

# **The Roller Coaster of Child Custody Law over the Last Half Century**

by  
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Welcome to the postmodern family, a landscape of various family configurations, not always united by marriage or related to the children by biology, where no clear rules prevail and the child is rarely given a voice when adults vie for her custody. This article will provide an overview of the history of child custody preferences and presumptions and lead into the post-modern family forms, which include grandparents as parents; same-sex couples and divorced parents.\*\*

## **I. Child Custody Rules Through History**

Child custody determinations have had a roller coaster history, reflecting the jagged evolution of the American family. The largest portion of that history, roughly two hundred years, found its authority regarding parents and children in divine law. This era corresponded with the period of colonial settlement and the birth of the New Republic.

Not surprisingly, the divine order of the family closely reflected the political economy of the family and political balance between men and women during this period. Fathers were the masters of the households and held complete rights over everyone in the household. The children in the household might include young indentured servants, and in some regions, slave children in addition to the master's natural children and children of orphaned relatives. Family survival depended upon the labor

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of all the members of the family, including the children, and the father was the boss of the household labor team. .<sup>1</sup>

The second major historical era, which introduced the doctrines of the best interest of the child and maternal preference, held sway roughly from the last half of the nineteenth century through the first half of the twentieth century. After the founding of the New Republic the concept of a divine plan was steadily replaced by the Enlightenment concept of natural law. Here also there were clear rules that human beings need only apply to a specific fact situation. But God was no longer actively involved in presenting the rules and could not be called upon as authority.<sup>2</sup> As New York's highest court noted in an 1840 decision when they awarded a sickly daughter to the mother, "the law of nature has given to her an attachment for her infant offspring which no other relative will be likely to possess in an equal degree."<sup>3</sup>

This drastic swing in the status of mothers and children was precipitated by a shift in the household economic structure during the nineteenth century. America gradually changed from a self-sufficient farm economy into a new industrial nation. The "modern" family evolved as fathers moved out of the house to work in factories and offices and mothers took their place as heads of the domestic scene. Some children who one hundred years earlier would have been put to work as soon as possible, now, for the first time, experienced a childhood as we have come to know it, focused on school and play. Even children who lost their parents were now placed in what was considered a great leap forward, the orphanage, where they were schooled and treated as children, rather than being placed in a poorhouse with adult vagrants, or recycled back into the labor force as apprentices. Some children were sent to work in factories and many children still worked on the farm, but for growing numbers of children, childhood became a way of life.

Children and childhood were not actually invented in this era, but they were thought of quite differently than before. Children were now seen as tender creatures that required nurturing,

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<sup>1</sup> MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 4-5 (1994).

<sup>2</sup> *Id.* at 162-63.

<sup>3</sup> *Mercein v. People ex rel. Barry*, 25 Wend. 64,106 (N.Y. 1840) (internal quotation omitted).

rather than creatures whose innate evil tendencies must be curbed with a strong hand or a stick. And it was mother, at home alone now with the children, who was seen as the nurturing parent, the parent who most determined the child's development. It is apparent that the "tender years doctrine," a doctrine that favored mothers as custodians of small children, was the foundation for the current best interest standard.<sup>4</sup>

In consideration of the new emphasis on children and childhood, the term "the best interests of the child" has been used continuously from the mid-nineteenth century to the present to justify where and with whom the child shall reside when a family breaks down. Its interpretation, however, has reflected frequently shifting public values. During the last third of the twentieth century alone, this term has taken several distinct turns in how Americans perceive the child's interest in the event of the breakdown of the family.

In the 1950's and early 1960's, it was still common wisdom that children were almost always best off in an intact family. Parents, it was believed, must sacrifice their own happiness and avoid divorce in "the best interests of the children." Then in the 1970's it became accepted dogma that children were happy only if their parents were happy and that divorce was preferable to an unhappy marriage. Divorce became far easier, but at first the maternal preference was still largely intact. Beginning in the 1980's joint physical custody was preferred as a way of giving children access to both parents while allowing the parents freedom of divorce. More social scientists were called upon to validate the shift. Joint custody became the new standard of what was considered "in the best interests" of the child.<sup>5</sup> Custody guidelines and public attitudes turned rapidly in this direction. A current survey indicates that almost half of the states employ a presumption or preference for joint custody.<sup>6</sup>

By the advent of the twenty-first century, other family configurations were challenging the rule of the "best interests" of the

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<sup>4</sup> Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J.L. & FAM. STUD. 337, 367 (2008).

<sup>5</sup> Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent*, 153 U. PA. L. REV. 921, 984 (2005).

<sup>6</sup> *Id.* at 946.

child. As the percent of children born out of wedlock continued to increase, rights and obligations of the unwed father drew great attention. Gay and lesbian couples, now politically active, vied for recognition of their family status, promoting new psychological investigations into what “healthy families” looked like, and what rights a non-biological parent could claim. Non-biological parents also fought for recognition as stepfamilies; relatives and other caretakers staked their claims as well.

## **II. The Egalitarian Marriage**

### *A. Political Dynamics Affecting Family Formation*

The first great modern shift in considering what is in the best interests of children began during the 1970's, precipitated by a change in the political and economic balance of the household as women began to work outside the home. Whether they were spurred by necessity, by choice, or by the third wave of feminist ideology, the balance shifted. Women demanded and received a larger share of gender equality in the workplace and to some extent in the home. But in the gender struggles that ensued, they also lost their special status in custody decisions, the maternal preference, which had prevailed since the mid-nineteenth century. California, which led the nation in these domestic relations matters, passed no fault divorce in 1970, forbade gender consideration in custody in 1975, and legislated a preference for joint custody in 1980. All of these shifts were advertised as in “the best interests” of the child, although the actual child was rarely represented or heard in custody disputes.

By the last third of the twentieth century, unlike previous eras, where child custody issues usually involved orphans or children of parents who could not care for them, the great majority of child custody matters were the product of an exploding divorce rate.<sup>7</sup> The event of easy and acceptable divorce rearranged the tentative symmetry between mother, father, and the state with regard to the custody of children, which had prevailed since the nineteenth century. State legislatures and courts weakened

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<sup>7</sup> Demographers predicted that at least half of American marriages entered into in the 1980's would end in divorce. LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* xiv (1985).

mothers' legal claims to the custody of their children following divorce actions, systematically wiping out the maternal preference of the tender years doctrine, and leaving only the vague "best interests of the child" standard. Some lawmakers replaced the maternal preference with new gender-neutral preferences, such as joint custody and primary caretaker, hoping to provide consistency in decision-making where there was no longer an easy choice.

Some of the legal rhetoric for treating mothers and fathers equally derived from the second wave of the feminist movement for equal rights. NOW's (The National Organization for Women's) founding statement in 1966 decried the "half equality in the marriage relationship" and called for a re-examination of laws governing marriage: "We reject . . . [that] home and family are primarily woman's world and responsibility—hers, to dominate—his to support. We believe that a true partnership between the sexes demands a different concept of marriage, an equitable sharing of the responsibilities of home and children[.]"<sup>8</sup>

It was not only feminist rhetoric promoting equal treatment that persuaded legislators and judges to abandon the maternal presumption; equal treatment arguments were combined with the reality that great numbers of women had abandoned full-time housekeeping for the workplace. Moreover, most of these new workers were mothers. In the 1970's only 27% of women with children under age three were in the workforce; by 1985 this figure was more than 50% and by 2004 64% of mothers with children under six and 56% of mothers of infants (under one year old) were employed.<sup>9</sup>

### B. *Social Science Studies Regarding Parenting*

The shift in the law away from a maternal preference toward joint custody was impelled by political forces, but was often justified in the courtrooms by an increased reliance on social science. Social science evidence was employed in custody decisions to support several sometimes contradictory positions. Fathers argued that social scientists determined that fathers and mothers

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<sup>8</sup> National Organization for Women, *Statement of Purpose (1966)*, in UP FROM THE PEDESTAL 368 (Aileen S. Kraditor, ed. 1970).

<sup>9</sup> National Women's Law Center, <http://www.nwlc.org/pdf/WorkingMothersMarch2008.pdf> (This is not a working link).

are equally suited as parents. Mothers argued that early maternal nurture mattered. As an example of this new thinking, a New York court rejected the notion that mothers and children share a special bond by invoking the authority of anthropologist Margaret Meade, who charged “[T]his is a mere and subtle form of anti-feminism which men—under the guise of exalting the importance of maternity—are tying women more tightly to their children than has been thought necessary since the invention of bottle feeding and baby carriages.”<sup>10</sup>

Dependence upon the social sciences accelerated late in the twentieth century. The gradual abolition of fault-based divorce and, more gradually, the maternal presumption in almost all states promoted this dependence. The use of social sciences expanded in three ways. First, social science scholarship, usually in the form of psychological theories to support the primacy of mother, father, or both parents, influenced both legislators in drafting laws and judges in deciding custody disputes following divorce. Second, expert witnesses, most often mental health professionals trained in the social and behavioral sciences, were called upon to testify as to the capabilities of a particular parent. Third, the courts moved toward the use of the therapeutic model of mediation in place of the adversarial mode of litigation in all matters of family law.

Parties used social science studies to provide authority for widely differing results. The concept “psychological parent,” for instance, which grew out of attachment theory, was used in various courts first in the 1970’s to justify the maternal preference, then in the 1980’s and 90’s to justify paternal custody, primary caretaking, and sometimes joint custody.<sup>11</sup>

The psychological parent theory is most closely associated with the 1973 book, *Beyond the Best Interests of the Child*, by Joseph Goldstein, Anna Freud and Albert Solnit.<sup>12</sup> They deem

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<sup>10</sup> *State ex rel. Watts v. Watts*, 350 N.Y.S. 2d. 285, 289 (1973) (quoting Margaret Mead, *Some Theoretical Considerations of the Problems of Mother-Child Separation*, 24 AM. J. ORTHOPSYCHIATRY 471, 475 (1954).

<sup>11</sup> Kathryn L. Mercer, *A Content Analysis of Judicial Decision-Making-How Judges Use Primary Caretaker Standard to Make a Custody Determination*, 5 Wm. & Mary J. Women & L. 1, 10 (1998). This study looks at the primary caretaker standard as used in appellate court decisions.

<sup>12</sup> JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* (1973).

the “psychological parent” as the one individual, not necessarily the biological parent, with whom the child was most closely associated. In their opinion this person should have total, and if necessary exclusive custodial rights, including refusing visitation to noncustodial parents.

In the early years the theory was mostly used to justify awarding mothers sole custody,<sup>13</sup> but as a gender-neutral standard for custody was promoted by both feminists and fathers’ rights groups, this began to shift. Father-child interactions, an area previously ignored by social scientists, took off and fathers increasingly became designated as the “psychological parent.” Most father researchers studied father-infant relationships in a laboratory setting where fathers were assigned tasks usually performed by mothers. The findings from the many studies were ambiguous, and produced heated debate among legal scholars regarding their appropriate application to custody standards.<sup>14</sup> Nonetheless, the message heard by lawmakers was that fathers were, on balance, interchangeable with mothers.

While father studies first promoted a gender-neutral preference that supported the model of a single custodial parent, who could be the father rather than the mother, these same studies quickly became the ammunition for advocates of shared, or joint parenting. The argument posed that if parents were equally good at parenting, a child could have two “psychological parents.” Depriving the child of one of them was not in the child’s best interest.

Some courts enthusiastically imposed joint custody arrangements, even over the disagreement of the parents. The practical consequences for the children were rarely considered.<sup>15</sup>

The subsequent research on shared or joint parenting, like the father studies, ultimately yielded ambiguous findings.<sup>16</sup> Yet inconclusive findings did not dampen the ardor of those con-

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<sup>13</sup> *Supra*, note 11, at 73. .

<sup>14</sup> For a thorough discussion of father parenting studies, see Ross A. Thompson, *Fathers and the Child’s “Best Interests”: Judicial Decision Making in Custody Disputes*, in MICHAEL F. LAMB, *THE FATHER’S ROLE: APPLIED PERSPECTIVES* ch. 3 (1986).

<sup>15</sup> See *Taylor v. Taylor*, 508 A.2d. 964, 975 (Md. 1986).

<sup>16</sup> Frank F. Furstenberg, Jr., Address to the American Association of the Advancement of Science (AAAS) 18 (May 1986).

vinced that shared parenting was the best custodial arrangement. By the late 1980's courts could choose from a number of studies that supported shared parenting.

Determinations of what are the best interests of the child took yet another turn as decision making moved out of the court and into the mediator's office. The trend toward mediation was rooted in the elimination of no-fault divorce. Judges were overwhelmed by the swelling number of divorces, which in turn produced an unprecedented volume of custody disputes; they pushed the parents toward mediation. Mediators, usually (but not always) mental health professionals, sought to achieve agreement between parents. This agreement was based, theoretically, on the parents' own concept of fairness, not that invoked by state law. Children were not welcome in mediation, which was considered to be a process of negotiation between the parents, not a democratic family council. Exact figures are not available, but a high percentage of mediated custody disputes resulted in joint custody; in one California county 54% of couples chose this option.<sup>17</sup>

Critics of the joint custody process claimed that it didn't work. Very few parents could sustain an arrangement in which the child actually resided with each parents about one-half of the time. Inevitably the child soon drifted into spending most time with one parent, usually the mother. Child support, however, was usually configured differently for joint custody. A mother could find herself with effective sole custody but less support than a sole custodian might receive.<sup>18</sup>

Social science, of course, can provide important insights into human behavior and especially into child development, but it can also be used to justify the political climate of the time. Nevertheless, by the end of the twentieth century two observations could be made with some certainty: the proper role of the social sciences was still a subject of controversy, but the continuing role of the social sciences was an established fact.

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<sup>17</sup> Hugh McIsaac, *Court-Connected Mediation*, 21 FAM. CT. REV. 49, 53 (1983).

<sup>18</sup> See, e.g., Ramsey Laing Klaff, *The Tender Years Doctrine: A Defense*, 70 CAL. L. REV. 335 (1982).



### **III. The Post-Modern Family: Non-biological Parents, Stepparents, Gay Parents and Other Cohabitators**

By the advent of the twenty-first century, the traditional family configuration of a married mother and father had broken down radically. With 40% of children born out of wedlock by 2007,<sup>19</sup> marriage no longer defined parental relationships, and increasingly neither did biology, as large numbers of non-biological parents, such as stepparents and gay partners, vied for recognition. Other relatives, such as grandparents, also demanded parental rights.

#### *A. Unwed Fathers*

In 2000 nearly one-third of all babies were born out of wedlock (this figure advanced to 40% by 2007). This fact more than any other in recent history changed the nature of the family and provoked a serious national debate. The vigorous crusade for fathers' rights following divorce in the 1980's had been taken up by few unwed fathers, but the rights of unwed fathers to their children was pursued far more forcefully by the federal government in its relentless campaign to wrest child support from unwed fathers, most of whom did not pay child support. It found that almost 70% of women on welfare were unmarried when they had their first child. In a conscious effort to tie the obligation of support to the right to custody of the child, courts and legislatures increasingly promoted the rights of unwed fathers. This very political shift to emphasize rights of unwed fathers was grounded not in psychological theory regarding the best interests of the child, but in the political need to impose financial responsibility.<sup>20</sup>

The results of this initiative were mixed. While more child support was collected, some bizarre results occurred. The concept of "best interests of the child" was thrown out in cases of a biological parent versus a non-biological contender, even when

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<sup>19</sup> Associated Press, *Unwed Birth Rate Reaches All-Time High in U.S.*, MSNBC (Mar. 18, 2009, 12:02:37 PM), [http://www.msnbc.msn.com/id/29754561/ns/health-womens\\_health/t/unwed-birth-rate-reaches-all-time-high-us/](http://www.msnbc.msn.com/id/29754561/ns/health-womens_health/t/unwed-birth-rate-reaches-all-time-high-us/).

<sup>20</sup> Rebeca Aizpuru, *Protecting the Unwed Father's Opportunity To Parent: A Survey of Paternity Registry Statutes*, 18 REV. LITIG. 703, 707 (1999)

the biological parent was an unwed father who has never laid eyes on the child. This most often occurred in cases where the child is put up for adoption by the mother. In one such California case, *Michael U. v. Jamie B.*, the parents were underage.<sup>21</sup> Except for one judge, there was no consideration of the “best interests of the child” standard.<sup>22</sup>

The public’s drive for child support has caused even wrongly attributed non-biological fathers to be held responsible. With the greater accuracy and ease of determining paternity with DNA tests in the twenty-first century, a large number of men who believed they were fathers and acted as fathers found that they were not in fact the fathers. Nevertheless the courts have mostly required them to continue with their child support payments voicing any concern for “the best interest of the child.”<sup>23</sup>

### B. Stepparents

In the wake of the divorce revolution, re-marriage occurred almost as frequently as divorce. About 70% of mothers were re-married within six years. Sometimes there was more than one re-marriage. In addition the 40% of unwed mothers often eventually married someone who was not the father of their child. Children were shifted around with the new marriages and re-marriages and a large new class of parents developed—stepparents. It was estimated about one-third of the children born in the early 1980’s would live with a stepparent before they reached adulthood.<sup>24</sup>

There were other large classes of long-term cohabiting adults who acted as parents, but were not married to the biological parent. The reasons these couples did not marry were numerous, including couples who were legally forbidden to marry because they were of the same sex. No matter what their reason for not marrying, they were all treated like stepparents, as legal

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<sup>21</sup> 705 P.2d 362 (Cal. 1985).

<sup>22</sup> *Id.* at 368-69.

<sup>23</sup> Ruth Padawer, *Losing Fatherhood*, N.Y. TIMES MAG., Nov. 22 2009, at 38-44, 58-62.

<sup>24</sup> Frank F. Furstenberg, Jr., *The New Extended Family: The Experience of Parents and Children After Remarriage*, in REMARRIAGE AND STEPPARENTING: CURRENT RESEARCH AND THEORY 185-86 (Kay Pasley & Marilyn Ihinger-Tallman, eds. 1987).

strangers. American law was not prepared to deal with non-biological parents, much less three parents.

Not all stepparents wanted legal rights to custody or visitation in the event that the stepfamily disbanded due to divorce or death, but those who wanted these rights did not fare well. The rights of the biological parent were at the forefront.<sup>25</sup>

### C. *Gay and Lesbian Parents*

Gay parents who were not biological parents faced even more barriers than stepparents. First, they cannot marry in all but a few states and homosexual parents were still considered “unfit” by many people and by the laws of a few states. “Moral fitness,” particularly concerning mothers, had been a cornerstone of custody law since the maternal preference was adopted in the nineteenth century. It was assumed that it was harmful to children to be raised by mothers who deviated from the sexual mores of the time. For most of history “fitness” focused on heterosexual adultery, but the focus in the late twentieth century shifted to homosexuality.

In some states, following a divorce, even a biological mother could lose custody to a biological father or relative if she engaged in homosexual activity.<sup>26</sup> A few states banned adoption by homosexual couples entirely, and many more did not allow “second parent” adoptions where the non-biological parent in a gay family adopts the child.<sup>27</sup>

Homosexual, non-biological parents were actively discouraged in many ways. Even in California, a notably progressive state in family law matters, in 1991 a court denied custody rights to a second mother. She was even denied visitation rights to the two children she had parented since birth with her name on their birth certificates as father, when her cohabiting relationship of more than a decade with the biological mother ended. The court claimed it did not want to expand the definition of parent to include “child care providers of long standing, relatives, successive sets of stepparents or other close friends of the family.”<sup>28</sup>

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<sup>25</sup> Howell v. Gossett, 214 S.E.2d 882, 883 (Ga. 1975).

<sup>26</sup> Bottoms v. Bottoms, 457 S.E. 2d 102, 107 (Va. 1995).

<sup>27</sup> Liberty Counsel, *Same-Sex Adoption Laws by State*, [http://www.lc.org/profamily/samesex\\_adoption\\_by\\_state.pdf](http://www.lc.org/profamily/samesex_adoption_by_state.pdf).

<sup>28</sup> Nancy S. v. Michele G., 279 Cal. Rptr. 212, 219 (1991).

#### D. Grandparents

With an increase in the number of nonnuclear families, there was a growing recognition of the fact that a large proportion of children were being raised by parent figures or relatives who were not their biological parents. Courts in different states crafted rules or exceptions to include those who acted as a parent, but had no legal claim, creating an inconsistent and arbitrary set of rules regarding the best interests of the child.

Grandparents were a large class of those people asking for recognition in the postmodern family as they increasingly stepped in to fill parental roles. Prior to 1965, their legal role was not well recognized, and grandparents, who had no legal right to seek visiting privileges, were blocked from seeing their grandchildren, usually by the parents. As divorce rates, out-of-wedlock births and drug use increased, states began passing laws bolstering grandparent rights when parents died, divorced, separated or were jobless or disabled. In 1965, state legislatures began “sympathizing with the plight of grandparents” and enacted grandparent visitation statutes.<sup>29</sup> Grandparents had more appeal than stepparents of gay parents and all states developed guidelines or laws which allowed them visitation or sometimes custody.

The pendulum swung back, however, in 2000 when the U.S. Supreme Court, which did not normally enter the troubled waters of family law, sided with Washington state’s high court in a grandparent visitation suit, *Troxel v. Granville*,<sup>30</sup> and struck down a state law that allowed anyone—even a nonrelative—to seek the right to visit if it served the best interest of the child. More than a third of the states with non-parent visitation rights pulled back.

#### E. De Facto Parents

In 2000, the turn of the millennium, the prestigious American Law Institute (ALI) turned its attention to the uncertainty and complexity of early twenty-first century family law. The ALI attempted to craft a uniform rule that could apply to all non-parents in child custody or visitation disputes. The rule it chose,

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<sup>29</sup> Anne Marie Jackson, *The Coming Age of Grandparent Visitation Rights*, 43 Am. U. L. Rev. 563, 575 (1994).

<sup>30</sup> 530 U.S. 57 (2000).

“de facto” parent, is defined as a person who shares (at least) equally in primary childcare responsibilities while residing with a child for reasons other than money for at least two years.<sup>31</sup> The concept owes much to the social scientists’ contribution of “psychological parent” first introduced in the 1960’s.<sup>32</sup>

The high bar of parent involvement time would leave many contenders, such as most grandparents who were not residing with the child, out of the race. It would also leave out nannies and other employees who were paid. But it would probably well serve the stepfather Grant Gosset, who had parented the child as a father, and Michelle G., the lesbian partner, who has also fully shared in parental responsibility.

#### F. *Reproductively Assisted Families*

The beginning of yet another wave of family change which will seriously challenge our ability to define the “best interests of the child” in the future has begun to appear in disputes involving “reproductively assisted” families. Reproductive techniques now permit adults to circumvent each stage of the normal procedure of insemination, conception, pregnancy, and childbirth. These technological interventions, often involving a test tube at some juncture, raise basic questions regarding the essence of motherhood and fatherhood. They also raise new issues regarding the custody rights over the products of each discrete stage in the cycle of reproduction from ova to baby. The cast of competing characters goes beyond traditional custody battles. The competitors in a surrogate parent suit may include, but are not limited to: the biological (sperm-supplying) father; the biological father’s wife; the biological mother’s husband; the biological (ovum supplying) mother; and the surrogate mother who carries either another woman’s ovum (the sperm donor’s wife’s or another ovum donor) or her own ovum-fetus-child to term under an agreement (possibly for hire) calling for the relinquishment of the child

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<sup>31</sup> Mary Ann Mason & Nicole Zayac, *Rethinking Stepparent Rights: Has the ALI Found a Better Definition?*, 36 FAM. L.Q. 227, 233 (2002).

<sup>32</sup> Note, *Alternatives to “Parental Right” in Child Custody Disputes Involving Third Parties*, 73 YALE L. J. 151, 160-64 (1963).

upon birth to one or both biological parent(s) or adoptive parents(s).<sup>33</sup>

The cases thus far are few in number and conflicting in their decisions. One of the earliest, a frozen embryo dispute, has provoked even more political and religious issues than surrogacy cases. In March, 1989, a Tennessee resident, Junior Lewis Davis, sued his wife in a divorce action to restrain her from having any of their seven fertilized eggs implanted.<sup>34</sup> When the couple divorced five frozen pre-embryos were still awaiting implantation.<sup>35</sup>

The ensuing court actions reveal a painful confusion about the respective legal rights of mother, father, and the frozen embryos. Mary Sue Davis originally asked for control of the “frozen embryos” with the intent of having them transferred to her own uterus in a post-divorce effort to become pregnant. The trial court awarded them to her, but the appellate court disagreed, claiming that Junior Davis has a “constitutionally protected right not to beget a child where no pregnancy has taken place[.]”<sup>36</sup> The appellate court granted them “joint control” effectively granting each former spouse veto power.

While the case dragged through the legal system, working its way up to the Tennessee Supreme Court, the facts changed. Each of the parties remarried, and Mary Sue decided she did not want to use the embryos for herself; rather, she would donate them to another needy couple.

The court chose its words carefully. It decided that pre-embryos as frozen matter have no rights, and the test is not a “best interest of the child” test, but rather a contest between the rights of adults. It chose Junior Davis, deciding that “he would face a lifetime of either wondering about his parental status or knowing about his parental status but having no control over it.”<sup>37</sup>

This carefully restricted wording was not convincing to all states, nor to all ethicists. While avoiding the word “property,” the Tennessee Supreme Court did not give the pre-embryos any

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<sup>33</sup> MARY ANN MASON, *THE CUSTODY WARS: WHY CHILDREN ARE LOSING THE LEGAL BATTLE AND WHAT WE CAN DO ABOUT IT* 204 (1999).

<sup>34</sup> *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992).

<sup>35</sup> *Id.* at 592.

<sup>36</sup> *Id.* at 589.

<sup>37</sup> *Id.* at 604.

legal status. Louisiana, however, the only state to pass a law, declared that disputes between parties should be resolved in the “best interests of the embryo,” and that interest should be “adoptive implementation.”<sup>38</sup>

In the early part of the twenty-first century, it is no longer simply a question of who is considered a parent; the more fundamental issue of who or what is considered a child or a pre-human must be addressed. In this arena, custody judgments are backing into the turbulent waters of the abortion wars. The language of law and the findings of scientists may give way to ethicists and philosophers, and of course, politics.

#### **IV. The Future of the Best Interests Standard**

In the dizzying shifts and changes of law regarding who had rights to the child over the past fifty years, all supposedly based on the “best interest of the child,” one voice was almost never heard or acknowledged, that of the child. During this same time period the law determined that a child who steals a candy bar is entitled to a lawyer. Yet a child subject to a brutal tug of war between adults remained powerless. The wishes and feelings of the child, even teenagers, were rarely sought or even considered.

Increasingly the United States has grown out of step with the rest of the world in not focusing on the child’s interests and developmental needs. We are the only nation that has signed but not ratified the 1989 United Nations Convention on the Rights of the Child, which states that children have the right to a nurturing environment in accordance with their developmental needs,<sup>39</sup> the right to legal representation,<sup>40</sup> and the right to economic and emotional support from their parents and the state.<sup>41</sup> Several other countries, including England and Scotland, have issued explicit legislation regarding the rights of children, which guarantee

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<sup>38</sup> LA. REV. STAT. ANN. § 9:123 (2008) (stating that “An in vitro fertilized human ovum exists as a juridical person until such time as the in vitro fertilized ovum is implanted in the womb; or at any other time when rights attach to an unborn child in accordance with law.”).

<sup>39</sup> United Nations, Convention on the Rights of the Child, art. 6(2), Nov. 20, 1989, 1577 U.N.T.S. 3.

<sup>40</sup> *Id.* at art. 12(1)-(2).

<sup>41</sup> *Id.* at art. 3(2).

that children have representation in all administrative and legal proceedings that pertain to them.

In some states a small movement has begun in the new millennium which considers the wishes and feelings of children themselves, not just the parents, in configuring what was in their best interests. Colorado and several other states have re-thought their custody laws and moved away from parental rights to parental responsibilities; children are provided with special advocates in all child custody disputes to present all available evidence.<sup>42</sup> Many courts across the country are combining juvenile and family courts so that all issues affecting children can be heard in a court prepared for children's issues, where children are listened to and can receive support from social services.<sup>43</sup> Still, without adopting the principles of the U.N. Convention on the Rights of the Child, there will be no national consensus on the "best interests of the child."

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<sup>42</sup> *In re Marriage of Barnhouse*, 765 P.2d 610, 613 (Colo. App. 1988).

<sup>43</sup> Mary E. Boudreau & Judge Regnal W. Garff, *The Family Court Issue: A Vital Question Quietly Visits Utah's Judicial Council*, 12 UTBJ 18, 19 (1999).