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A Child's Perspective of Defining a Parent: The Case for Intended Parenthood

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[A] [family] relationship is built on a commitment by the adults to live as a family, accompanied by the actuality of family life . . . . The relationship that develops between children and those who function as their parents . . . ordinarily creates a life-long bond between them.

That bond is not the result of the sexual orientation of the adults or of their marital status. It does not arise solely from biology or legal adoption.[1]

I. INTRODUCTION

A child's sense of belonging begins soon after birth as the child learns to rely on caregivers for food, shelter, and love. The child does not care how those persons are labeled, only that there is stability and continuity in everyday life. The child does not know whether he or she was the product of sexual intercourse or assisted reproductive technologies (ART), whether he or she was born into a marriage or born to unmarried persons. The law, however, cares a great deal about these issues because a parent has a fundamental right to make decisions regarding the care, custody and control of his or her child;[2] others do not. A parent not living with the other parent has a right to seek parenting time according to the best interests of the child;[3] others may not have contact with the child without the parent's permission or a court order. A parent may have an obligation to pay child support;

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1. V.C. v. M.J.B., 748 A.2d 539, 557 (N.J. 2000) (Long, J., concurring), *cert. denied* 531 U.S. 926 (2000).

2. Troxel v. Granville, 530 U.S. 57, 66 (2000) ("[T]he Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.").

3. Linda D. Elrod & Milfred D. Dale, *Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance,* 42 FAM. L. Q. 381, 384 (2008).

others do not. A parent's rights are not absolute, however, and are subject to the State's exercise of its *parens patriae* power to protect children from harm.[4]

Traditionally, defining a parent was relatively easy because there were only three avenues to parenthood: giving birth (*mater sempe certe est*),[5] being married to the mother of the child (*pater est quem nuptiae demonstrant*),[6] or adopting a child.[7] At common law, a child born out of wedlock suffered numerous disabilities.[8] As the number of out of wedlock births rose, currently close to 41%,[9] through a series of opinions, the United States Supreme Court basically eliminated the legal discriminations attached to the status of illegitimacy.[10] The Supreme Court noted:

> imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.[11]

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4. Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944) (recognizing that the state could properly intrude on that "private realm of family life" to protect child from harm); Parham v. J.R, 442 U.S. 584, 603 (1979) (noting that "a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized."). *See also* Kulstad v. Maniaci, 220 P.3d 595, 604 (Mont. 2009) (stating that the "parent's constitutionally protected interest in parental control . . . should yield to the best interests of the child 'when the parent's conduct is contrary to the child-parent relationship.'"

5. Nguyen v. I.N.S., 533 U.S. 53, 62 (2001) (stating that the [parentage of a mother] "is verifiable from the birth itself.").

6. WILLIAM BLACKSTONE, 1 COMMENTARIES 455 (1765) ("The main end and design of marriage [is] to ascertain and fix upon some certain person, to whom the care, the protection, the maintenance, and the education of the children should belong."). The common law presumption of legitimacy did not apply if the father was sterile, impotent, or beyond the four seas. *Id.* at 457.

7. U.S. BUREAU OF THE CENSUS, HOUSEHOLDS BY TYPE: 2000, Table 1, fn 2 (noting that for computational purposes "family members include only people related to the family householder by birth, marriage or adoption.").

8. *See generally* HARRY D. KRAUSE, ILLEGITIMACY: LAW AND SOCIAL POLICY (1971).

9. *See* Joyce A. Martin, et al., *Births: Final Data for 2008*, 59 (1) NAT. VITAL STAT. REP. 1 (Dec. 2010). Between 1970 and 2004, the proportion of nonmarital births increased from 10.7 to 35.8 percent. HARRY D. KRAUSE, ET AL., FAMILY LAW 308 (6th ed. 2007) (citing national health statistics for 2004).

10. *See* Levy v. Louisiana, 391 U.S. 68 (1968) (noting past treatment of children born out of wedlock and finding these children to be "persons" within the meaning of the Equal Protection Clause); Glona v. Am. Guar. & Liab. Ins. Co., 391 U.S. 73 (1968).

11. Weber v. Aetna Cas. & Surety Co., 406 U.S. 164, 175-76 (1972) (holding that the Equal Protection Clause prohibits discriminatory laws related to status of birth absent a legitimate state interest).

The Supreme Court also found that children are entitled to financial support from their father, whether he is married to the mother or not.[12] As unwed fathers demanded, and received, the opportunity to establish a parental relationship with their child,[13] presumptions of legitimacy based on marriage gave way to presumptions of parentage based also on genetic testing and voluntary acknowledgments.[14]

In 2006, over 41,000 children were born through assisted reproductive technologies (ART);[15] many to same-sex couples.[16] There is every reason to believe this number is greater today. If the parents are married, laws protect the rights of these children by declaring that the husband who consents to the artificial insemination of his wife is the legal father of the child.[17] Legislatures have done little to protect a

12. Gomez v. Perez, 409 U.S. 535 (1973) (finding father of child born out of wedlock had legal obligation to pay child support). Since 1974, Congress has taken steps to facilitate the establishment of parentage for non-marital children. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) imposed on the states a range of requirements aimed at early paternity establishment, including voluntary acknowledgments of paternity, early genetic testing, and limitations on rebuttal of presumptions of paternity to improve child support establishment and collections. *See* Laura W. Morgan, *Child Support Fifty Years Later*, 42 FAM. L. Q. 365 (2008) (discussing child support and paternity establishment and disestablishment).

13. Stanley v. Illinois, 405 U.S. 645 (1972) (requiring due process hearing before removing children from unwed father when mother died). *See also* Lehr v. Robertson, 463 U.S. 248 (1983) (denying unwed father standing because he did not follow state law requirement to file in putative father registry); Caban v. Mohammed, 441 U.S. 380 (1979) (allowing unwed father who had lived with and maintained relationship with children to veto adoption by stepparent); Quilloin v. Walcott, 434 U.S. 246 (1978) (denying unwed father the right to veto stepparent adoption where he had little contact over many years).

14. *See* UNIF. PARENTAGE ACT § 4(a) 9B U.L.A. 393-94 (1973) [hereinafter UNIF. PARENTAGE ACT (1973)]; UNIF. PARENTAGE ACT §§ 204, 301, 9B U.L.A. 311 (2000), as amended 2002 (2001 & West Supp. 2010) [hereinafter UNIF. PARENTAGE ACT (2000)]. For a discussion of the differences in the 1973, 2000 and 2002 amendment versions, see *generally UNIFORM PARENTAGE ACT (2000) (with Unofficial Annotations by John J. Sampson, Reporter)*, 35 Fam. L. Q. 83 (2001) and John J. Sampson, *Preface to the Amendments to the Uniform Parentage Act (2002)*, 37 Fam. L. Q. 1 (2003).

15. Centers for Disease Control, *Assisted Reproductive Technology (ART) Success Rates: National Summary and Fertility Clinic Reports: 2006 ART Report* (indicating there were 138,198 ART cycles performed at 483 fertility clinics in 2006, resulting in 41,343 live births).

16. Of the 770,000 same-sex couples, more than twenty percent are raising children. The Williams Institute, *Census Snapshot: United States* (Dec. 2007), *available at* http://www.law.ucla.edu/williamsinstitute/publications/USCensusSnapshot.pdf. *See also* Courtney G. Joslin, *Interstate Recognition of Parentage in a Time of Disharmony: Same-Sex Parent Families and Beyond*, 70 OHIO ST. L. J. 563, 591 n. 153-55 (2009).

17. *See e.g.* ALA. CODE § 26-17-21; ARIZ. REV. STAT. § 25-501(B); ARK. CODE ANN. § 28-9-209; CAL. FAM. CODE § 7613 (2009); COLO. REV. STAT. § 19-4-107; DEL. CODE ANN. tit. 13, § 8-101 *et seq.*; FLA. STAT. §§ 742.11-14; IDAHO CODE § 39-5401 *et seq.*; ILL. COMP. STAT. 40/2; KAN. STAT. ANN. § 23-128 (2007); KY. REV. STAT. § 213.046; LA. CIV. CODE ANN. ART. 188; MD. CODE ANN., FAM. LAW §1-206; MASS. GEN. LAWS Ch. 46, § 4B; MICH. COMP. LAWS § 333.2824; MINN. STAT. § 257.56; MO. REV. STAT. §193.085; MONT. CODE ANN. § 40-6-101 *et seq.*; NEB. REV. STAT. § 43-1412.01(3); NEV. REV. STAT.§ 126.061; N.J. STAT. ANN. § 9:17-44; N.M. STAT. ANN. § 40-11-6; N.Y. DOM. REL. LAW § 73; N.C. GEN.

child conceived through use of ART, however, especially by same-sex partners. In many states the child has only one legal parent.[18] The child, however, has the same bonding, emotional development and financial needs as any other child. In addition to possibly losing the primary caregiver, the child may be denied child support, inheritance, worker's compensation, or other government benefits for which the child would be eligible from the other "parent."[19]

The United States Supreme Court has recognized the rights of adults to maintain family relationships in both traditional and nontraditional families.[20] The child, as a part of the family, should also have the right to maintain family relationships. The Supreme Court has not yet decided "whether a child has a liberty interest, symmetrical with that of her parent" in maintaining filial relationships.[21] Justice Stevens in his dissent in *Troxel,* hinted at this by saying:

> While this court has not yet had occasion to elucidate the nature of a child's liberty interests in preserving established familial or family-like bonds, it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so too, must their interests be balanced in the equation.[22]

This article starts by briefly reviewing attachment theory as it relates to the importance of maintaining continuity and stability in

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STAT. § 49A-1; OHIO REV. CODE ANN. § 3111.95; OKLA. STAT. TIT. 10, § 551-553; OR. REV. STAT. § 109.239; TENN. CODE ANN. § 68-3-306; TEX. FAM. CODE ANN. § 160.201; UTAH CODE ANN. § 78B-15-702; VA. CODE ANN. § 20-49-10; WASH. REV. CODE § 26.26.705; WIS. STAT. § 69.14(H); WYO. STAT. § 14-2-902.

18. *See* Kazmierazak v. Query, 736 So. 2d 106 (Fla. Dist. Ct. App. 1999); Alison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991); Titchenal v. Dexter, 693 A.2d 682, 686 (Vt. 1997); *In re* C.B. L., 723 N.E.2d 316 (Ill. App. Ct. 1999); McGuffin v. Overton, 542 N.W.2d 288 (Mich. Ct. App. 1995); White v. White, 293 S.W.3d 1 (Mo. Ct. App. 2009), *rev. denied*; White v. Thompson, 11 S.W.3d 913, 919 (Tenn. Ct. App. 1999).

19. *In re* M.M.D., 662 A.2d 837, 857-59 & nn. 43-48 (D.C. Ct. App. 1995) (noting that a child having two legal parents rather than one created substantial benefits). *See also* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 964 (Mass. 2003) (noting that exclusion of same-sex couples from marriage directly disadvantaged the children by denying the families of benefits).

20. Moore v. City of E. Cleveland, 431 U.S. 494, 505-06 (1977) (finding that a grandmother and her two grandsons from different fathers had a right to live as a family; grandmother as custodian of one grandson possessed the rights of a parent).

21. Michael H. v. Gerald D., 491 U.S. 110, 130 (1989).

22. Troxel v. Granville, 530 U.S. 57, 88 (Stevens, J. dissenting). *See also* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 15 (2004) (noting while the father had an interest in inculcating his child with his views on religion, the mother also had rights and that "most important, it implicates the interests of a young child who finds herself at the center of a highly public debate . . . .").

parent-child relationships. The next part looks at the increasing use of assisted reproductive technologies to produce children and explores the ways legislatures and courts have struggled to define the term "parent." A review of cases illustrates that some courts are broadly interpreting their statutes or fashioning a variety of equitable remedies to protect the child's relationship with a nonbiological intentional parent.

The article concludes that in the absence of specific legislation, the state should use its role as *parens patriae* to protect children from harm by preventing disruption of existing intentionally-created parental relationships. The time has come for legislatures and courts to recognize a new category of parent – the intended parent. Especially when a child results from the use of assisted reproductive technologies, the best interest of the child requires the law to create nonmodifiable parental rights to protect the emotional reality of the child, preserve the child's attachment bonds, and ensure that the child receives adequate financial support.

II. BRIEF REVIEW OF ATTACHMENT LITERATURE

> *Unlike adults, children have no psychological conception of relationship by blood tie until quite late in their development.*[23]

Forty years of social science research shows that children form significant "attachment" relationships to parental figures early in life and these bonds are essential to the child's well being and development.[24] Attachment bonds are the "reciprocal, emotional, and physical affiliation between a child and a caregiver."[25] These bonds develop through the provision of physical and emotional care, continuity or consistency in the child's life and emotional investment in the child.[26] Attachment relationships have profound neurological

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23. JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 12-13 (1973).

24. For a general discussion of attachment theory, see JOHN BOWLBY, ATTACHMENT 177, 265-68 (2d ed. 1982); MELVIN KONNER, CHILDHOOD 84-87 (1982); HANDBOOK OF ATTACHMENT: THEORY, RESEARCH AND CLINICAL APPLICATIONS (JUDE CASSIDY & PHILLIP R. SHAVER, EDS. 1990). *See also* Ana H. Marty et al., *Supporting Secure Parent-Child Attachments: The Role of the Non-Parental Caregiver*, 175 EARLY CHILD DEVELOPMENT & CARE 271, 274 (2005) (stating that the child's social adjustment is affected by the quality of attachment).

25. BEVERLY JAMES, HANDBOOK FOR TREATMENT OF ATTACHMENT - TRAUMA PROBLEMS IN CHILDREN 2 (1994).

26. NAT'L RES. COUNCIL & INST. OF MED., FROM NEURONS TO NEIGHBORHOODS: THE SCIENCE OF EARLY CHILDHOOD DEVELOPMENT 234 (Jack P. Shonkoff & Deborah A. Phillips

effects which are among the major environmental factors shaping a child's brain.[27] Secure attachment leads to the "development of awareness, social competence, conscience, emotional growth and emotional regulation."[28] These attachment bonds serve to protect the child's development, forming the building blocks for the emerging sense of emotional security, the ability to cope with stress, and an increased self awareness.[29]

Children form strong attachment bonds to parental figures and can form attachments to more than one person. A child develops an attachment relationship with the person who on a day-to-day basis "fulfills the child's psychological needs for a parent, as well as the child's physical needs."[30] The quality and nature of the interaction of the parent and child creates the attachment, not the legal designation of parent, not the parent's marital status, and not the parent's sexual orientation.[31] The lack of a legally protected relationship for the nonbiological partner and the child conceived by artificial insemination (or adopted by only one of the partners) and reared by both may impair the initial attachment.[32]

Continuity of the parent-child relationship is essential to the child's overall well-being. When an attachment relationship is severed by one

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eds. 2000) [hereinafter FROM NEURONS TO NEIGHBORHOODS].

27. DANIEL J. SIEGEL, THE DEVELOPING MIND: TOWARD A NEUROBIOLOGY OF INTERPERSONAL EXPERIENCE 67-68, 81-87, 116-20 (1999). *See also* Am. Acad. of Pediatrics, Comm. on Early Childhood, Adoption, and Dependent Care, *Developmental Issues for Young Children in Foster Care*, 106 PEDIATRICS 1145 (2000) (noting that "[E]motional and cognitive disruptions in the early lives of children have the potential to impair brain development.").

28. FROM NEURONS TO NEIGHBORHOODS, *supra* note 26, at 226, 265.

29. *Id.* at 226. *See also* James G. Byrne, et al., *Practitioner Review: The Contribution of Attachment Theory to Child Custody Assessments*, 46 J. CHILD PSYCHOL. & PSYCHIATRY 115, 118 (2005).

30. GOLDSTEIN, FREUD & SOLNIT, *supra* note 23, at 98.

31. Barbara M. McCandlish, *Against All Odds: Lesbian Mother Family Dynamics*, *in* GAY AND LESBIAN FAMILIES 30-31 (Frederick W. Bozett, ed., 1987) (reporting that when both partners care for a child, the child becomes attached to both); Am. Acad. of Pediatrics, *Family Pediatrics: Report of the Task Force on the Family*, 111 PEDIATRICS 1541, 1550 (2003) (reporting that parental sexual orientation has no measureable effect on the quality of parent-child relationships); Amer. Acad. of Pediatrics, *U.S. National Longitudinal Lesbian Family Study: Psychological Adjustment of 17-Year Old Adolescents*, 126 PEDIATRICS 1 (2010) [hereinafter *Longitudinal Lesbian Family Study*] (noting that children's optimal development seems to be influenced more by the nature of the relationships and interactions within the family unit than by the particular structural form it takes). *See also* Raymond W. Chan, et al., *Psychological Adjustment Among Children Conceived by Donor Insemination By Lesbian and Heterosexual Mothers* 69 CHILD DEV. 443, 454 (1998) (indicating that children's well-being is more a function of parenting and relationship process than household composition).

32. *See* David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 41 ARIZ. L. REV. 752, 798-803 (1999) (discussing literature showing the quality of bonding can be impaired when there is substantial legal insecurity in the relationship between children and their adult caregivers).

parent dropping out of a child's life, the child suffers emotional and psychological harm. Disrupting attachments can turn a securely attached child into an insecure one.[33] Harm can occur to any child if one parent suddenly refuses to allow the other to maintain contact with a child. When a legally recognized parent is denied contact, there are legal remedies. But if the nonbiological partner lacks legal standing, the harm to the child can be irreparable because there may be no remedy to allow the child to maintain the relationship.[34] A Texas judge noted: "The destruction of the parent-child relationship is a traumatic experience that can lead to emotional devastation for all the parties involved. . . ."[35]

Children benefit from having two parents for emotional and financial support. The American Law Institute's *Principles of the Law of Family Dissolution* state that the best interest of the child is served by the "continuity of existing parent-child attachments; meaningful contact between the child and each parent; caretaking relationships by adults who love the child, know how to provide for the child's needs and place a high priority on doing so."[36] A growing body of research indicates that children reared in same-sex relationships appear to develop the same as other children.[37] Therefore, protecting the child's

33. VIRGINIA L. COLIN, HUMAN ATTACHMENT 96-97 (1996) (noting that children manifest anxiety and insecurity when impaired bonding); WILLIAM F. HODGES, INTERVENTIONS FOR CHILDREN OF DIVORCE: CUSTODY, ACCESS, AND PSYCHOTHERAPY 8 (2d ed. 1991) (indicating that children assume they can depend on both parents and when that assumption proves incorrect, they then doubt whether they can count on any parent); Frank J. Dyer, *Termination of Parental Rights in Light of Attachment Theory: The Case of Kaylee*, 10 PSYCHOL. PUB. POL'Y & L. 5, 11 (2004) (citing numerous empirical findings that provide a basis for predicting long term harm associated with disrupted attachment relationships); Joan B. Kelly & Michael E. Lamb, *Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children*, 38 FAM. & CONCIL. CTS. REV. 297, 303 (2000) (noting that substantial literature documents the adverse effects of disrupted parent-child relationships on children's development and adjustment).

34. Nancy D. Polikoff, *Lesbian and Gay Parenting: The Last Thirty Years*, 66 MONT. L. REV. 51, 53 (2005) (noting that "children have been harmed by losing a relationship with their legally unrecognized parent."). *See also* FIONA L. TASKER & SUSAN GOLOMBOK, GROWING UP IN A LESBIAN FAMILY: EFFECTS ON CHILD DEVELOPMENT 12 (Guilford Press 1997) (reporting that cessation of parent-child bond between a child and a lesbian psychological parent causes harm); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Non-traditional Families*, 78 GEO. L. J. 459, 473 (1990) (stating that ignoring the relationship between children and functional parents is not in the best interests of children in nontraditional homes).

35. Goodson v. Castellanos, 214 S.W.3d 741, 749 (Tex. App. 2007), *rehearing overruled* (2007), *review denied* (2008).

36. ALI PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §2.02(1)(b)-(d) (2002) [hereinafter ALI PRINCIPLES].

37. *See Longitudinal Lesbian Family Study*, *supra* note 31, at 5-6 (finding that children raised by lesbian parents demonstrated higher levels of social, academic and total competence, and lower levels of rule breaking and aggressive behavior than gender matched samples of other

attachments with both parents, even if the parents are unmarried or of the same sex, will usually be in the best interests of the child and society. As the United States Supreme Court explained:

> [T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in "promot[ing] a way of life" through the instruction of children . . . as well as from the fact of blood relationship.[38]

III. DEFINING A PARENT USING ART

> *The traditional concept of family as based on genetics is directly challenged by assisted reproduction emphasis on choice of offspring whether genetically related or not. . . .*[39]

Assisted reproductive technology allows for the creation of a child by methods other than heterosexual intercourse, including gamete (sperm or egg) donation, intrauterine insemination, in vitro fertilization (IVF), and surrogacy.[40] To date, there has been relatively little federal or state regulation of assisted reproduction,[41] so courts have struggled to define who is a parent. The sole aim of ART is to produce a child, so parenthood is "intentional" rather than happenstance. ART may be used to overcome fertility problems of one of the parties[42] or a woman's age limitations.[43] ART also enables

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teenagers); William Meezan & Jonathan Rauch, *Gay Marriage, Same-Sex Parenting, and America's Children*, 15(2) THE FUTURE OF CHILDREN: MARRIAGE AND CHILD WELL-BEING 97, 108 (2005) (indicating that same-sex marriage might benefit children in the durability and stability of parental relationships); Charlotte Patterson, *Children of Lesbian and Gay Parents*, 15(5) CURRENT DIRECTIONS IN PSYCHOL. SCI. 241-44 (2006) (reviewing current social science research on well-being of children in same-sex families). *See also* Kulstad v. Maniaci, 220 P.3d 595, 601 (Mont. 2009) (noting "Children of same-sex parents fare just as well as their peers physically, psychologically, emotionally, cognitively, and socially.").

38. Smith v. Org. of Foster Families for Equal. and Reform, 431 U.S. 816, 844 (1977).

39. CHARLES KINDREGAN & MAUREEN MCBRIEN, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER'S GUIDE TO EMERGING LAW AND SCIENCE, 2 (2d ed. 2010) [hereinafter ART: A LAWYER'S GUIDE].

40. See The Society for Assisted Reproductive Technology (SART) website, at http://www.sart.org/detail.aspx?id=1903.

41. The American Bar Association House of Delegates approved a Model Act Governing Assisted Reproductive Technology which is considered a first step toward legal recognition and regulation of ART. See Charles P. Kindregan, Jr. & Steven H. Snyder, Clarifying the Law of ART: The New American Bar Association Model Act Governing Assisted Reproductive Technology, 42 Fam. L. Q. 203 (2008).

42. Estimates are that 7.3 million women of reproductive age have some sort of infertility that prevents them from having children without medical intervention. *See* Center for Disease Control, National Center for Health Statistics, http://www.cdc.gov/nchs/fastats/fertile.htm

same-sex couples to procreate, sometimes using the genetic material from both partners.[44] Because a child may be created by using anonymously contributed sperm, an anonymous donor egg or a mixture of two eggs and different sperm donors, and gestated by a third person, there may be more than "two" parents.[45] In this "brave new world" of technologically-produced children, adhering to the traditional definition of a parent can harm the child by not recognizing as parents those persons whose intentions, and sometimes one of the person's genetic material, produced the child.

A. ART and the Married Woman - Presumption of Legitimacy

At common law and by statute, the man married to the mother is presumed to be the father of the child.[46] Most states have extended the presumption of legitimacy by enacting statutes to provide that a child born of artificial insemination with the consent of the husband and wife is the husband's legal child, irrespective of biology.[47] In the six jurisdictions that allow same-sex marriage,[48] the presumption of legitimacy or parentage statutes arguably apply. The presumption should also apply in states which offer civil unions and domestic partnerships that give the partners the same status as married couples.[49] When a same-sex couple enters into a valid civil union and

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43. *See* J.F. v. D.B., 897 A.2d 1261 (Pa. Super. Ct. 2006) (using gestational carrier with father's sperm because his female partner who was a widow with grown children and grandchildren and fertility treatments failed); *In re* C.K.G., 173 S.W.3d 714 (Tenn. 2005) (noting gestational mother used donated eggs because she was forty-five and doubted the viability of her own eggs).

44. K.M. v. E.G., 117 P.3d 673 (Cal. 2006) (finding both women parents when one provided her eggs for her female partner's IVF).

45. *See In re* Buzzanca, 72 Cal. Rptr. 2d 280 (Ct. App. 1998) (holding that the husband and wife who intended to create the child were the legal parents); Jacob v. Schultz-Jacob, 923 A.2d 473 (Pa. Super. Ct. 2007) (finding that a child could have three parents, the lesbian couple and sperm donor); Raftopol v. Ramey, 12 A.3d 783 (Conn. 2011) (allowing both male partners to be listed as parents when they used a gestational surrogate to have a child).

46. *See* Goodright v. Moss, 98 Eng. Rep. 1257, 1258 (K.B. 1777) (stating that "decency, morality, and policy" required the law to be that a couple, after the birth of a child in wedlock, would not be heard to say that they have no connection and their offspring was spurious).

47. UNIF. PARENTAGE ACT (1973) § 5 (providing "[i]f, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived."). *See supra* note 17 for listing of statutes.

48. D.C. CODE § 46-401(a) (2009); N.H. REV. STAT. ANN. § 457:1-a (West 2010); VT. STAT. ANN. tit. 15 .§ 8 (2009); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

49. NEV. REV. STAT. § 122A.200 (2010) (stating "[d]omestic partners have the same rights, protections and benefits, and are subject to the same responsibilities, obligations and

that status permits a parentage order, courts have held that the order is entitled to full faith and credit.[50] A parentage relationship should be recognized in other states even if the Defense of Marriage Act denies legal recognition of the marriage or civil union.[51] Because the Supreme Court has struck down state laws discriminating against children, the child's status should not depend on whether the parents are married or in a civil union.

The UPA 2000 includes specific provisions for reproductive technology. When couples use ART, either Article 7 dealing with a child of assisted conception or Article 8 dealing with gestational agreements, the parent-child relationship may be created with or without judicial intervention depending on the procedure. If a married woman gives birth by ART, her husband may not challenge his paternity unless he brings a paternity suit within two years of the child's birth and the courts finds that he did not consent to ART before or after the birth.[52] When a man and woman use ART with the intent to become parents, they both must consent in a written record.[53]

Surrogacy involves a woman agreeing to serve as the birth mother to have a child for another person or couple whether or not she is the genetic mother.[54] In a few states, when using gestational surrogacy,

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duties under law, whether derived from statutes, administrative regulations, court rules, government policies, common law or any other provisions or sources of law, as are granted to and imposed upon spouses."). *See also* CAL. FAM. CODE § 297.5; HAWAII REV. STAT. §§ 572C-1-7; N.J. STAT. ANN. § 103; OR. REV. STAT. 11§ 106 (2009); WASH.REV.CODE § 26.60.010 – 901 (2009); WIS. STAT, 770.01-15 (2009).

50. *See* Debra H. v. Janice R., 930 N.E.2d 184 (N.Y. 2010); Miller-Jenkins v. Miller-Jenkins, 637 S.E.2d 330 (Va. Ct. App. 2006). The Attorneys General of both Maryland and Rhode Island have indicated their states would recognize same-sex marriages valid in other jurisdictions.

51. 1 U.S.C. § 7 and 28 U.S.C.§ 1738C. The Defense of Marriage Act has been found unconstitutional in two federal court cases. *See* Gill v. Office of Personnel Management, 699 F. Supp. 2d 374 (D. Mass. 2010); Mass. v. U.S. Dep't of Health & Human Servs., 698 F. Supp. 2d 234 (D. Mass. 2010).

52. UNIF. PARENTAGE ACT (2000) § 705(a) (allowing a court to adjudicate paternity at any time if it is found that he did not provide sperm or consent, he and the mother have not cohabited since the probable time for the ART, and the husband never treated the child as his own).

53. *Id. at* § 704(a) (stating that failure of the man to sign does not preclude paternity finding if he lives with child for two years and holds child out as his own). *Id.* at § 704(b). When a child is conceived by ART with eggs, sperm or embryo implanted after divorce, the former husband is not a parent unless he consented in a written record. *Id.* at § 706(a).

54. ART: A LAWYER'S GUIDE, *supra* note 39, at 151. In traditional surrogacy, a woman is artificially inseminated with the sperm of a man who is not her husband. The wife often is infertile or unable to carry a child. *See In re* Baby M., 537 A.2d 1227 (N.J. 1988) (recognizing the parental rights of the surrogate, genetic mother). In gestational surrogacy, the woman carries an embryo created from gametes of others for intended parents. Because the surrogate is not biologically related to the child, gestational surrogacy agreements are more likely to be enforceable. *See* Johnson v. Calvert, 851 P.2d 776 (Cal. 1993); R.R. v. M.J., 689 N.E.2d 790

the intended parents are the legal parents.[55] Five states explicitly prohibit surrogacy.[56] About twenty-two expressly or impliedly permit the enforcement of some type of surrogacy contract; the remaining twenty-four states have no statutes or case law.[57]

The UPA 2000 creates a mechanism for recognizing a written agreement between the gestational mother, her husband if she is married, the donor or donors, and the intended parents.[58] The agreement provides for the intended parents to be the legal parents of the child, with the others relinquishing their rights.[59] The court may approve the agreement if the parties are residents, the agreement is voluntary, and meets other requirements.[60] If a gestational agreement is invalid, the gestational mother is the mother and her husband is the father if she is married. If not, the sperm donor, if known, is the father.[61]

One recent case dealt with surrogacy in the context of same-sex male partners. The Connecticut Supreme Court granted a declaratory judgment that a biological father and his same-sex domestic partner were the legal parents of a child being carried by a surrogate mother with eggs recovered from a third party donor and fertilized with sperm contributed by one of the partners. The court found that intended parents who are parties to a valid gestational agreement acquire parental status and are entitled to be named as parents on the replacement birth certificate, without respect to their biological relationship to the child.[62]

(Mass. 1998). The UPA drafters rejected use of the term "surrogacy agreement" in favor of gestational agreement.

55. ILL. COMP. STAT. 47/15 (2010); N.D. CENT. CODE §14-18-05, at 7 (2009).

56. ARIZ. REV. STAT. ANN.§ 25-218(B) (2010); IND. CODE ANN. § 31-20-1-1(1)-(8) (2009); MICH. COMP. LAWS ANN. § 722.855 (2010); NEB. REV. STAT. § 25-21, 200 (2010); N.Y. DOM. REL. LAW § 122 (2009); *In re* Baby M., 537 A.2d 1227 (N.J. 1988) (finding a surrogacy for hire arrangement unenforceable because it was too close to baby selling). *But see* J.R. v. Utah, 261 F. Supp. 2d 1268 (D. Utah 2002) (finding that statute denying effect to surrogacy contracts violated the fundamental rights of those who wish to procreate using gestational surrogacy).

57. ART: A LAWYER'S GUIDE, *supra* note 39, at 157-58.

58. UNIF. PARENTAGE ACT (2000) § 801.

59. *Id.* at § 801(a)(2), (3).

60. *Id.* at § 802, 803.

61. *Id.* at § 809.

62. Raftopol v. Ramey, 12 A.3d 783 (Conn. 2011).

B. ART and Single Woman

When a single woman uses ART, there is clearly a birth mother, but not an identified father. The Uniform Parentage Act (2000), as amended in 2002, provides that a man who provides sperm for use by someone other than his wife with no intent to become a parent is a "donor" and not a legal parent whether the donor was known to the mother or not.[63] Some states have allowed a known sperm donor to have legal rights and responsibilities.[64] Others find that the donor of sperm is not the father unless there is a written agreement to the contrary.[65] This latter view seems wrong, as outside of the ART context, no laws grant a parent the right to be a sole parent. The child created by ART should be treated as any other child and allowed to benefit from having two parents.[66]

Few states have specific legislation covering same sex partners who wish to be listed as co-parents. Before enacting a same-sex marriage law in December, 2009, the District of Columbia had enacted the Domestic Partnership Judicial Determination of Parentage Amendment Act. That law granted legal parentage to the spouse or unmarried partner who consents to the child being conceived using artificial insemination.[67] Other states have tried to work with existing statutes. For example, Oregon interpreted its statute that provides that a man who consents to his wife's insemination is a parent to apply to a female same-sex partner of the woman inseminated.[68]

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63. UNIF. PARENTAGE ACT § 702 (2000). Alabama, Delaware, New Mexico, North Dakota, Oklahoma, Texas, Utah, Washington and Wyoming have enacted the UNIF. PARENTAGE ACT (2000), as amended 2002.

64. C.M. v. C.C., 407 A.2d 849 (N.J. Juv. & Dom. Ct. 1979); Jhordan C. V. Mary K., 224 Cal. Rptr. 2d 530 (Ct. App. 1986); LaChapelle v. Mitten, 607 N.W.2d 151 (Minn. 2000); *In re* Sullivan, 157 S.W.3d 911 (Tex. App. 2005).

65. *In re* K.M.H., 169 P.3d 1025 (Kan. 2007); Ferguson v. McKiernan, 940 A.2d 1256 (Pa. 2007).

66. Marsha Garrison, *Law Making for Baby Making: An Interpretative Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835 (2000).

67. D.C. CODE ANN. § 16-909(a-1) (according a presumption of parentage for the female partner of a woman giving birth).

68. Shineovich v. Kemp, 214 P.3d 29, 40 (Or. Ct. App. 2009). *See also* Raftopol v. Ramey, 12 A.3d 783 (Conn. 2011) (allowing both male partners to be listed as parents when they used a gestational surrogate to have a child.); *In re* Parentage of Robinson, 890 A.2d 1036, 1042 (N.J. Super. Ct. Ch. Div. 2005) (same).

C. The Uniform Parentage Act

Several states have adopted the Uniform Parentage Act (UPA), either the 1973 or the revised 2000, amended in 2002, version.[69] The 1973 Prefatory Note states that the purpose is to provide for substantive legal equality for all children regardless of the marital status of their parents.[70] Although the UPA seeks to ensure that a child has two parents, it is flexible enough that it can be interpreted to establish parenthood by a single parent, a heterosexual couple, or a same-sex couple.

Both the original and updated versions of the UPA have provisions relating to presumptions of parentage. Maternity is presumed from giving birth.[71] The 1973 version allows any interested party to bring an action to determine the existence of a father and child relationship. A man is presumed to be the natural father of a child among other things if he married or attempted to marry the mother or if he "receives the child into his home and openly holds out the child as his natural child. . . ."[72] When presumptions conflict, the 1973 UPA provides that the "presumption which on the facts is founded on weightier considerations of policy and logic controls."[73] The Rhode Island Supreme Court, using its paternity statute which follows the UPA language, found that the partner was an "interested party" because she had functioned as a parent, even though she was not biologically related to the child.[74] The partner was "involved with" the child's paternity because the partners jointly planned to bear and raise the child, she helped arrange and pay for the insemination procedure, and the child's last name was a hyphenated version of both their

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69. For a listing of states, see Uniform Law Commission, http:www.uniformlaws.org/LegislativeFactSheet.aspx?title=Parentage.

70. UNIF. PARENTAGE ACT (1973) Prefatory Note and § 2. *See In re* Marriage of Ross, 682 P.2d 331, 338 (Kan. 1989).

71. UNIF. PARENTAGE ACT (1973) § 3(1).

72. *Id.* at § 4(a)(4). *See* KAN. STAT. ANN. § 38-1114(a)(4) (Supp. 2010) (providing presumption of parentage if man "notoriously or in writing recognizes paternity of the child . . . .").

73. UNIF. PARENTAGE ACT § 4(b). *See* KAN. STAT. ANN. § 38-1114(c) (Supp. 2010) (adding the best interest of the child as a consideration).

74. Rubano v. DiCenzo, 759 A.2d 959, 966-67 (R.I. 2000). The court also found that the partner's claim for visitation fell within "matters relating to adults who shall be involved with paternity of children born out of wedlock" and noted, "We are mindful of the Legislature's instruction that when statutes are construed 'every word importing the masculine gender only, may be construed to extend to and to include females as well as males.' . . . Thus, two women may certainly be 'adults who shall be involved with paternity' of a child for purposes of this statute." *Id.* at 970.

surnames.[75]

The California Supreme Court held that the same sex partner of the biological mother is a presumed parent under the California Parentage Act if she receives a child into her home and holds the child out as her own.[76] Having previously recognized that a child could have two mothers,[77] the court interpreted the provision that a man is presumed to be the natural father if he lives with the child and openly holds the child out as his own as applying equally to women.[78]

The donor of either eggs or sperm is not a parent and has no legal rights or obligations of parenthood.[79] When a woman uses ART and a man provides sperm or consents to use of another's sperm with the intent that he be the parent, he is the legal father.[80] In a California case, the court used the provision of the UPA using genetic consanguinity where one partner donated the egg to her partner for in vitro fertilization.[81]

Not all courts are willing to use an expansive interpretation of the UPA.[82] The Wisconsin court recently stated, "[f]or obvious reasons, a same sex partner . . . can never receive the presumption of parenthood."[83] To adequately protect children, the UPA should be amended to specifically create a presumption of parentage in the case of intended parents using assisted reproductive technologies. Perhaps

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75. *Id.* at 971.

76. Elisa B. v. Superior Ct., 117 P.3d 660, 664-65 (Cal. 2005) (finding that the non-biological mother of twins born to her partner during the relationship was a legal parent with the obligation to pay child support).

77. *Id.* at 666, discussing Sharon S. v. Superior Court, 73 P.3d 554 (Cal. 2003).

78. *Id.* at 667. The California court had previously determined that biology is not essential for a man to be a natural father when he married the pregnant mother and assumed the role of parent. *In re* Nicholas H., 46 P.3d 932, 934 (Cal. 2002) (noting that "[t]his social relationship is much more important, to the child at least, than a biological relationship of actual paternity."); Charisma R. v. Kristina, 96 Cal. Rptr. 3d 26 (Ct. App. 2009) (granting partner standing even when the partners were only together for four months after the birth of the child). *See also* Smith v. Gordon, 968 A.2d 1, 6-7 (Del. 2009) (finding that there was nothing impractical about allowing a woman to satisfy either the notorious acknowledgment or writing requirements of the Uniform Parentage Act, but that the partner did not meet the requirements).

79. UNIF. PARENTAGE ACT (2000) § 702.

80. *Id.* at § 703.

81. K.M. v. E.G., 117 P.3d 673 (Cal. 2005).

82. *See* Chatterjee v. King, --- P.3d ----, 2010 WL 5783011 (N.M. Ct. App. Dec. 1, 2010) (finding that nothing in the paternity "statute indicates that the Legislature contemplated a parent and child relationship being established between a natural mother and a child with regard to anyone other than a natural mother"); *In re* Paternity of Christian R.H., 2010 WL 5158629 (Wis. Ct. App. Dec. 21, 2010) (finding that a same-sex partner can never receive a presumption of parentage under the Parentage Act). *See also In re* Parentage of L.B., 122 P.3d 161, 166 (Wash. 2005) (noting that the Uniform Parentage Act "did not contemplate nor address every conceivable family constellation" but granting equitable relief).

83. *In re* Paternity of Christian, 2011 WI App 2, ¶ 10 (Wis. Dec. 21, 2010).

an easier way to amend the UPA would be to change the term "paternity" to "parentage" and change the terms "husband" and "wife" to "parent partners." Any of these amendments would allow courts to interpret the UPA to benefit children by recognizing both parents—the biological and legal or intended.

D. Adoption

A parent-child relationship can be created by adoption. Adoption is statutory and did not exist at common law, resulting in some states construing adoption statutes strictly. The birth parents must relinquish their rights or have them terminated before an adoption can create legal rights in another person. Most states make an exception for a stepparent adoption in which only one parent's rights are terminated and the other legal parent remains. Several courts have extended the rationale underlying a stepparent adoption to allow a same-sex partner to adopt because it is in the child's best interests to provide security and stability for the child.[84]

A second-parent adoption permits a partner of the child's biological or adoptive parent to adopt the child without terminating the first parent's rights. If a state allows a second parent adoption, a same or opposite sex partner could adopt the child conceived by assisted reproduction. Only five statutes specifically allow a second parent adoption.[85] Two thirds of the states either prohibit adoptions by same-sex partners or do not have a case on point.[86] While adoption solves

84. *See* Sharon S. v. Super. Ct. of San Diego, County, 73 P.3d 554 (Cal. 2003); *In re* Hart, 806 A.2d 1179 (Del. Fam. Ct. 2001); *In re* M.M.D. v. B.H.M., 662 A.2d 837 (D.C. 1995); *In re* Petition of K.M. & D.M., 653 N.E.2d 888 (Ill. App. Ct. 1995); *In re* Adoption of K.S.P., 804 N.E.2d 1253 (Ind. Ct. App. 2004); Mariga v. Flint, 822 N.E.2d 620 (Ind. Ct. App. 2005), *trans. denied*; *In re* Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993); *In re* Adoption of Two Children by H.N.R., 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995); *In re* Jacob, *In re* Dana, 660 N.E.2d 397 (N.Y. 1995); *In re* R.B.F. & R.C.F., 803 A.2d 1195 (Pa. 2002); *In re* B.L.V.B., 628 A.2d 1271 (Vt. 1993). *See also In re* Adoption of T.A.M., 791 N.W.2d 573 (Minn. Ct. App. 2010) (refusing to vacate a second parent adoption on procedural grounds and not deciding the issue of whether Minnesota allows or not). *But see* M.S. v. C.S., 938 N.E.2d 278 (Ind. Ct. App. 2010) (strictly construing the stepparent adoption statute to find same-partner was not a legal parent).

85. *See e.g.,* CAL. FAM. CODE § 9000(b) (2010); COLO. REV. STAT. §§ 19-5-203(1)(d.5), 19-5-208(5), 19-5-210(1.5), 19-5-211 (1.5); CONN. GEN. STAT. §§ 45a-724(a)(2) and (3); 45a-731(5), (6) and (7); N.Y. DOM. REL. LAW. §110 (McKinney 2010); VT. STAT. ANN. tit. 15A, § 1-102(b) (West 2010). *See In re* Adoption of Carolyn B., 774 N.Y.S.2d 227 (Sup. Ct. 2004) (allowing two women to jointly adopt a child who was not biologically related to either party).

86. *See* Lynn D. Wardle, *Comparative Perspectives on Adoption of Children by Cohabiting, Nonmarital Couples and Partners*, 63 ARK. L. REV. 31, 47 n. 66, 98 (2010) (listing thirty three states as not allowing adoption by same-sex partners and couples).

the legal parentage issue, it seems like an expensive and unnecessary step. But otherwise, court action may be required, also an expensive step which may exceed the cost of adoption.

The advantage of a second parent adoption is that it creates a judgment that is entitled to full faith and credit in other states.[87] Although the failure to adopt if the state allows it may work against legal recognition of the same-sex co-parent,[88] from a child's perspective, a formal adoption is irrelevant if the child has formed a psychological attachment to the person acting as a parent.

E. Equitable Powers of the Court

> *From a child's perspective it makes sense to treat sexual orientation and marital status as relevant only to the extent they bear on the capacity of the party seeking custody . . . to meet the child's needs.*[89]

In the majority of states, courts have struggled to find ways to recognize a same-sex partner who has consented to the artificial insemination or surrogacy procedure.[90] If children are to reap the benefit of having two parents, the law must fashion remedies to protect them. The consent of two persons to use of ART and co-parent creates an extraordinary circumstance that allows a state to use its *parens patriae* power to protect the emotional and financial interests of children in maintaining the parent-child relationship.[91] Several courts

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87. U.S. CONST. art. IV, § 1. *Accord* Embry v. Ryan, 11 So. 3d 408 (Fla. Dist. Ct. App. 2009); Russell v. Bridgens, 647 N.W.2d 56 (Neb. 2002); *See* Finstuen v. Crutcher, 496 F.3d 1130 (10th Cir. 2007) (finding that an Oklahoma statute that barred recognition of an adoption by a same-sex couple that is finalized in another state violated the Full Faith and Credit Clause). *See also In re* Adoption of Sebastian, 879 N.Y.S.2d 677 (Sur. Ct. 2009) (allowing a decree of adoption for couple who had same-sex marriage from Netherlands to ensure that both women would be recognized as legal parents of the child created from assisted reproduction). *But see* Oren Adar, et al. v. Darlene Smith, 2011 WL 1367493 (5th Cir. Apr. 12, 2011) (finding that two men did not state a §1983 claim against the Registrar of Vital Statistics who refused to change the Louisiana birth certificate of the child they adopted in New York).

88. *See* M.S. v. C.S., 938 N.E.2d 278 (Ind. Ct. App. 2010) (finding same sex partner who was de facto parent had not adopted child and therefore was not legal parent entitled to parenting time); Titchenal v. Dexter, 693 A.2d 682 (Vt. 1997) (finding partner's failure to adopt child indicated lack of intent to be a legal parent).

89. Barbara Bennett Woodhouse, *It All Depends on What You Mean by Home: Toward a Communitarian View of the Nontraditional Family*, 1996 UTAH L. REV. 569, 610-11.

90. *See generally* Deborah L. Forman, *Same-Sex Partners: Strangers, Third Parties or Parents? The Changing Legal Landscape and the Struggle for Parental Equality*, 40 FAM. L.Q. 23 (2006) (discussing problems with not recognizing parents in same-sex relationships); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747 (1993).

91. Morrison v. Sadler, 821 N.E.2d 15, 24 (Ind. Ct. App. 2005) (discussing difference

have used principles of equitable estoppel, functional, *de facto* or intended parenthood principles to protect a child's relationship with both parents, whether or not there was a formal legal relationship or a biological connection.

1. Equitable Estoppel

Courts have applied the doctrine of equitable estoppel to prevent a parent from denying the parental status of a co-parent.[92] The ALI's *Principles of the Law of Family Dissolution* use estoppel to afford parental status to co-parents. Section 2.03(b)(iii) defines a "parent by estoppel" as one who:

> lived with the child since the child's birth, holding out and accepting full and permanent responsibilities as parent, as part of a prior co-parenting agreement with the child's legal parent (or, if there are two legal parents, both parents) to raise a child together each with full parental rights and responsibilities, when the court finds that recognition of the individual as a parent is in the child's best interests.[93]

One of the earliest cases involved a husband who had consented to the artificial insemination of his wife, then claimed the child was not his biological child at the time of the divorce. The California court stated: "One who consents to the production of a child cannot create a temporary relation to be assumed and disclaimed at will."[94] In a later California case, the same-sex partners had obtained a stipulated judgment that they were "the joint intended legal parents" of the child and permitting identification of the nonbiological partner as a "parent" on the birth certificate in the space provided for "father." When the couple separated, the biological parent sought to set aside the judgment. The court did not address whether the judgment was appropriate under the UPA, but concluded that the biological parent

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between natural reproduction and adoption or assisted reproduction).

92. L.S.K. v. H.A.N., 813 A.2d 872 (Pa. Super. Ct. 2002) (affirming order of child support against lesbian co-parent who assisted in artificial insemination and jointly reared the resulting children); H.M. v. E.T., 14 N.Y.3d 511 (2010) (finding jurisdiction to entertain a child support petition by a biological mother seeking support from her former same sex partner on the assertion that the partner is the parent of the child).

93. ALI PRINCIPLES, *supra* note 36, at §2.03(1)(b)(iii) (2002). The comments clarify that it does not require a formal, written agreement. *Id.* at Comment b.iii.

94. People v. Sorenson, 437 P.2d 495, 499 (Cal. 1968) (ordering husband to pay child support).

was estopped from contesting the judgment she had sought.[95]

The intended parent cases involve situations in which a couple chooses to have a child, either through adoption by one of the parents or assisted conception. These cases fit the mold of when equitable estoppel should be used.[96] If one parent has adopted the child in a same-sex or heterosexual relationship, courts could recognize the other parent as a legal parent. The Montana Court of Appeals noted that "homosexuals in an intimate domestic relationship each have the right to parent the children they mutually agree that one party will adopt (or, presumably, conceive)."[97] When two persons agree to and do produce or have a child and subsequently co-parent the child, the use of estoppel should provide for the child to continue a relationship with the nonbiological, non-legal parent unless it is not in the best interests of the child and to ensure that the child receives support.[98]

The New York Court of Appeals used equitable estoppel principles to bar the child's biological mother from denying the parental relationship of her former same-sex domestic partner. Even though the partner lacked standing under New York law to assert a right to custody or visitation, the court used the best interest of the child standard to maintain the established relationship between the parent and the child.[99]

2. Psychological or De Facto Parents

Absent explicit statutory authority, courts have exercised equitable powers to protect a child's relationship with an individual who has functioned as the child's parent. A few states have used the concept of functional parenthood, which has been variously described as an individual acting *in loco parentis*, as a *de facto* parent, or as a

95. Kristine H. v. Lisa R., 117 P.3d 690 (Cal. 2005) (noting that to do otherwise would allow the parent to "trifle with the courts" and run afoul of the public policy in favor of two-parent families). *Id.* at 693-696.

96. Davis v. Swan, 697 S.E.2d 473 (N.C. Ct. App. 2010).

97. Kulstad v. Maniaci, 220 P.3d 595, 612 (Mont. 2009).

98. Chambers v. Chambers, No. CN00-09493, 2002 WL 1940145, pg. 11 (Del. Fam. Ct. 2002) (using equitable estoppel to impose a child support order on a same-sex partner who paid for the in vitro fertilization of her partner, co-parented the child and sought visitation when the relationship ended). *See also* Jacob v. Shulz-Jacob, 923 A.2d 473 (Pa. 2007) (using equitable estoppel to impose child support on a known sperm donor who had voluntarily provided some support and was actively involved in the children's lives); *In re* LaPiana, 2010 WL 3042394 (Ohio App., Aug. 5, 2010) (finding the law estopped biological mother from denying former partner shared custody when the two co-parented the children during and after the relationship ended).

99. Debra H. v. Janice R., 930 N.E.2d 184 (N.Y. 2010).

psychological parent, as a sufficient basis for granting complete parental status to same-sex co-parents.[100] Some of these courts assert their *parens patriae* power to protect children. The Colorado Court of Appeals affirmed granting joint custody to the same-sex partner who had been functioning as a parent without a finding of parental unfitness of the adoptive parent. The court found that proof that "a fit parent's exercise of parental responsibilities poses actual or threatened emotional harm to the child establishes a compelling state interest sufficient to permit state interference with parental rights."[101] The court further found that "emotional harm to a young child is *intrinsic* in the termination or significant curtailment of the child's relationship with a psychological parent . . . ."[102]

The Wisconsin Supreme Court first announced a four-pronged test to determine whether a nonbiological partner had a parent-like relationship with a child to allow the court to exercise its inherent equitable power to grant visitation, but not custody, over the objection of the biological parent. The factors are:

> (1) the legal parent consented to and fostered the nonparent's formation and establishment of a parent-like relationship between the nonparent and the child; (2) the nonparent and the child lived together in the same household; (3) the nonparent assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation, and (4) the nonparent has established a parental role sufficient to create with the child a bonded, dependent relationship parental in nature.[103]

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100. *See* Mullins v. Picklesimer, 317 S.W.3d 569 (Ky. 2010) (finding the biological mother had facilitated an emotional and psychological bond between her partner and the child); C.E.W. v. D.E.W., 845 A.2d 1146, 1147-50, 1151 (Me. 2004) (recognizing equal parental rights of a lesbian co-parent who was a *de facto* parent); J.A.L. v. E.P.H., 682 A.2d 1314 (Pa. Super. Ct. 1996) (finding that former domestic partner stood *in loco parentis* with child and had standing to seek partial custody); *In re* Parentage of L.B., 122 P.3d. 161, n. 7, 177 (Wash. 2005) (distinguishing *de facto* parents from those who stand *in loco parentis* which describes individuals who parent temporarily in place of a legal parent and whose status can be terminated by the withdrawal of consent).

101. *In re* E.L.M.C., 100 P.3d 546, 558 (Colo. Ct. App. 2004), *cert. denied* (applying a statute granting standing to seek parental decision-making responsibilities to a person other than a parent who had been in physical care of the child for six months or more to a same sex partner where the other partner adopted a six-month-old child under China law, and both partners parented the child during their seven-year relationship).

102. *Id.* at 561.

103. *In re* H.S.H-K., 533 N.W.2d 419, 421, 435-36 (Wis. 1995) (allowing the non biological partner visitation over objection of biological parent and finding that parental autonomy and constitutional rights are protected by requiring that the parent-like relationship

The court added that: "This exercise of equitable power . . . protects a child's best interest by preserving the child's relationship with an adult who has been like a parent."[104] One court called the Wisconsin test as "[t]he most thoughtful and inclusive definition of *de facto* parenthood" and many have applied it.[105] In allowing a nonbiological same-sex partner standing to seek legal custody and visitation, the New Jersey Supreme Court noted:

> At the heart of the psychological parent cases is a recognition that children have a strong interest in maintaining the ties that connect them to adults who love and provide for them. That interest, for constitutional as well as social purposes, lies in the emotional bonds that develop between family members as a result of shared daily life.[106]

The consent of the biological or adoptive parent is the key allowing a finding of a psychological parent. When the legal parent consents and encourages the formation of a parent-child relationship between her child and the nonbiological parent, judicial acknowledgment of the relationship does not infringe upon the biological parent's constitutional rights. The court can look at the harm to the child if the relationship is unilaterally severed.[107]

Some have used the psychological parent test to provide full parental rights. For example, the Washington Supreme Court recognized the parental status of a former same-sex partner as a common law *de facto* parent who stood in legal parity with the mother so custody and visitation were determined under the best interests of the child standard.[108]Allowing parental rights to a psychological or *de facto* parent based on the best interests of the child does not infringe on the legal or biological parent's constitutionally protected interest in

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develop only with the consent and assistance of the biological or adoptive parent).

104. *Id.* at 436.

105. V.C. v. M.J.B., 748 A.2d 539, 551 (N.J. 2000), *cert. denied sub nom* 531 U.S. 926. *See also* Middleton v. Johnson, 633 S.E.2d 162, 168 (S.C. Ct. App. 2006) (finding four factors ensure limited number of persons will be psychological parents); Rubano v. DiCenzo, 759 A.2d 959, 974 (R.I. 2000); *In re* Parentage of L.B., 122 P.3d. 161, 176 (Wash. 2005).

106. V.C. v. M.J.B., 748 A.2d at 550.

107. *Id.* at 549-50, 553-54; Rubano v. DiCenzo, 759 A.2d 959, 974 (R.I. 2000) (finding consent of legal parent protects against claims by individuals not functioning as parents); *In re* Parentage of L.B., 122 P.3d. 161,179 (Wash. 2005) (noting that the State is not interfering on behalf of a third party in an insular family unit but is enforcing the rights and obligations of parenthood that attach to de facto parents).

108. *In re* Parentage of L.B., 122 P.3d. at 173, 177 (noting de facto parenthood status is limited to nonparents who have fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life).

respecting the parent-child relationship because the parent has voluntarily chosen to yield parental control to the partner.[109]

Courts in approximately a dozen states have allowed partners standing to seek visitation, but these rights are generally not as extensive as physical custody.[110] The Pennsylvania Supreme Court used the doctrine of *in loco parentis* to grant a lesbian co-parent standing to seek visitation, but the partner had the burden of overcoming the presumption in favor of the biological parent.[111] In Massachusetts the court exercised its equitable power to protect the best interests of the child in continuing her relationship with a *de facto* parent by ordering visitation with the child's lesbian co-parent[112] and finding a "minimal intrusion" on the biological parent's superior rights.[113] In some states, however, even if the child was produced by ART during the relationship and the non-biological partner is a *de facto* parent, the court may deny parenting time because of lack of legal status as a parent.[114]

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109. *Id.* at 179. *See also* C.E.W. v. D.E.W., 845 A.2d 1146, 1147-1150, 52 (2004) (recognizing the "unusual and significant parent-like role" that the functional parent played and placing her in legal parity with an otherwise legal parent). *See also* Mullins v. Picklesimer, 317 S.W.3d 569 (Ky. 2010); Mason v. Dwinnell, 660 S.E.2d 58, 69 (N.C. Ct. App. 2008) (applying the best interest standard because the legal parent acted inconsistently with her constitutional rights by allowing a third party to function as a parent to her child); Middleton v. Johnson, 633 S.E.2d 162 (S.C. Ct. App. 2006) (noting that when a legal parent invites a third party into a child's life and provides the child with essentially another parent, "the legal parent's rights to unilaterally sever that relationship are necessarily reduced.").

110. *See* Thomas v. Thomas, 49 P.3d 306 (Ariz. Ct. App. 2002); Laspina-Williams v. Laspina-Williams, 742 A.2d 840 (Conn. Super. Ct. 1999); King v. S.B., 837 N.E.2d 965 (Ind. 2005); S.F. v. M.D., 751 A.2d 9 (Md. Ct. Spec. App. 2000); E.N.O. v. L.M.M., 711 N.E.2d 886 (Mass. 1999); SooHoo v. Johnson, 731 N.W.2d 815, 818, 824 (Minn. 2007); LaChapelle v. Mitten, 607 N.W.2d 151 (Minn. Ct. App. 2000); Kulstad v. Maniaci, 220 P.3d 595 (Mont. 2009); Mason v. Dwinnell, 660 S.E.2d 58, 65 (N.C. Ct. App.2008); Middleton v. Johnson, 633 S.E.2d 162 (S.C. Ct. App. 2006); *In re* H.S.H-K., 533 N.W.2d 419 (Wis. 1995); A.C. v. C.B., 829 P.2d 660 (N.M. Ct. App. 1992); *Cf.* Clifford K. v. Paul S., 619 S.E.2d 138, 153-54 (W. Va. 2005) (finding partner had standing to intervene in custody proceeding after biological mother's death under "exceptional cases" provision).

111. T.B. v. L.R.M., 786 A.2d 913, 917, 919 (Pa. 2001) (holding former same-sex partner who assumed a parental status and duties with the biological mother's consent standing to seek visitation if it was in the child's best interests to maintain the relationship). The American Law Institute distinguishes a *de facto* parent from a parent by estoppel. ALI PRINCIPLES, *supra* note 36, at § 2.03(1)(b)(iv) (defining a *de facto* parent as one who has not lived with the child since birth but has lived together for at least two years and assumed full parental responsibility with the agreement of the legal parent. The *de facto* parent is presumptively entitled to some share of custodial time but not the majority).

112. E.N.O. v. L.M.M., 711 N.E.2d 886, 891 (Mass. 1999) (defining a *de facto* parent as one who lives with the child and assumes caretaking functions "at least as great as the legal parent" with the consent and encouragement of the legal parent).

113. *Id.* at 893.

114. M.S. v. C.S., 938 N.E.2d 278 (Ind. Ct. App. 2010) (noting, however, that even if former partner was not automatically precluded from obtaining visitation rights, visitation was not in child's best interests where partner threw objects at mother, threatened mother's life in

IV. DEFINING PARENTS BY INTENTION - CONTRACTS AND ART

> *[I]t seems to follow both logically and pragmatically that if a couple in a nontraditional family relationship cooperates to bring a child into existence by such technologies as in vitro fertilization, they should both be responsible for supporting the child.*[115]

The intention to become a co-parent can be shown by conduct and contract. The combination of contracts and intention to create and rear a child should be sufficient to create the status of "parent" if a child is born and the parties do co-parent.[116] The California Supreme Court first applied the intent test when a husband and wife contributed genetic material and a surrogate carried the child to term, finding that "[s]he who intended to bring about the birth of a child that she intended to raise as her own - is the natural mother . . . ."[117] The court extended the concept to find that when a married couple intends to procreate using a non-genetically related embryo implanted into a surrogate, the intended parents are the legal parents of the child so created.[118] The California Supreme Court extended the "intent" concept beyond the married couple situation to find that a child could have two mothers.[119]

Other courts have looked at the intentions of the parties to create a child. The Tennessee Supreme Court found that both genetics and parenting intent are relevant in determining parenthood. It found that a

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front of child, and actions were so threatening that six-year-old child tried to intervene by holding onto partner and asking mother to leave).

115. ART: A LAWYER'S GUIDE, *supra* note 39, at 109.

116. *See* Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 323 (arguing that "intentions that are voluntarily chosen, deliberate, express and bargained for ought presumptively to determine legal parenthood."). *See also* Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L. J. 597, 597 (2002); Nancy G. Maxwell & Caroline J. Forder, *The Inadequacies in U.S. and Dutch Adoption Law to Establish Same-Sex Couples as Legal Parents: A Call for Recognizing Intentional Parenthood*, 38 FAM. L. Q. 623 (2004).

117. Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993) (holding that genetic mother of a child born through use of a gestational surrogate was the "natural" mother).

118. *In re* Buzzanca, 72 Cal. Rtpr. 280, 284 (Ct. App. 1998) (finding that the husband who with his wife contracted with a surrogate to carry a child conceived with donor sperm and donor egg could not escape the obligation to pay child support).

119. Elisa B. v. Superior Ct. of El Dorado Cty, 117 P.3d 660, 666-67, 670 (Cal. 2005) (finding the non biological mother of twins born to partner during relationship to be a legal parent with the obligation to pay child support when both partners were artificially inseminated at the same time, gave the resulting children a hyphenated last name, and breast fed and parented each other's children.); K.M. v. E.G., 117 P.3d 673 (Cal. 2005) (finding both women to be legal parents where they had twins together through ovum sharing with an egg removed from one, fertilized in vitro, and implanted in the partner).

woman who gave birth to triplets through IVF using eggs from an anonymous donor and sperm from her unmarried partner was the children's legal mother based on her intention to assume parental responsibility and her gestational role.[120] As noted, the UPA presumes maternity by virtue of birth.

The concept of intended parenthood for a child conceived by ART can have even more importance for a couple who cannot marry, form a civil union, or have a second parent adoption. These couples often enter into contracts expressing the intent to have a child and co-parent followed by use of ART procedures.[121]

Once created, the law should protect the child's parent–child relationships. The law can protect the relation best by legally recognizing both intentional parents from the time the child is born.[122] Connecticut recently allowed a declaratory judgment to determine that two male partners were the legal parents of a child, rather than the gestational surrogate.[123] The Ontario Court of Appeals went beyond recognizing two parents by finding both lesbian partners and the male sperm donor were parents.[124] In the unwed parent context, there are procedures for voluntary acknowledgments of paternity. The law could provide for similar acknowledgments in assisted reproduction cases. If the Uniform Parentage Act term "paternity" were changed to "parentage," voluntarily acknowledgments could work for same-sex couples or other nontraditional parenting relationships.

Some states appear to endorse the use of contract principles in cases of assisted reproduction. In Kansas, the absence of a written agreement between a biological mother and a sperm donor meant that

120. *In re* C.K.G., 173 S.W.3d 714 (Tenn. 2005).

121. *In re* LaPiana, 2010 WL 3042394 (Ohio App. Aug. 5, 2010) (finding that the two women had planned for and paid for pregnancy, the partner was present at birth and her name was on the birth certificate, the partners jointly cared for the child, held themselves out and acted as a family, the partner's will listed the other as the child's guardian, the parent executed a general durable health care power of attorney, and after separation, they agreed to support each other as parents and did co-parent); Mullins v. Picklesimer, 317 S.W.3d 569 (Ky. 2010) (noting the parties cared for the child from birth, biological mother had encouraged, fostered, and facilitated an emotional and psychological bond between the child and parent); C.E.W. v. D.E.W., 845 A.2d 1146, 1147-50, 52 (2004) (finding the former same-sex partner to be a functional parent because she lived with the mother, agreed to conceive a child, and signed two co-parenting agreements stating their intentions to have equal rights and responsibilities.).

122. *See* Mary Patricia Byrn & Jenni Vainik Ives, *Which Came First The Parent or the Child?* 62 RUTGERS L. REV. 305 (2010) arguing that children have a constitutional right to have legal parents named at birth); James G. Dwyer, *A Constitutional Birthright: The State, Parentage, and the Rights of Newborn Persons,* 56 UCLA L. REV. 755 (2009).

123. Raftopol v. Ramey, 12 A.3d 783 (Conn. 2011). *See also In re* Roberta D.B., 923 A.2d 115 (Md. C. App. 2007) (allowing biological father who used a gestational surrogate to be listed alone on the birth certificate).

124. A.A. v. B.B., 83 O.R.3d 561 (2007).

the sperm donor had no rights.[125] The court indicated that the writing requirement to give a sperm donor rights "enhances predictability, clarity, and enforceability."[126] The same argument could be applied to partners who chose to create parenting relationships through ART (or one parent adoption). The biological parent's consent to the creation of the parent-child relationship with the partner is a critical waiver of the biological parent's constitutionally-protected exclusive right to parenthood. That consent is the boundary distinguishing true parent-like persons from grandparents, caretakers, other third parties or legal strangers, who do not deserve parental rights or responsibilities.[127] These private contracts can set out the intention of the parties to agree to conceive a child, to act as co-parents with equal rights and responsibilities, to address obligations between the parties, and to authorize certain actions. These documents can include a power of attorney, medical decision-making forms, and wills, providing inheritance rights. In addition, the parties may set out what should happen if the relationship ends and how parenting will be determined. These contracts, like separation agreements or parenting plans of divorcing or separating parents, address what the intended parents believe is in the best interest of their child and should be presumptively valid. Enforcing these contracts protects the children from the harm of losing emotional and financial support and provides clarity and predictability.

Contracts, however, do not bind third parties, do not affect the government's grant of benefits, and therefore, are not equal to a grant of positive rights. In addition, some courts declare such agreements unenforceable as a matter of public policy, reasoning that the law does not allow "parenthood by contract."[128] Other courts have occasionally viewed the existence of a co-parenting agreement as an indirect basis for affording parental rights but have not reached that result by enforcing the contract itself.[129] Some courts have been willing to

125. *In re* K.M.H., 169 P.3d 1025 (Kan. 2007).

126. *Id.* at 1039.

127. *See* V.C. v. M.J.B., 748 A.2d 539, 552 (N.J. 2000) *cert denied sub nom* 531 U.S. 926 (requiring the legal parent's consent to the creation of the partner's relationship with the child "is critical because it makes the biological or adoptive parent a participant in the creation of the psychological parent's relationship with the child. Without such a requirement, a paid nanny or babysitter could theoretically qualify for parental status.").

128. T.F. v. B.L., 813 N.E.2d 1244, 1250-51 (Mass. 2004) (finding implied agreement between mother and partner unenforceable and refusing to invoke equitable powers to order partner to support child); Wakeman v. Dixon, 921 So. 2d 669 (Fla. 2006); Janis C. v. Christine T., 742 N.Y.S.2d 381 (N.Y. App. Div. 2002).

129. E.N.O. v. L.M.M., 711 N.E.2d 886, 892 n.10 (Mass. 1999) (viewing the existence

enforce settlement agreements entered into by same-sex parents, if sanctioned by the court.[130]

V. CONCLUSION

> *The denomination of children's associational interests as 'right' might lead some judges to give greater credence to the emotional losses suffered by children when important familial bonds are severed.*[131]

Protecting the child means considering the reality of the child's life and experience.[132] While I agree that "responsible parenthood" is one the "root paradigms" of society,[133] an adherence to strict legal or biological definitions of a parent denies the child access to one of the persons who, in the child's reality, is the child's parent. The lack of legal recognition probably will not keep same-sex couples or others from using ART. No useful purpose is served if the child is deprived of the love and support of the second person who intended to be, and who has acted, as a parent. Indeed, only a severe negative is achieved if a child of assisted conception, or adopted by one partner, does not receive the same level of protection as other children. To the extent that family law protects individuals within the family unit, a child conceived by ART should be found to have a recognized constitutional right to maintain a relationship with both "parents."

As a dissenting New Mexico judge stated when the majority determined that a same sex partner who acted as a parent for nine years had no right to seek declaration of parenthood or legal custody

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of a written co-parenting agreement as demonstrative of the biological mother's consent to and encouragement of the plaintiff's *de facto* parental relationship with the child, as well as indicative of the parties' belief regarding the child's best interests). *See also* C.E.W. v. D.E.W., 845 A.2d 1146, 1147, 1151 (Me. 2004) (observing parties' signed parenting agreement shortly after child's birth and again after separation; agreement provided further evidence of mother's admission that partner was de facto parent).

130. *In re* Bonfield, 780 N.E.2d 241, 249 (Ohio 2002) (finding shared parenting agreement between the biological mother and her same-sex partner could be enforceable, as long as it was in the best interests of the children); A.C. v. C.B., 829 P.2d 660, 664 (N.M. Ct. App. 1992) (finding a settlement agreement providing for shared parental rights and responsibilities initially entered into upon the birth of the child and honored after the separation could be enforceable).

131. David D. Meyer, *The Modest Promise of Children's Relationship Rights*, 11 WM. & MARY BILL OF RTS. J. 1117, 1137 (2003).

132. Barbara Bennett Woodhouse, *supra* note 90, at 1809-10 (discussing legal obstacles faced by nonparent caregiver seeking to regain or retain custody against wishes of a biological parent, saying: "[a]lthough giving lip service to children's interests, [courts] fail to reflect children's experience of reality.").

133. Lynn D. Wardle, *Parenthood and the Limits of Adult Autonomy*, 24 ST. L. U. PUB. L. REV. 169, 178 (2005).

of the child:

> The child is helpless with the most to lose in this case: a loving, nurturing parent. Petitioner asks for her day in court where she can seek to have her rights and duties as a parent of the child confirmed. In concluding Petitioner has no standing to be heard, the majority negates years of jurisprudence which recognizes the realities of a parent-child relationship, and the child's interest in *her* right to a parent.[134]

Where assisted reproduction is used to produce a child by agreement of the partners, both should be considered parents of the child. The consent of both partners to creation of the child waives one's superior rights based on a genetic or legal connection and best protects a child's rights to financial and emotional support. A child-centered approach does not deprive the child of a person the child considers a parent because of the status of the adults.

134. Chatterjee v. King, --- P.3d ----, 2010 WL 5783011 (N.M. Ct. App. Dec. 1, 2010).