# Collaborative Reproduction and Rethinking Parentage

by
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## I. Introduction

By the middle of the twentieth century, issues of legal parenthood were well settled in American law; in the first decade of the twenty-first century, those issues are hardly settled at all. How did this happen, and how does it impact family law today? This article explores some developing aspects of these questions.

In the not-very-distant past, the question of who is a legal father and who is a legal mother could be answered easily. A woman who gave birth was the mother. If she was married, her husband was presumed to be the father, and the circumstances in which this presumption could be rebutted were very narrow. If the birth mother was unmarried, she was the only parent until a male either acknowledged paternity or was determined to be the father in a court of law. If a child was adopted after its birth, the adoptive parents were the legal parents. In this idealized world, issues of parentage rarely arose in divorce litigation, and there were no cryopreservation banks containing embryos of doubtful legal status.

Those realities have now changed, and the result is that in the absence of controlling legislation,[1] the courts must struggle to answer this question: "Who is a parent?" This article will discuss

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[1] The A.B.A. Family Law Section Committee on Assisted Reproduction and Genetics, chaired by the author of this article, drafted a comprehensive model act on assisted reproduction which was approved by the Family Law Section Council in February, 2007, and by the A.B.A. House of delegates in February, 2008, and which could serve as a legislative model. The Uniform Parentage Act (2000), 9B U.L.A. 295 (2001 & Supp. 2006), as amended in 2002, deals with some parentage issues relevant to this Article and will be cited in context below.

the historic emphasis on the traditional family, the new reproductive technologies and the need to re-think the meaning of parenthood.

## II. Historic Emphasis on the Traditional Family

Through much of the twentieth century, American courts emphasized the procreative role of the traditional marital family. The Supreme Court of Washington noted that in the United States, the marital family was linked to the biological function of conceiving and raising children, and that "[n]early all United States Supreme Court decisions declaring marriage to be a fundamental right expressly link marriage to fundamental rights of procreation, childbirth, abortion, and child rearing."[2] But the reality of contemporary society is that family life today takes many different forms, and as part of that development, ideas about the meaning of parentage are changing. The increasing use of collaborative reproduction (also called "assisted reproduction," "artificial reproduction," and "asexual reproduction") has made parentage issues even more complex.

Less than a generation ago, courts rarely confronted parentage issues outside of a biological framework. A noted decision of the New York Court of Appeals in 1991 rejected a visitation claim by a woman who had co-parented a child for over two years with her former female domestic partner.[3] The child had been conceived by intrauterine insemination using donor sperm, which was then the most common form of collaborative reproduction. The child was gestated by and born to the plaintiff's former partner after they had agreed on a co-parenting arrangement. They gave the child the names of both women and shared the duties of parenting after the child's birth. The adult relationship subsequently ended, and the birth mother denied her former companion any contact with the child. The highest court in New York denied the plaintiff's claim that she should be allowed to visit with the child she had once co-parented. In reaching this decision, the court stressed both the biological connection between the birth mother and the child and the absence of any biological (or adoptive) connection between the plaintiff

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2 Anderson v. Washington, 138 P.3d 963 (Wash. 2006).

3 Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991).

and the child. This judicial reliance on biological factors in considering parental rights was reinforced in 2000 in the United States Supreme Court decision in *Troxel v. Granville*,[4] in which the Court, as a matter of due process, gave primacy to the decisions of the biological parent in restricting grandparent visitation with her child.

## III. The New Reproductive Technologies

The changing realities of modern family life, and the increasing use of collaborative reproductive technology to procreate children by asexual means, has forced a reconsideration of the meaning of parenthood. Technologies such as in vitro fertilization, intrauterine insemination, embryo transfer, gestational surrogacy, and (in the future) human reproductive cloning raise legal questions about parental rights and responsibilities that are not necessarily answerable by resort to traditional formulations of tests for parenthood. Growing awareness of children living with adults who form same-sex partnerships, millions of children in step-families, single mothers having children, and the birth of numerous children out of traditional wedlock have produced new legal issues and demand new thinking about parenthood. The ability to conceive children literally in a petri dish, or even after the death of the "parent," raise new questions that were not addressed by older family law doctrines. The new technologies of assisted reproduction have raised legal, social and financial issues not previously considered.

## IV. The Need to Re-think the Meaning of Parenthood

The growing recognition of a need to re-think the question of who is a parent is acutely obvious when one considers the American Law Institute's *Principles of the Law of Family Dissolution*, which suggest previously unknown forms of legal parenthood such as parenthood by estoppel and *de facto*

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[4] 530 U.S. 57 (2000) (resolving dispute between surviving parent and paternal grandparents, court upheld parent's decision to reduce visitation between child and extended family, based on due process rights of biological parent).

parenthood.[5] While achieving parenthood through traditional marriage and sexual intercourse (or adoption) will continue to be favored by many people, the new and evolving family realities and their use of ever-evolving reproductive technologies will require creative thinking and analysis as new issues of parenthood are presented to the legal system. The availability of novel reproductive technologies has made asexual reproduction possible, although it has also created a new billion-dollar business which makes it expensive both for the parents and society.[6]

Changes in the social forms of family life, abetted by assisted reproduction, have created new legal concepts that are relevant to issues of parentage. The traditional nuclear male-female family unit was intimately tied to the theory of biological (genetic) parenthood. In addition to the impact that reproductive science has on the theory of genetic parenthood, the social reality of newer forms of family life such as same-sex relationships have called into question the use of a biological connection between parent and child as the exclusive basis for determining parenthood. This does not mean that biology is irrelevant. Instead it means that factors such as the intent of the parties who cooperate in using reproductive technology, de facto parenting, co-parenting agreements, and the function of the family are also important. In other words, parenthood should not be viewed exclusively through the lens of biology and genetics.

Science has created the potential for non-traditional families to have children.[7] The ability of non-traditional families (such as same-sex unions), single-parent families, or infertile couples to procreate has in turn created the need for legal categories that did not previously exist. The traditional categories of "mother" and "father" can no longer be universally applied, at least without reservation as to the meaning of those words. Today the law

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5 AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.03 (2002) [hereinafter ALI PRINCIPLES]. See critiques of the ALI Principles in RECONCEIVING THE FAMILY (Robin Fretwell Wilson ed., 2006). *See also* Gregory A. Loken, *The New "Extended Family"—DeFacto Parenthood and Standing Under Chapter* 2, 2001 BYU L. REV. 1045.

6 *See* DEBORA L. SPAR, THE BABY BUSINESS: HOW MONEY, SCIENCE, AND POLITICS DRIVE THE COMMERCE OF CONCEPTION (2006) (identifying costs of collaborative reproduction to individuals and society).

7 *See* AMY AGIGIAN, BABY STEPS: HOW LESBIAN ALTERNATIVE INSEMINATION IS CHANGING THE WORLD (2004).

must consider categories such as "genetic parent," "surrogate parent," "intended parent," "gamete-donor parent," and other concepts that have grown out of the new realities. Even these new legal categories of parentage are shifting and evolving as reproductive science and law continue to progress in different directions.[8]

Except for the application of the common law presumption that a child born to a married woman was that of her husband, determination of legal parenthood until recently necessarily involved a biological connection between parent and child. Indeed, modern parentage law is based on an ability to determine a biological connection through the use of genetic marker testing. Modern reproductive science has changed that. Reproductive technology has enabled a person or a couple who wish to achieve parenthood to do so by using the gametes of donors. This technology separates intended parenthood from genetic parenthood. In such a case, the genetic parent is a gamete donor who simply provides either sperm or eggs so that others can have a child.

## V. The Separation of Biological Parenthood from Intended Parenthood

The separation of *biological* parenthood from *intended* parenthood is a truly revolutionary event that throws much of the earlier law of parenthood into chaos. Although some cases decided early in the use of collaborative reproduction held that a genetic gamete donor can have the rights and obligations of a legal parenthood, these are either unusual factual situations or cases in which the gamete donor was a known person so that the issue of the parties' intent was in dispute.[9] But as the law

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[8] *See* Note, *Changing Realities of Parenthood: The Law's Response to the Evolving American Family and Emerging Reproductive Technologies*, 116 HARV. L. REV. 2052 (2003) (observing that traditional concepts of parenthood are affected by use of collaborative reproductive technologies).

[9] *E.g.*, K.M. v. E.G., 33 Cal. Rptr.3d 61 (Cal. 2005) (woman who provided her eggs to her female companion so she could become pregnant was a legal mother; dispute over intent of the parties in donation); *In re* Interest of R.C., 775 P.2d 27 (Colo. 1989) (known sperm donor's parentage recognized; dispute over intent); LaChapelle v. Mitten (*In re* L.M.K.O.), 607 N.W.2d 151 (Minn. 2000) (sperm donor who provided gametes to for use by same-sex female couple awarded joint legal custody and visitation); C.M. v. C.C., 377 A.2d

evolved, courts began to recognize that while a gamete donor was the genetic parent, he or she should not be treated as a legal parent. While the issue is still in doubt in many jurisdictions, the better view is expressed in the Uniform Parentage Act that a gamete donor is not a legal parent,[10] except in the case of a husband who provides his sperm so his wife can become pregnant by intrauterine insemination.[11]

If a man sells his sperm to a cryopreservation bank so that it can be used in an infertility treatment of a patient whose identity is not known to him, then the sperm provider should be considered a mere gamete donor rather than a legal parent. But a whole range of cases exists where the parental status of a gamete or embryo provider is less than clear. The gamete donor may be anonymous in the sense that his or her identity is not revealed to the recipient. The identity of the donor, however, is known to the reproductive services provider and presumably he could be discovered. In theory, for example, a child support agency may seek to discover the donor's identity if no other obligor is available to pay support. In another example, when a child conceived by the use of the donor's gametes may be carrying a genetic defect, some effort may be made to depose the donor (or even hold him liable for concealing the condition) in a tort case. Today, the internet is used to discover the biological parent by children conceived through assisted reproduction.[12]

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821 (N.J. Juv. & Dom. Rel. Ct. 1977) (woman used sperm provided by a known man to become pregnant; his claim of paternity recognized); Myers v. Moschella, 677 N.E.2d 1243 (Ohio Ct. App. 1996) (known sperm donor claimed paternity and mother could seek child support); Matter of Parentage of J.M.K. and D.R.K., 119 P.3d 840 (Wash. 2005) (man who was in a long-term non-marital sexual relationship with mother and allowed his sperm to be used so woman could become pregnant by in vitro fertilization was the legal father of the children so conceived).

10 A donor is not a parent of a child conceived by means of assisted reproduction under the Uniform Parentage Act. U.P.A. § 702 (2000); 9B U.L.A. 355 (2001).

11 U.P.A. § 102(8)(A) (2000); 9B U.L.A. 355 (2001).

12 There have been reports of genetic siblings discovering the identity through internet searches of anonymous sperm donors whose gametes were used to conceive them. For an example of a donor registry, see The Donor Sibling Registry, http://donorsiblingregistry.com (last visited June 29, 2007).

Further, children are increasingly using the internet to identify their biological parents, and it is likely that children of collaborative reproduction will do

Female gametes (eggs) are not nearly as readily available for use in assisted reproduction as is sperm. Unlike sperm, unfertilized eggs are not subject to long-term cryopreservation. Additionally, many potential parents seek direct contact with a young woman who is willing to donate eggs, or at least seek specific information about her intelligence, physical appearance, national or ethnic origins, or even her religion. The intended parents may know the identity of the egg donor or have enough information to identify her. In most cases the intended parents have no intent to have the egg donor be involved in the life of the child. In some cases, however, the intended legal mother will enter a co-parenting agreement with the egg donor, an arrangement that is sometimes used in female same-sex relationships; this results in the genetic mother having both a biological connection and a contractual parenting relationship to the child.

The man who provides the sperm and the woman who provides the egg become "parents" of an embryo upon fertilization of the egg by the sperm. Technically, the fertilized egg is not an embryo until later in the zygote's development, but courts and legal writers often use the term "embryo," and I will use it here. Unlike a gamete, an embryo has two genetic parents. Since both a male and female contributed gametes to produce the embryo, both may have parental interests. This fact can create potential issues regarding who has the right of control and disposition of the embryos, a problem that has begun to arise in cases involving embryo transfer[13] and divorce controversies.[14]

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the same. *See* Kim Nguyen, *Mothers Who Used Same Sperm Donor Meet,* Associated Press, at http://www.winktv.com/x466.xml?URL=http://localhost/APWIREFEED/d8jeck8gO.xml (last visited Aug. 17, 2006) (reporting that mothers of autistic children produced by sperm donation located each other and discovered information about the common sperm donor).

13 *See generally* Charles Kindregan & Maureen McBrien, *Unresolved Legal Issues in the Transfer of Surplus Cryopreserved Embryos,* 49 VILL. L. REV. 169 (2004) (reviewing various legal problems that have resulted from the cryopreservation of numerous surplus embryos).

14 *See* Issa Fazila, *To Dispose or Not to Dispose: Questioning the Fate of Preembryos After a Divorce in* J.B. v. M.B., 39 HOUS. L. REV. 1549 (2003); Shana Kaplan, *From A to Z: Analysis of Massachusetts Approach to the Enforceability of Cryopreserved Pre-embryo Dispositional Agreements,* 81 B.U. L. REV. 1093 (2001).

The increasing popularity of in vitro fertilization results in multiple "excess" embryos that are cryopreserved for potential future use. Many of these cryopreserved embryos are never used by the couple who created them. In some cases, the couple who produced them for their own use completed their family, or divorced, or simply decided not to continue the effort to have more children. In some cases, one or both of them decide that they would like to donate the embryos to another couple who could use them to achieve parenthood; if the donee couple are married, both husband and wife should consent to the wife being implanted with the embryo. But the parentage issues in such a transfer become complex, because it is legally impossible for the donee couple to legally "adopt" an embryo.[15] In such a situation, there would appear to be two sets of "parents," i.e., the donor couple and the donee couple, each without a clear line of legal authority as to their decision-making rights or obligations. For example, following an embryo donation, which couple (donors or donees) has the obligation of support, or to provide medical expenses or insurance coverage if the child is born with serious defects?

Given the large number of "excess" embryos in existence, and a perhaps substantial demand for their use by infertile couples who want to become parents, it seems inevitable that the potential for commercial marketing of embryos will increase if it is not restricted by law. The Abraham Center of Life in San Antonio, Texas,[16] already is in the business of offering embryos for sale. While society seems tolerant of the right of a man or woman to sell their gametes, it is less than clear if society will be so tolerant of a widespread commercial enterprise offering embryos for sale. Attempts to legally prevent potential parents from "buying" embryos, however, could run into constitutional arguments based on the right of people to make decisions to have a child. Such issues may currently not be resolved, but they are likely to become intensely debated in the coming years.

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15 Adoption, entirely statutory in every state except Louisiana, requires that to be adopted a child must have first been born. In Louisiana, the statute, LA. REV. STAT. ANN. § 9:130 (2004), recognizes the donation of a fertilized human ovum and "a notarial act of adoption."

16 The Abraham Center of Life, http://www.theabrahamcenteroflife.com/index4.html (last visited June 29, 2007).

## VI. Divorce and Disposition of Excess Embryos

A practical issue now being decided in divorce courts is the right to dispose of cryopreserved embryos when the husband and wife cannot agree on what should happen to the embryos when the marriage is dissolved. The first reported case in which this issue was raised was *Davis v. Davis*.[17] This Tennessee Supreme Court decision established a number of important benchmarks for future cases. One was that a cryopreserved embryo was not a child subject to the ordinary custody rules applied when parents are divorcing. Another was that embryos are not mere property, subject to being equitably divided upon divorce. A third was that a court could consider and possibly enforce a prior agreement between the husband and wife about the disposition of the embryos, even over the subsequent objection of a party.[18] Finally, in the absence of an agreement, the court should ordinarily side with the party who wants to avoid parenthood, although the court left the door open for a different result in a future case in which destroying the embryos would eliminate all potential for the party opting for parenthood to have a genetically-related child.

Decisions since *Davis* have considered all these issues, although sometimes reaching different conclusions. The New York court in *Kass v. Kass*[19] enforced the husband-wife agreement that the embryos should be donated to research. In contrast, the Massachusetts court in *A.Z. v. B.Z.*[20] rejected the use of prior contracts to resolve disputes about use of embryos, ruling that the advantage in such cases is with the party who wants to avoid parenthood after the divorce. The New Jersey court in *J.B. v. M.B. and C.C.*,[21] heard a wife's objection to a possible post-di-

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17 842 S.W.2d 588 (Tenn. 1992) (wife wanted to either use or donate the embryos but the husband wanted them destroyed).

18 This was dictum since there was no such agreement in the *Davis* case.

19 696 N.E.2d 174 (N.Y. 1998) (husband and wife disagreed over use of embryos, but court enforced their earlier agreement to donate surplus embryos to research).

20 725 N.E.2d 1051 (Mass. 2000) (contract was not appropriate basis for determining issues relative to whether to become a parent).

21 J.B. v. M.B. and C.C., 783 A.2d 707 (N.J. 2001) (wife wanted cryopreserved embryos destroyed while husband wanted them either used or donated to infertile couples; ruling for wife).

vorce implantation of the embryos which the husband wanted preserved, and ruled that when a party has changed his or her mind after an earlier agreement, the court should evaluate and weigh the position of both parties, but that ordinarily the choice of one party to not become a parent would prevail.

## VII. Limits on the Application of the Intended Parent Theory

In many cases of collaborative reproduction, the couple who are the intended parents have no genetic or birth parent connection to the child.[22] In other instances, a couple may hire a surrogate to carry the fetus to term, using the gametes of one or both of the intended parents.[23] There have been cases where a single man who desired to become a parent provided his sperm to fertilize the egg of a donor, which was then implanted into a gestational surrogate who agreed to carry a child for him.[24] Other examples of intended parenthood being separated from biological parenthood are found in same-sex unions when one party has a child in accord with a joint parenting agreement of the couple, resulting in one intended parent having no biological connection to the child,[25] or where one partner is the genetic mother and her partner is the birth mother but both are intended parents.[26] In a co-parenting agreement between people who intended to be the

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22 *E.g.*, Buzzanca v. Buzzanca, 72 Cal. Rptr. 2d 280 (Cal. Dist. Ct. App. 1998) (married couple used donated gametes and hired a gestational surrogate to carry the fetus).

23 Calvert v. Johnson, 851 P.2d 776 (Cal. 1993), *cert. denied*, 510 U.S. 938 (1993) (intended parents were also genetic parents but the birth mother was a gestational surrogate).

24 J.F. v. D.B., 848 N.E.2d 873 (Ohio App., 2006); J.F. v. D.B., Appeal of J.R., 897 A.2d 1261 (Pa. Super. Ct. 2006) (intended father in Ohio arranged to have his sperm used to fertilize an egg from a Texas donor and then implanted in a Pennsylvania gestational surrogate).

25 Elisa B. v. Super. Ct., 117 P.3d 660 (Cal. 2006) (woman who encouraged her female domestic partner to have a child held liable for child support).

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

parents of a child produced by assisted reproduction,[27] not all courts have applied the intended parent theory. However, this theory of parentage has the convenience of being a simple test of parental rights and responsibilities for a child of assisted conception, since it attributes rights and duties based on who made the decision to become a parent by asexual means.[28]

The intended parent theory will not work in cases where the parties who are competing to be declared the parents of a child of collaborative reproduction, all intended to become parents, and all have some biological connection to the child. The misimplanted embryos cases are the best example of this problem. Reproductive services that maintain cryopreserved embryos have sometimes mistakenly or even intentionally implanted an embryo produced for one woman into another female patient. Both women are undergoing treatment in the hope of becoming pregnant, but who is the legal parent in such a case? A California court, in *Robert B. v. Susan B.*,[29] was asked to resolve the question of parenthood as between a married couple and a single woman mistakenly implanted with an embryo produced by the couple for their own use using the husband's sperm and a donated egg. The husband, wife, and single woman were all intended parents, but the court ruled that the husband and single woman were the parents based on his genetic connection and her status as the birth mother.[30] A New York court, in *Perry-Rogers v. Fasano*,[31] struggled with a determination of parentage when a clinic mistakenly implanted an embryo produced by a married African-American couple into a married Caucasian woman, resulting in a custody dispute in which the genetic parents were awarded custody and the birth mother was allowed visitation. The reproductive medicine clinic at the University of California witnessed a terrible example of embryos being misappropriated by physicians who implanted embryos produced by some patients

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27 A.H. v. M.P., 857 N.E.2d 1061 (Mass. 2006) (woman had child by in vitro fertilization after agreeing with her same-sex partner to coparent a child, but this did not make the partner a parent of the child).

28 *See* CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER'S GUIDE TO THE EMERGING LAW AND SCIENCE § 4.5 (2006) (discussing the intended parent theory).

29 135 Cal. Rptr.2d 785 (Cal. App. Ct. 2003).

30 *Id.* at 790.

31 715 N.Y.S.2d 19 (N.Y. App. Div. 2000).

into other patients.[32] After this was discovered, a series of legal disputes began over the issue of the parenthood of the children who were conceived as a result of this criminal conduct.[33]

## VIII. Maternity in the Context of Surrogacy

Over the past two decades, there has been an increased use of surrogacy arrangements whereby one woman agrees to carry the fetus of another couple. Most of these situations involve gestational surrogacy in which the surrogate mother is the birth mother but has no genetic connection to the child. States have enacted statutes expressly dealing with various aspects of surrogacy, but they range from creating procedures for recognition of surrogacy, to distinguishing between compensated and non-compensated surrogacy, to outright bans or declarations of unenforceability.[34] Some states have no statute dealing with surrogacy but have court decisions addressing the parentage of children born to a surrogate.[35] A few states have attorney general rulings questioning the use of surrogacy arrangements as they affect the legal parenthood claims of the non-birth mother.[36] Surprisingly, a good number of states have no decisional or statutory law con-

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32 KINDREGAN & MCBRIEN, *supra* note 28, at 279-80 and sources cited therein.

33 *See* Cyrene Grothaus-Day, *Criminal Conception: Behind the White Coat,* 39 FAM. L. Q. 707 (2005); Rebecca S. Snyder, *Reproductive Technology and Stolen Ova: Who Is the Mother?,* 16 LAW & INEQ. J. 289 (1998).

34 These statutes are summarized in KINDREGAN & MCBRIEN, *supra* note 28, chapter 5.

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

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

trolling determination of the parentage of a child born to a surrogate.[37]

Historically, the legal determination of maternity presented no complex legal issues because the legal mother was the person who gave birth to the child. But the combination of in vitro fertilization and gestational surrogacy has created the potential for separation of genetic mothering from gestation and birth. The historic identification of maternity with birth worked well until the development of these collaborative reproductive technologies. It must be recognized that birth mothering cannot be simply dismissed as a significant factor in maternity. Certainly a woman makes a material contribution to a child's well-being in giving birth, even if another woman has provided the genetic contribution.[38] Having said this, I believe that when conflicting maternal claims arise from collaborative reproduction, the law should favor the intended parent(s) when the parties have voluntarily set the arrangement in progress.[39] While this policy should be established clearly in the law, in the absence of controlling decisions or statutes, issues of maternity will continue to be ambiguous and the birth mother may be accorded deference on the basis of traditional family law concepts of parentage.

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

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

39 KINDREGAN & MCBRIEN, *supra* note 28, at §§ 4.5, 5.4 (supporting use of intended parent theory to determine parentage).

## IX. Posthumous Reproduction

The ability of medical technology to cryopreserve embryos and gametes further creates the potential for posthumous reproduction. This does not refer to a child who was conceived before his father's death and is in utero at the time of the father's death, but to the potential to *conceive* a child after the death of a biological parent using his or her gametes, or to implanting a cryopreserved embryo after the death of a biological parent. Forty years ago, when the only form of collaborative reproduction was intrauterine insemination, the potential for posthumous reproduction was recognized in an article discussing the "fertile decedent" in relation to the rule against perpetuities.[40] Today, with the development of other reproductive technologies, the potential for posthumous reproduction is much greater.

A California decision[41] involved a man who deposited his sperm in a clinic before his death and provided documentation that his girlfriend was entitled to use the sperm; he executed a deed of gift and a will so stating. The man's children by a prior marriage objected to the girlfriend's having access to the sperm. The court refused to impose a public policy rule against the use of a dead person's gametes.[42] California later enacted a statute providing for recognition of posthumous parenthood within narrowly defined limits.[43]

Initially, the Social Security Administration resisted efforts to collect benefits for children conceived posthumously. The status of children of deceased parents is determined by state law, however, and this resulted in some decisions that opened the door to such children being ruled eligible for Social Security benefits. For example, the Massachusetts court applied a balancing

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

41 Hecht v. Kane, 20 Cal. Rptr. 275 (Cal. Ct. App. 1993).

42 *Id.* at 288-91.

43 Cal. Assembly Bill 1910, approved Sept. 24, 2004, amending various sections of the Cal. Family Code, the Cal. Health and Safety Code, the Cal. Insurance Code, and the Cal. Probate Code. The afterborn child must be in utero within two years of the parent's death, the parent must have consented to posthumous reproduction in writing before his death and have specified who was entitled to use his gametes. Children produced by cloning are not covered by the statute.

test of the various interests involved and ruled that twin children who were conceived by a widow using her late husband's cryopreserved sperm and born two years after his death were his legal heirs.[44] A Ninth Circuit decision applying Arizona law recognized the Social Security claims of twin children conceived by a widow using her late husband's sperm ten months after his death.[45]

In some instances, the law imputes parenthood even when there is no necessary biological basis for it. The best historical example of this is the common law presumption that a child born to a married woman is the child of her husband. When assisted reproduction became possible, many states enacted statutes that provided that the husband is the legal father of any child conceived by his wife using intrauterine insemination with his consent even if he was not the biological father. Although the statutes usually required that the husband consent in writing, oral consent has been held adequate to impose child support obligations on the husband.[46]

## X. The Non-Marital Family

An unmarried woman whose male companion consents to her use of assisted reproduction is treated differently than a married couple, but the Uniform Parentage Act would change that. Section 704 permits an unmarried man and woman to consent in writing and thereby jointly become the parents of a child by assisted reproduction even though one or both are not genetically the parents.[47] The UPA also permits a post-birth ratification by an unmarried man, allowing parenthood to be imputed to him when he cohabits with the mother and child for two years after birth and they hold out the child as their own.[48]

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

45 Gillett-Netting v. Barnhart, 371 F.3d 593 (9th Cir. 2004).

46 *E.g.*, Brown v. Brown, 125 S.W.3d 840 at 844 (Ark. Ct. App. 2003) (when the husband knew his wife was seeking to become pregnant by intrauterine insemination with donor sperm and did not object he was the legal father and obligated to pay child support); R.S. v. R.S., 670 P.2d 923 (Kan. App. 1983) (husband who orally consented to wife's insemination with donor sperm was estopped to deny paternity).

47 Uniform Parentage Act § 704(a); 9B U.L.A. 51 (Supp. 2006).

48 Uniform Parentage Act § 704(b); 9B U.L.A. 51 (Supp. 2006).

A form of legal parenthood can also be achieved by having a court prevent a person from denying that he or she is a parent. This is parenthood by estoppel, which may confer a limited parental right or obligation, most often child support.[49] For example, the California Supreme Court ruled that a former same-sex companion of the mother had a child support obligation. The mother had a child by assisted conception when the defendant encouraged the mother to conceive the child that way, and the two women had co-parented the child after its birth.[50] In some instances, a form of parenthood can be created by a court estopping a biological parent from denying the parenting rights of another person.[51] A California court used an estoppel theory to preclude a birth mother from denying the parenting status of her former same-sex partner who was named as a mother on the birth certificate with the birth mother's consent.[52] These results are by no means universal, but they suggest a willingness by courts to search for a definition of parenthood arising from the use of assisted reproductive technology to conceive children.

In some instances, a non-biological parent of a child of assisted reproduction might gain some recognition as a *de facto* parent. The American Law Institute has proposed that courts recognize *de facto* parenthood when an individual has lived with the child for not less than two years, and primarily for reasons other than financial compensation, and with the agreement of a legal parent to form a parent-child relationship, or as a result of a complete failure or inability of any legal parent to perform caretaking functions, has regularly performed a majority of the caretaking functions for the child, or has regularly performed a share

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49 ALI PRINCIPLES, *supra* note 5, at § 2.03(1)(b)(i).

50 Eliza B. v. Superior Ct., 33 Cal. Rptr.3d 46 (Cal. 2005) (non-parent former cohabitant ordered to pay child support). *But see* T.F. v. B.L., 813 N.E.2d 1244 (Mass. 2004) (court refused to require former female partner of the mother to pay child support even though they agreed to coparent any child conceived by collaborative reproduction; court rejected argument that the contract or principles of equity could be the basis of a support order against a woman who never actually parented the child).

51 Rubano v. DiCenzo, 729 A.2d 959 (R.I. 2000) (estopping a birth mother from denying the visitation claims of her former same-sex partner).

52 Kristine H. v. Lisa R., 117 P.3d 690 (Cal. 2005) (preventing legal and birth mother from denying parenthood of former same-sex partner when she initially supported recognition of that person's motherhood).

of caretaking functions at least as great as that of the parent with whom the child primarily lived.[53] This has potential application to a child of collaborative reproduction, as shown by a Massachusetts decision citing the ALI proposal on *de facto* parenthood in allowing a former same-sex partner of the biological mother to visit with her former companion's child.[54] The two women made a co-parenting agreement under which the mother would try to become pregnant by intrauterine insemination with donor sperm, and after the birth of the child both women co-parented the child for four years before the adult relationship ended and the mother restricted her former companion's access to the child.[55] The fact that a *de facto* parent has been accorded visitation rights does not of itself mean that she will be obligated to pay child support, although there is some case law imposing support on an estoppel theory.[56] But since the *de facto* parent doctrine is based on actual parenting, a promise to co-parent or a provision of financial support would not necessarily lead a court to order support in the absence of a history of actual parenting by the alleged *de facto* parent.[57] I predict, however, that in future years we will see more courts reconsidering the support issue, and I think this is appropriate.

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53 ALI PRINCIPLES, *supra* note 5, at § 2.03(1)(c).

54 E.N.O. v. L.M.M., 711 N.E.2d 886, 881 (Mass. 1998).

55 *See also* Youmans v. Ramos, 711 N.E.2d 165, 167 n.3 (Mass. 1998) (allowing visitation to an aunt over father's objection when aunt had cared for the child during the mother's final illness).

In *A.H. v. M.P.,* 857 N.E.2d 1061 (Mass. 2006), the court rejected a de facto parenthood claim by a woman seeking parental rights as to her former same-sex partner's child when the plaintiff did not exercise substantial care-taking during the 18 months she lived with the child, although she provided financial support.

Without citing the ALI Principles, the Supreme Court of Indiana ruled that a complaint for visitation by the mother's former same-sex partner based on a *loco parentis* theory should not be dismissed for failure to state a claim. Parentage of A.B., 873 N.E.2d 965 (Ind. 2005).

56 In *Chambers v. Chambers*, No. CN00-09493, 2002 WL1940145 * 11 (Del. Fam. Ct. 2002), the court ordered the mother's former same-sex companion who encouraged the mother to become pregnant by in vitro fertilization and then helped co-parent the child after its birth to pay child support. *See also* Eliza B. v. Superior Ct., 33 Cal. Rptr.3d 46.

57 T.F. v. B.L., 813 N.E.2d 1244 (Mass. 2004) (former same-sex partner who had urged her to have a child by assisted reproduction but never lived with or cared for the child). *See supra* note 50 for additional discussion of *T.F. v. B.L.*

## XI. Conclusion

The evolving science of collaborative reproductive technology has created new legal challenges for the law regarding parentage issues. The ability of same-sex couples and single parents to have children by asexual means has focused attention on the relationship between family and its procreative function. Often, the evolving forms of family life simply do not fit the mold of the traditional nuclear family on which much of our domestic relations law has been based. A genetic or adoptive connection between parent and child can no longer be the exclusive basis for imposing the rights or duties of parenthood when children can be brought into existence in a reproductive collaboration outside of sexual intercourse or adoption decrees. Because of new reproduction technologies, the evolution of legal thought about the family has witnessed greater reliance on concepts of intended parenthood and responsibility for the life choices which people make. This, it seems to me, is the essential reality today: however children come into existence, they have a legal right to a responsible parent to care for them. Stated differently, people should not be able to disown the procreative choices they have made once a child has been conceived.