogate who is also the genetic mother. See id. at 326
n.144.
surrogate mother who changes her mind about relinquishing the child. Here again, the explanation must be the woman’s nine months of pregnancy and childbirth. On these grounds, Professor Bartlett most likely would award custody to a gestational surrogate rather than to the contracting couple, even if the child had been conceived with the contracting wife’s egg and the husband’s sperm. Although the wife had demonstrated commitment by undergoing egg retrieval, the gestational surrogate had already formed a relationship with the child during pregnancy, a relationship to which Professor Bartlett gives priority.\footnote{848} 

One difficulty in applying Professor Bartlett’s theory to these situations is that her proposal does not offer a conclusive rule to determine legal parenthood at the birth of the baby. Instead, she analyzes responsibility in the context of choosing between conflicting claims to rear a child. If her rules applied to determine parenthood at birth, then in most cases the child would inherit only from the birth mother. If the biological father died at that time, he could not have established parenthood by a “cycle of gift”\footnote{849} unless he had acted responsibly towards the birth mother during her pregnancy. Thus, in surrogacy, if the biological father became unable or unwilling to take the child at its birth, Professor Bartlett’s rules would compel the surrogate, even an unwilling one, to accept the child because she is the participant best situated to assume parental duties.\footnote{850} Moreover, if the father died at that time, the child would not inherit from him because he had not yet established a responsible parental relationship with the child.

Like Professor Bartlett, Professor Jackson also analyzes the issue of whether to enforce a preconception surrogacy agreement against the surrogate in terms of a rule that best furthers “a social sense of responsibility.”\footnote{851} Professor Jackson, however, reaches a different conclusion as how to best further that goal. Her proposal is a rule that recognizes as parents all the people who were responsible for bringing a particular life into being.\footnote{852} At the time of the child’s birth, the parents are all those who caused the child’s birth through their own bodies or through a commitment to rear the child.\footnote{853} Thus, the child born of a surrogacy arrangement would have more than two parents at

\footnotesize{848. See id. at 325.} 
\footnotesize{849. Id. at 295.} 
\footnotesize{850. See id. at 336.} 
\footnotesize{851. Jackson, supra note 829, at 1822.} 
\footnotesize{852. See id. at 1824.} 
\footnotesize{853. See id. at 1824-25.}
his or her birth. After the child is born, Professor Jackson would not enforce the contract against an unwilling surrogate, but, instead, would give the surrogate the option to voluntarily relinquish custody to the contracting couple so that it could adopt the child. If she does not relinquish custody, a court would determine custody between or among the parents.854

One reason Professor Jackson puts forward for not enforcing a surrogacy contract is that enforcement would discourage a surrogate from acting responsibly towards the fetus while she is pregnant.855 Professor Jackson criticizes a rule that enforces a surrogacy contract and denies the motherhood of the gestational woman as “inconsistent with enhancing a moral sense of responsibility to the life one creates... A rule that would make a prebirth surrender clause specifically enforceable is one that psychologically encourages and permits the birth mother to disclaim all responsibility for the child during pregnancy and upon birth.”856 Indeed, the point has been raised successfully in surrogacy litigation that a woman lacks a maternal tie to the child if she has contracted to relinquish custody of the child whom she has borne.

B. Responsibility and Sperm Donation

Daniel Callahan has also defined parenting in terms of relationships and the responsibilities imposed by those relationships, rather than in terms of parents’ and children’s rights and separate needs.857 Callahan, however, has focused on the social importance of encouraging more responsible fatherhood.858 Thus, Callahan disagrees with intent-based theories regarding AID. In order to encourage men to donate sperm, intent-based theorists would relieve a sperm donor of all responsibilities of fatherhood unless the sperm donor contracted otherwise. However, they recognize that the biological father of a child conceived coitally bears legal responsibility for the child.859 In the intent-based calculus, the interest in facilitating sperm donation to enable the recipients to

854. See id. at 1827.
855. See id. at 1825 n.34; see also LAURITZEN, supra note 845, at 111 (questioning a surrogate mother’s commitment to properly care for the fetus).
856. Jackson, supra note 829, at 1822.
858. See Callahan, Bioethics, supra note 857, at 738.
859. See supra Part VII.
exercise their procreational rights outweighs the social interest in enforcing a parent’s fiscal responsibility to his children.\textsuperscript{860} However, inquiring, “[w]hat could society have been thinking about?”\textsuperscript{861} Callahan has criticized AID and anonymous sperm donation as “an organized and sanctioned way of allowing men to be biological fathers and still bear no responsibility for their children.”\textsuperscript{862} He observes that current AID practice is a symbol of the more general social problem of “male procreational irresponsibility.”\textsuperscript{863}

Callahan advocates treating a sperm donor the same as a man who impregnates a woman coitally.\textsuperscript{864} His criticisms of AID, however, are difficult to reconcile with the current practice of anonymous sperm donation to a married woman.\textsuperscript{865} In fact, the law now treats similarly a sperm donor whose sperm is used for AI of a married woman and a man who fathers a child coitally with a woman married to another man. In both situations, the law presumes that the husband is the father.\textsuperscript{866} Unless the husband rebuts the presumption, he is the parent responsible for that child, even to the extent of providing child support if the couple divorces. The consenting husband of a recipient of AID assumes the same legal status.

Callahan may be referring only to donations to unmarried women, but he has not suggested how he would treat sperm donation differently in order to impose paternal responsibility in that situation. Under current law, without a statute determining otherwise, the sperm donor should be the legal father of a child born of AID.\textsuperscript{867} In only a few states do current AI statutes terminating a donor’s parental rights apply to the use

\footnotesize{\begin{align*}
860. & \text{See Robertson, supra note 266, at 128. Professor Robertson would balance these interests differently to account for the risk of the mother's need for welfare, but he concludes, without support, that the risk is slight. See id.; see also Schiff, supra note 663, at 553 (arguing that allowing a sperm donor to avoid his agreement not to play a parental role violates a woman's autonomy).} \\
861. & \text{Callahan, Bioethics, supra note 857, at 739.} \\
862. & \text{Callahan, Opening the Debate, supra note 857, at 43.} \\
863. & \text{Id.} \\
864. & \text{See Callahan, Bioethics, supra note 857, at 739.} \\
865. & \text{One commentator has criticized theories of procreational liberty because they fail to recognize the importance of individual responsibility. See George P. Smith II, Children of Choice: Freedom and the New Reproductive Technology, 36 Jurimetrics J. 115, 118 (1995) (book review). Even Smith, however, does not criticize the participants in AID to a consenting married couple on these grounds. See George P. Smith II, The New Biology: Law, Ethics, and Biotechnology 82 (1989); Smith, supra note 106, at 145.} \\
866. & \text{See Nicole Miller Healy, Beyond Surrogacy: Gestational Parenting Agreements Under California Law, 1 UCLA Women's L.J. 89, 124 (1991).} \\
867. & \text{See supra text accompanying notes 164-68 and note 164.}
\end{align*}
of AID by unmarried women.\textsuperscript{668} Even in those states, a donor may be the legal father because donors to unmarried women have litigated successfully for the opportunity to establish paternity over their biological children.\textsuperscript{669} Indeed, two courts have held that their states’ AID statutes would be unconstitutional if applied to deny donors that opportunity.\textsuperscript{670} Some courts have approved, on policy grounds, a biological father’s socially responsible act of assuming fiscal responsibility for his nonmarital child in terms of support and inheritance.\textsuperscript{671} Moreover, if a donor had agreed with the mother that he would not establish his paternity and had abided by that agreement, but the mother required public assistance to support the child, she most likely would not receive that assistance without revealing the father’s name for purposes of imposing a duty of support on the donor.\textsuperscript{672}

In order to equate sperm donation with fatherhood by coitus, it is likely that Callahan would assign legal paternity only to a donor who gave his sperm to an unmarried woman. Thus, a man who donated sperm to a sperm bank would have to specify the marital status of the female recipient. If he donates to an unmarried woman, he would have to agree to undertake the responsibilities of fatherhood. The sperm bank would then be required to reveal the names of the donors to unmarried women and keep accurate records of each donation and recipient. These records would become public. In addition, the sperm bank would have to limit the number of unmarried recipients of one man’s sperm so that the man would not father an unmanageable number of children whom he could not support financially.

A more workable distinction, however, might be between men who donate anonymously to sperm banks and clinics, and those whose sperm

\textsuperscript{668} See supra note 202.


\textsuperscript{671} See C.O., 639 N.E.2d at 525. A few states, by statute, provide for enforcement of a written agreement by a sperm donor and a woman in which they agree that the donor will be the child’s natural father. See N.J. STAT. ANN. § 9:17-44(b) (West 1993); N.M. STAT. ANN. § 40-11-6(B) (Michie 1994); WASH. REV. CODE ANN. § 26.26.050(2) (West 1997). None of these statutes limits the agreement to one with an unmarried woman. However, one court has upheld a written agreement in which the donor specifically relinquished a paternal role, but then changed his mind. See Leckie v. Voorhies, 875 P.2d 521, 522 (Or. Ct. App. 1994).

\textsuperscript{672} See 45 C.F.R. § 232.12(a) (1995).
is used in order to conceive a particular child at a particular time.\textsuperscript{873} Only in the latter situation should the man undertake the responsibility of fatherhood.\textsuperscript{874} Anonymous donation of gametes to a clinic is sufficiently unlike traditional parenthood by coitus\textsuperscript{875} so that this status should relieve the donor of parental responsibility for the resulting child.

\section*{C. Responsibility and Postmortem Children}

Responsible parenthood is also at issue when a man bequeaths his frozen sperm to be used after his death in order for the recipient to conceive his child. Yet, the California court’s decision in \textit{Hecht I}\textsuperscript{876} would allow posthumous biological fatherhood without responsibility towards the child. \textit{Hecht I} permits a man to devise his frozen sperm to be used by the beneficiary for AI to continue his genetic line, yet it does not subject his estate to the child’s claims.\textsuperscript{877} Consequently, \textit{Hecht I} has been criticized on these grounds because the posthumously conceived child could not prove paternity under California law, and the decedent bequeathed sperm without any financial responsibility for the consequences of that act.\textsuperscript{878}

One commentator proposes an amendment to the California Family Code which would require a man who devises sperm or who leaves directions with a sperm bank to give the sperm to a particular recipient to be treated as the legal father of his children conceived and born after his death. The proposal requires a man who deposits sperm with a sperm bank for freezing and who wants to father a child after his death to sign a written declaration of his intention to do so and accepting paternity for that child.\textsuperscript{879} The depositor would also agree, in writing, to subject his testamentary dispositions of property to an obligation to support the

\begin{footnotesize}
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\item \textsuperscript{873} See Jackson, supra note 829, at 1825 n.35.
\item \textsuperscript{874} See id.; see also Chester, supra note 57, at 995 ("[L]egislation should require that any offspring resulting from [sperm donated to a specific woman should] take by intestacy from [the donor] if born alive within two years plus 300 days of [the donor’s] death.").
\item \textsuperscript{875} See Estes v. Albers, 504 N.W.2d 607, 609 (S.D. 1993).
\item \textsuperscript{876} 20 Cal. Rptr. 2d 275 (Ct. App. 1993). For further discussion of \textit{Hecht I}, see supra text accompanying notes 392-402.
\item \textsuperscript{877} See \textit{Hecht}, 20 Cal. Rptr. 2d at 290.
\item \textsuperscript{878} See Lisa M. Burkall, Note, \textit{A Dead Man’s Tale: Regulating the Right to Bequeath Sperm in California}, 46 Hastings L.J. 875, 898-99 (1995). Similarly, “any right of the male to procreate posthumously subsumes the responsibility to support the resulting offspring by inheritance.” Chester, \textit{supra} note 57, at 994; see also USCACA, \textit{supra} note 69, § 4(b), 9B U.L.A. 166 (providing the same result).
\item \textsuperscript{879} See Burkall, \textit{supra} note 878, at 904-05.
\end{itemize}
\end{footnotesize}
child. The support obligation to the postmortem child would override all other testamentary gifts. Under the proposal, the decedent’s estate would be kept open pending the child’s conception until the earliest to occur of “two years after the date of [the decedent’s] death; the death or (re)marriage of the woman to whom he bequeathed or contractually conveyed his sperm; and the woman’s . . . statement” that she does not intend to inseminate with the sperm. The probate court would have discretion to determine and set aside the amount necessary for the child’s support. Only if there is additional property in the estate would any property go to other beneficiaries. The child would also inherit from an intestate estate as an heir, or from a testate estate as a pretermitted child, and would be a member of a class of children for purposes of gifts in written instruments made by others, unless the donor had specifically excluded posthumous children.

This proposal ensures that the biological father bears financial responsibility for his postmortem children, but at the same time it imposes significant burdens on the father’s estate. One consequence is that it treats a posthumous child differently and more favorably than the decedent’s other children who may also be in need of support from their inheritance. A more equitable solution may be that the postmortem child inherits from the decedent but be treated the same as the decedent’s other children. That is, the child would take whatever testamentary gift the decedent had bequeathed or would share as a pretermitted heir or in an intestate estate. Of course, if a decedent has provided specifically for a postmortem child in his or her will, differently from other children, the gift should be enforced.

The argument against the child’s inheritance is that enforcement would require keeping a portion of the estate open until the child’s birth. The decedent who leaves frozen gametes for a designated recipient, however, manifests his intent to biologically parent a child, rather than

880. See id. at 905.
881. See id.
882. Id.
883. The support provisions would not apply if the sperm donor leaves all or the bulk of the estate to the woman who is the recipient of the sperm. See id.
884. See id. at 906. It is not clear whether the decedent’s support obligation to the postmortem child is in addition to the child’s inheritance. But see Thies, supra note 435, at 923 (proposing a rule that would exclude postmortem children as issue of decedent from class gifts in instruments of others existing before date of proposed rule becoming effective).
to achieve finality by closing the estate before the child’s birth. 885 To provide finality, the decedent’s will or a state statute could specify a time limit before which the child must be either born or in utero.

D. Responsibility and Inheritance

The inheritance issues in Hecht I arose in the context of a known donor who wished to be involved in the conception of a particular child. As Professor Jackson has suggested, a donor who gives genetic material to create a specific child, and not simply to give or sell gametes to a sperm or egg bank, should be treated initially as a parent to that child until the child’s legal parents are determined by adoption or relinquishment, or until custody is otherwise determined among claimants. 886 Most state law is unclear as to the parental status of donors and other participants in a child’s procreation by reproductive technology. This Article suggests that where state law does not determine parenthood at the child’s birth, if any of those people who participated in procreating a specific child died before the child’s legal parents were determined, the child should inherit from that person’s estate.

An inheritance law that allows a child to inherit from all those whom society identifies as responsible for the child’s birth will fulfill a protective function 887 by making financial provisions for the child. It may also fulfill a channelling function 888 by requiring that those people take responsibility for the child unless countervailing interests outweigh that policy. For example, one such countervailing interest might exist when a married couple receives gamete donation and their child is conceived by AID or IVF. In this situation, if the donor were a male who had contributed to a sperm bank and had died at the child’s birth, a policy of paternal responsibility might be outweighed by the state interest in upholding the family unit against disruption by strangers to that unit, and by whatever continuing interest is furthered by the presumption of legitimacy. Those policies remain important, even though the stranger to the family unit had died because the donor could not have donated.

885. Professor Chester agrees with the distinction between a donor who designates a particular woman to bear his child after his death and one who wishes to be an anonymous donor and suggests legislation to that effect, requiring the man to choose at the time he deposits his sperm. See Chester, supra note 57, at 995. Under Professor Chester’s proposal, the legislation would also name the child as an intestate heir or pretermitted heir if the man died testate. See id.
886. See Jackson, supra note 829, at 1824-25.
887. See supra note 56 and accompanying text.
888. See supra note 19 and accompanying text.
anonymously if such a rule existed.\footnote{In order to effectuate their child’s inheritance from a donor’s estate, the recipients must know the donor’s identity at the time of the insemination or IVF.} If the recipients were known to the donor, the donor could intrude on the marital unit during pregnancy and after the child was born. Moreover, a rule that allowed a child to inherit from a donor’s estate when the gametes were obtained from a gamete bank could subject the estate to the claims of numerous children, complicating property titles and probate and splintering the estate into small shares.

In comparison, gamete donation for AID by a known donor to a known unmarried recipient will not involve as strongly the policies of not interfering with a family unit\footnote{A donor, however, may “interfere” with the unit of an unmarried woman or women and the child. However, the child’s custody would still be determined.} or of illegitimizing a child who might otherwise be presumed legitimate.

In other reproductive situations, a person who has frozen gametes for postmortem conception or has frozen an embryo for postmortem gestation by a specified individual is also a donor who intends to create a specific child. In turn, that person should be understood to have subjected his or her estate to the child’s inheritance. In surrogacy arrangements, all parties to the contract, whether the gametic donor(s) (unless they donated anonymously to a clinic), the gestational mother, the wife of the contracting sperm donor, or the orchestrators of those gametic and gestational services by others would have parental responsibilities because they brought about the birth of a particular child.\footnote{See Jackson, supra note 829, at 1824-25.} This rule would prevent the spectacle of the child in the \textit{Jaycee B.} litigation from being declared \textit{filius nullius}.\footnote{See supra notes 615-24 and accompanying text.} The rule would consider them all as parents for inheritance purposes. A rule allowing the resulting child to inherit from those parties until the child’s parents are legally determined promotes communitarian goals by offering financial protection to the child. This rule also impresses the consequences of their reproductive activity upon the parties to the conception and birth. Although the child might inherit from more than two “parents,” this result is appropriate to the new means of conception. In \textit{Jaycee B.}, five people were involved in the child’s conception and birth. Moreover, this result may occur whenever a child’s parent dies and the child is adopted by the surviving parent’s new spouse. This rule would neither decimate a single estate nor would it unduly disrupt estate administration because the child would
inherit from known contributors only.

Inheritance law thus may allow a child to reconstitute the seemingly shattered pieces of its origins and may help transmit to the contributors “the moral message of responsibility”893 for the life they helped create.

893. *Id.* at 1828.