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# THE EVER-WIDENING GAP BETWEEN THE SCIENCE OF ARTIFICIAL REPRODUCTIVE TECHNOLOGY AND THE LAWS WHICH GOVERN THAT TECHNOLOGY

*Weldon E. Havins and James J. Dalessio\**

Science frees us in many ways . . . from the bodily terror which the savage feels. But she replaces that, in the minds of many, by a moral terror which is far more overwhelming.<sup>1</sup>

## INTRODUCTION

The rapid advances of artificial reproductive technology (“ART”)<sup>2</sup> in the field of medical science provide increasing options to couples and individuals yearning to conceive a genetically related child.<sup>3</sup> While the number of couples and individuals who have utilized ART to conceive a child has increased dramatically over the last decade, the law regulating ART has been slow to develop and what law exists oftentimes appears inadequate.

Take for example surrogacy agreements. Although surrogacy has become a widely accepted ART technique, only one state, Florida, has promulgated legislation which distinguishes between “gestational” and “traditional” surrogacy arrangements,<sup>4</sup> despite the fact that ges-

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1. Charles Kingsley, Sermon, *The Meteor Shower*, Nov. 26, 1866.

2. The ART acronym may also represent “assisted reproductive technology.” The terms are synonymous. The term “artificial” seems more apt than “assisted” because “artificial” implies something other than the “old fashion” way of reproduction. “Assisted” implies some third party assistance with copulation, a la whales mating.

3. Depending on the situation, it is possible to have a child genetically related to both the intended mother and father although a third person, the surrogate, gestates the child. Under “traditional” surrogacy arrangements, the intended mother is not genetically related to the child and does not gestate the child. See *infra* Part II for a complete discussion of these two commonly accepted ART techniques.

4. FLA. STAT. ANN. § 742.15 (West 1997).  
Gestational surrogacy contract.

(1) Prior to engaging in gestational surrogacy, a binding and enforceable gestational surrogacy contract shall be made between the commissioning couple and the gesta-

tational surrogacy is clearly distinguishable in law and in biology.<sup>5</sup> Arkansas is the only state that has passed legislation providing an unconditional presumption of validity of traditional surrogacy arrangements. The state's statute concludes that a child born to a surrogate mother is the child of the "intended parents" and not that of the surrogate.<sup>6</sup>

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tional surrogate. A contract for gestational surrogacy shall not be binding and enforceable unless the gestational surrogate is 18 years of age or older and the commissioning couple are legally married and are both 18 years of age or older.

- (2) The commissioning couple shall enter into a contract with a gestational surrogate only when, within reasonable medical certainty as determined by a physician licensed under chapter 458 or chapter 459:
  - (a) The commissioning mother cannot physically gestate a pregnancy to term;
  - (b) The gestation will cause a risk to the physical health of the commissioning mother; or
  - (c) The gestation will cause a risk to the health of the fetus.
- (3) A gestational surrogacy contract must include the following provisions:
  - (a) The commissioning couple agrees that the gestational surrogate shall be the sole source of consent with respect to clinical intervention and management of the pregnancy.
  - (b) The gestational surrogate agrees to submit to reasonable medical evaluation and treatment and to adhere to reasonable medical instructions about her prenatal health.
  - (c) Except as provided in paragraph (e), the gestational surrogate agrees to relinquish any parental rights upon the child's birth and to proceed with the judicial proceedings prescribed under s. 742.16.
  - (d) Except as provided in paragraph (e), the commissioning couple agrees to accept custody of and to assume full parental rights and responsibilities for the child immediately upon the child's birth, regardless of any impairment of the child.
  - (e) The gestational surrogate agrees to assume parental rights and responsibilities for the child born to her if it is determined that neither member of the commissioning couple is the genetic parent of the child.

As part of the contract, the commissioning couple may agree to pay only reasonable living, legal, medical, psychological, and psychiatric expenses of the gestational surrogate that are directly related to prenatal, intrapartal, and postpartal periods.

5. See *infra* Part VII for a complete discussion of gestational and traditional surrogacy agreements.

6. ARK. CODE ANN. § 9-10-201 (Michie 1998).

Child born to married or unmarried woman—Presumptions—Surrogate mothers.

- (a) Any child born to a married woman by means of artificial insemination shall be deemed the legitimate natural child of the woman and the woman's husband if the husband consents in writing to the artificial insemination.
- (b) A child born by means of artificial insemination to a woman who is married at the time of the birth of the child shall be presumed to be the child of the woman giving birth and the woman's husband, except in the case of a surrogate mother, in which event the child shall be that of:
  - (1) The biological father and the woman intended to be the mother if the biological father is married; or
  - (2) The biological father only if unmarried; or
  - (3) The woman intended to be the mother in cases of a surrogate mother when an anonymous donor's sperm was utilized for artificial insemination.

Other states' laws upholding traditional surrogacy arrangements condition contract validity on the surrogate mother being unpaid and/or the non-gestating "mother" being "infertile."<sup>7</sup> As written, such laws may not apply to gestational surrogacy arrangements because the intended mother may be "fertile" to the extent that she can now donate her ovum which, when *in vitro* fertilized with her husband's sperm, can be placed into the uterus of a genetically unrelated woman to incubate (gestate) the embryo.<sup>8</sup> Many states have passed legislation which generally denies the enforcement of surrogacy arrangements.<sup>9</sup> It is altogether unclear whether such legislation includes the distinguishable gestational surrogacy contracts.

The ever-increasing gap between ART and the field of medical science, on the one hand, and the lack of any consistent regulation of that science, on the other hand, is also evident in many other techniques of ART besides surrogacy.<sup>10</sup> For example, lawmakers and the courts have struggled to define, with any consistency, the legal rights

- (c) (1) A child born by means of artificial insemination to a woman who is unmarried at the time of the birth of the child shall be, for all legal purposes, the child of the woman giving birth, except in the case of a surrogate mother, in which event the child shall be that of:
- (A) The biological father and the woman intended to be the mother if the biological father is married; or
  - (B) The biological father only if unmarried; or
  - (C) The woman intended to be the mother in cases of a surrogate mother when an anonymous donor's sperm was utilized for artificial insemination.
- (2) For birth registration purposes, in cases of surrogate mothers, the woman giving birth shall be presumed to be the natural mother and shall be listed as such on the certificate of birth, but a substituted certificate of birth may be issued upon orders of a court of competent jurisdiction.

7. Florida, Nevada, New Hampshire, and Virginia statutes specifically provide that unpaid surrogacy contracts are lawful and enforceable. All require that the intended mother must be infertile. Additionally, New Hampshire and Virginia require advance judicial approval of the surrogacy agreement and limit who may act as a surrogate. For a complete discussion of these statutes, see *infra* Part VII.C. As noted, because of the distinction between gestational and traditional surrogacy, it is unclear whether courts would apply such legislation to gestational arrangements.

8. See *infra* Part II.A for a discussion of the biology of ART, including definitions of embryo.

9. Arizona, District of Columbia, Indiana, Michigan, New York, North Dakota, and Utah deny enforcement of all surrogacy contracts. Kentucky, Louisiana, Nebraska, and Washington deny enforcement only if the surrogate is to be compensated. For a complete discussion, see *infra* Part VII.C.

10. This schism likely results at least in part from the difficult philosophical issues that arise when infertile couples and individuals turn to ART to procreate. For example, gestational surrogacy raises serious philosophical, and ultimately legal issues, regarding who is deemed to be the "mother" of the child: the woman who provided the ovum, e.g., the "genetic mother," or the woman who gestates the child, e.g., the "gestational" or "birth" mother. Such issues also arise when legislatures and courts determine the legal status afforded an embryo, as noted. See *infra* Part VII for a complete discussion of this issue.

afforded an embryo. Generally that determination turns on whether the embryo is considered merely property,<sup>11</sup> or afforded rights of a person,<sup>12</sup> or something in between.<sup>13</sup> No state legislation has been promulgated concerning rights governing embryo adoption,<sup>14</sup> and only one state has passed laws regulating embryo destruction.<sup>15</sup>

This Article will critically examine the current status of the law as applied to the present ART techniques. Part I briefly reviews constitutional cases affecting a person's right to "beget a child"<sup>16</sup> and the status of ART regulation under Title VII of the Civil Rights Act of 1964 with its pertinent amendments and the Americans with Disabilities Act of 1990.<sup>17</sup> Part II discusses ART's biological elements and procedures; defines gametes, zygotes, embryos, and the fetus; and briefly describes the procedures of artificial insemination and *in vitro* fertilization.<sup>18</sup> Part III reviews the legal status of gametes and the products of fertilization, zygotes, and embryos.<sup>19</sup> Part IV examines the law governing disputes over the control and ownership of cryopreserved embryos.<sup>20</sup> Part V analyzes gender or sex selection of offspring.<sup>21</sup> Part VI analyzes the regulation of persons conducting *in vitro* fertilization, ART, embryo research, the use of embryos for

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11. *York v. Jones*, 717 F. Supp. 421, 428 (E.D. Va. 1989). See *infra* Part III.C for a complete discussion of this case.

12. The state of Louisiana declares that embryos are "persons" within the meaning of the law unless an *in vitro* fertilized ovum "fails to develop further over a thirty-six hour period," unless cryopreserved. LA. REV. STAT. ANN. § 9:121-130 (West 1991).

13. Rejecting both the property and person characterizations of embryos, many states have adopted the "special respect" status announced by the Tennessee Supreme Court in *Davis v. Davis*, 842 S.W.2d 588, 596 (Tenn. 1992).

14. Although no states have sought to regulate embryo donation for adoption, one New Jersey couple was fortunate enough to have triplets as a result of this occurrence. *Dateline NBC: Ready Made; New Jersey Couple Has Triplets Through Embryo Adoption* (NBC television broadcast, Sept. 14, 1998) [hereinafter *Dateline*].

15. The state of Louisiana has provided the destruction of frozen embryos to be unlawful. See LA. REV. STAT. ANN. § 9:129 (West 1991). Instead, the control over the frozen embryo vests in the physician in charge of *in vitro* fertilization as the temporary guardian of the embryo, if the parents do not assume that responsibility. *Id.* § 126. This involuntary "control" of the embryo continues until either adoptive implantation occurs or the court appoints a curator on behalf of the embryo who then decides the fate of the embryo. *Id.*

16. "Beget a child" was the term used by United States Supreme Court Justice Brennan, writing for the majority, in his perspicacious opinion in *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). The Court's holding formally encompassed an individual's birth control decisions "as to whether to bear or beget a child" to be within the fundamental right of privacy penumbra freeing those decisions from unwarranted governmental intrusion. *Id.*

17. See *infra* Part I.

18. See *infra* Part II.

19. See *infra* Part III.

20. See *infra* Part IV.

21. See *infra* Part V.

clinical research, and the disposition and sale of embryos.<sup>22</sup> Part VII reviews the status of surrogacy contracts and the controversies surrounding the determination of legal parenthood in traditional and non-traditional surrogacy.<sup>23</sup> This Article concludes that it is not the science itself, but rather how, if at all, that science should be regulated which poses the greatest challenge associated with ART. As a result, the Authors believe that uniform legislation should be developed which, at a minimum, encompasses the scientific advancements made in ART and regulates that science accordingly.

## I. PROCREATION CONSTITUTIONAL AND FEDERAL STATUTORY RIGHTS

### A. Constitutional Protections

Neither the United States Supreme Court nor the federal circuit courts<sup>24</sup> have decided a case involving a state's ability to restrict or otherwise regulate ART, or whether such regulation would pass muster under the Constitution. Arguably a person's right to use ART to procreate is rooted in the Constitution.<sup>25</sup> The first United States Supreme Court case to judicially recognize a constitutional right to procreate was *Skinner v. Oklahoma*<sup>26</sup> in 1942. The Court stated that marriage and procreation are basic civil rights of man.<sup>27</sup> The Court also declared procreation to be a fundamental right essential to the existence and survival of the race.<sup>28</sup>

Later, the Court in *Eisenstadt v. Baird*<sup>29</sup> held that a fundamental right of privacy regarding birth control decisions exists under the penumbra of the Bill of Rights and "liberty" in the Fifth and Fourteenth Amendments.<sup>30</sup> This fundamental right is the "right of the individual . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."<sup>31</sup> Writing for the majority, Justice Brennan's sagacious

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22. See *infra* Part VI.

23. See *infra* Part VII.

24. One federal district court has discussed whether a constitutional right to artificial reproduction exists. See *Cameron v. Board of Educ.*, 795 F. Supp. 228 (S.D. Ohio 1991).

25. All cases involving constitutional rights to procreate have involved coital reproduction.

26. 316 U.S. 535 (1942).

27. *Id.* at 541.

28. *Id.* at 542.

29. 405 U.S. 438 (1972).

30. *Id.* at 453-54.

31. *Id.* at 453.

use of the word "beget" likely foresaw the oncoming scientific advances in reproductive medicine.<sup>32</sup>

In 1973, the Court's decision of *Roe v. Wade*<sup>33</sup> revolutionized women's privacy rights. The holding constitutionally protected a woman's right to determine whether to terminate her pregnancy.<sup>34</sup> The *Roe* first trimester strict scrutiny standard of review deflected governmental attempts to restrict a woman's freedom of choice until *Casey v. Planned Parenthood*<sup>35</sup> in 1992. The majority, written by Justice O'Connor, held that the strict scrutiny standard of review applied to the period of non-viability of the fetus.<sup>36</sup> After that time, the government's interest in protecting the mother and child was not subject to the strict scrutiny standard of review.<sup>37</sup>

Specifically addressing one aspect of ART, a federal district court in Ohio observed that "the Supreme Court precedent is clear. A woman has a constitutional privacy right to control her reproductive functions. Consequently, a woman possesses the right to become pregnant by artificial insemination."<sup>38</sup> Thus, while neither the United States Supreme Court nor federal circuit courts have directly ruled on a case involving ART, it appears that such a right does exist under constitutional protections afforded an individual to procreate. As such, any attempt by the government to intrude or otherwise restrict a person's access to ART arguably will be limited by the necessity to prove a compelling governmental interest.

### *B. Statutory Protections Under the Civil Rights Act and Americans with Disabilities Act*

Congress has promulgated legislation prohibiting discrimination relating to procreation. The Civil Rights Act of 1964 ("CRA")<sup>39</sup> prohibits discrimination in compensation, terms, conditions, or privileges of employment on the basis of race, religion, color, national origin, or sex. The Pregnancy Discrimination Act of 1978 ("PDA"),<sup>40</sup> amending the Civil Rights Act, specifically applied the CRA to women's employment rights as related to pregnancy.<sup>41</sup> The PDA protects a

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32. *Id.*

33. 410 U.S. 113 (1973).

34. *Id.* at 164-67.

35. 505 U.S. 833 (1992).

36. *Id.* at 867-70.

37. *Id.* at 869-70.

38. *Cameron v. Board of Educ.*, 795 F. Supp. 228, 237 (S.D. Ohio 1991).

39. 42 U.S.C. § 2000a-2000h (1994).

40. *Id.* § 2000e(k).

41. *Id.* § 2000(e)(2)(a). Prior to the PDA, the Court held, on Fourteenth Amendment Equal Protection grounds, that an employer's health plan that discriminated between pregnant and

woman's choice to become pregnant while maintaining her position in the workforce, thereby ensuring equal opportunity in employment.<sup>42</sup> As a result, any employer's conduct adversely affecting a woman's employment status because she chose to undergo possibly time consuming (and expensive) artificial reproductive procedures, including *in vitro* fertilization, would likely be prohibited under the PDA. While the language of the statute appears to limit the PDA to women,<sup>43</sup> it is possible that a court could extend the law to apply to men desiring ART services,<sup>44</sup> such as men deficient in sperm production (low sperm count) or post-vasectomy (who require a re-anastomosis of their previously ligated vas deferens).<sup>45</sup>

The Americans with Disabilities Act of 1990 ("ADA")<sup>46</sup> prohibits discrimination in employment and at places of public accommodation against a person on the basis of his or her disability.<sup>47</sup> Under the ADA, a disability is defined as a physical or mental impairment which substantially limits one or more major life activities.<sup>48</sup> In *Bragdon v. Abbott*,<sup>49</sup> the United States Supreme Court found infertility constituted a serious impairment of the "major life activity" of reproduction.<sup>50</sup> Consequently, the Court specifically included infertility as an ADA recognized disability prohibiting discrimination and requiring reasonable accommodation.<sup>51</sup>

Although relatively untested at present, the constitutional and statutory protections applicable to procreation generally will likely also severely limit any attempted governmental regulation aiming to restrict the availability of ART.

non-pregnant women did not violate Title VII of the CRA because the discrimination was not between men and women. *Geduldig v. Aiello*, 417 U.S. 484, 497 (1974). A similar holding two years later prompted Congress to begin work on the PDA bill. *See General Elec. Co. v. Gilbert*, 429 U.S. 125, 145-46 (1976).

42. 42 U.S.C. § 2000(e)(2)(a).

43. *See id.* The statute uses the feminine pronoun exclusively.

44. This would be an issue of first impression as there are no reported cases discussing whether the PDA applies to men. Moreover, there is nothing in the legislative history to suggest that Congress intended men to be covered by the PDA. However, given the policy of the PDA—preventing discrimination in employment based on a woman's choice to become pregnant—it is possible that the "spirit" of the legislation could be applied to men.

45. Just as a woman's fallopian tubes may be interrupted by ligation or by removing a segment of the tube ("tube tying"), a male may have a portion of the tube serving as a conduit for sperm from his testicles to his penis (vas deferens) ligated, including removing a segment. If a male later desires to have children, his vas deferens can be reconnected or re-anastomosed.

46. 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101-12213 (1994)).

47. *Id.* § 12101(b).

48. *Id.* § 12102(2).

49. 118 S. Ct. 2196 (1998).

50. *Id.* at 2205.

51. *Id.*



## II. TERMS AND PROCEDURES OF ART

### A. *The Biology of ART*

Before analyzing the various legal issues related to ART, it is important to understand the medical technology associated with ART. Indeed, any hope of achieving consistency in the regulation of ART will require, at a minimum, generally accepted definitions of the biology of ART.

A "gamete" is a sex reproduction cell containing one-half (a haploid) of the forty-six chromosomes contained in all other human body cells.<sup>52</sup> Gametes are either a spermatozoa (or sperm,<sup>53</sup> for short) or ova (or eggs).<sup>54</sup>

One sperm fertilizes one ovum. The result of this cellular fusion is a single cell known as a "zygote."<sup>55</sup> The zygote contains forty-six chromosomes with half of the genetic contents from the genetic female ova and half of its genes from the male sperm. The zygote proceeds to multiply by cellular replication. Implantation into the wall of the uterus normally occurs four to six days after fertilization.<sup>56</sup>

If fertilization is accomplished outside the body (*in vitro* fertilization), the cellular mass is cultured until it reaches the eight cell stage (about seventy-two hours after fertilization).<sup>57</sup> At this point, the cellular structure (now called a blastomere) may be placed into a uterus or into a fallopian tube in hopes that it will implant into the uterine wall and continue developing.<sup>58</sup>

Alternatively, at the eight cell stage, the blastomere can be frozen in liquid nitrogen.<sup>59</sup> If frozen, the mass is generically termed a frozen embryo. The frozen embryo can later be thawed and placed into a fallopian tube or into a uterus to enable implantation and development into a human fetus. The process of development within the uterus (or womb) is known as gestation.

52. MILLER-KEANE ENCYCLOPEDIA & DICTIONARY OF MEDICINE, NURSING & ALLIED HEALTH 593 (5th ed. 1992) [hereinafter MILLER-KEANE].

53. Just as the plural of sheep is sheep, the plural of sperm is sperm. However, the plural of ovum is not ovum or ovums, it is ova. *Id.* at 1805.

54. *Id.*

55. *Id.* at 1639.

56. See generally Richard J. Paulson, *Human In Vitro Fertilization and Related Assisted Reproductive Techniques*, in INFERTILITY CONTRACEPTION & REPRODUCTIVE ENDOCRINOLOGY 807 (Daniel R. Mishell, M.D. et al. eds., 3d ed. 1991) (offering results of ART studies).

57. *Id.*

58. *Id.*

59. *Id.* The blastomere is also generically referred to as an embryo or pre-embryo.

Medical nomenclature changes from an eight cell blastomere to a cystic blastocoele<sup>60</sup> and then to an embryo. Biologically the blastocoele becomes an embryo when a condensation of cells, known as the "primitive streak" appears; the primitive streak develops about ten to twelve days after fertilization.<sup>61</sup>

When the developing embryo reaches a crown-rump length of five centimeters (roughly two inches), it weighs approximately eight grams.<sup>62</sup> This occurs at the end of the eighth week when the embryo has developed into a fetus.<sup>63</sup>

### B. The Procedures of ART

Procedures of ART include: artificial insemination, *in vitro* fertilization ("IVF"), and pre-implantation surgeries known as GIFT, ZIFT, and TET.<sup>64</sup> Artificial insemination is the placement of semen (sperm) into the uterus opening (cervix or cervical opening) using a tube conduit (cannula).<sup>65</sup> This semen may be fresh (ejaculate) or may be from previously frozen and recently thawed semen.<sup>66</sup> The sperm cells in the semen travel up through the uterus and into the fallopian tubes where fertilization occurs. The fertilized ovum, now a zygote, floats back down the fallopian tube into the uterus, where it implants into the uterine wall.

IVF<sup>67</sup> literally means "fertilization in a glass." IVF is accomplished by combining sperm and an ovum in a petri dish where fertilization

60. *Id.* A cystic blastocoele is a fluid-filled area with the cellular mass. *Id.* The blastomere develops into a blastocyst and then into a blastocoele. See *id.* for a complete discussion of the science of ART.

61. This primitive streak develops into three layers known as the endoderm, mesoderm, and ectoderm. WALDO NELSON, *THE NELSON TEXTBOOK OF PEDIATRICS* 30-33 (Richard E. Behrman et al. eds., 15th ed. 1996). A portion of the ectoderm invaginates into a tubular structure known as the neural tube. *Id.* Imperfect neural tube formation can be variously expressed at birth as anything from exposed neural tissue, such as spinal cord elements, to a small bony defect in a spine bone, known as spondylolithisis. *Id.* Neural tube defects are suspected when a pregnant mother's blood tests positive for alpha-feto protein. *Id.*

62. *Id.*

63. *Id.* An embryo becomes a fetus at the end of the eighth week. The crown-rump length is five centimeters, the weight is about eight grams. At this stage the eyelids have begun to form, ovaries and testicles are distinguishable, and the arms and legs have distinct fingers and toes.

64. Paulson, *supra* note 56, at 820.

65. See Michael J. Kirby, *Medical Technology and New Frontiers of Family Law in Legal Issues*, in *HUMAN REPRODUCTION* 3 (Sheila McLean ed., 1989).

66. Semen (sperm with its supporting fluids from the prostate, Cowper's glands, and seminal vesicles) may be frozen in liquid nitrogen and stored for many years. This frozen storage capacity has made possible the industry of "sperm banks" where both donated sperm, for sale, and personal sperm frozen for some future use. See MILLER-KEANE, *supra* note 52, at 793.

67. "In vitro fertilization" means fertilization outside the body. *Id.* "In vivo fertilization" means fertilization within life or, as applied here, within the body. *Id.* See generally John D. Biggers, *In Vitro Fertilization and Embryo Transfer in Historical Perspective*, in *IN VITRO FERTIL-*

occurs. When the nuclei (actually called pro-nuclei) of the sperm and the ovum have fused, a zygote has formed. This zygote may be placed into the fallopian tube using an abdominal laparoscope, a procedure known as ZIFT.<sup>68</sup> TET is a procedure where an embryo, fresh or thawed, is placed into the fallopian tube through an abdominal laparoscope.<sup>69</sup> Most commonly, direct embryo insertion is performed wherein the embryo is inserted through the cervix into the uterus using a cannula, just as is sperm in artificial insemination. The direct procedure does not involve an anesthetic and has almost none of the infection risk which accompany laparoscopic procedures.

### III. EMBRYOS AS PROPERTY, PERSONS, OR "SOMETHING IN BETWEEN"

Although federal law appears to recognize an infertile woman's right to procreate using ART,<sup>70</sup> it is less than clear what rights, if any, fertilized (combined) gametes (i.e., those potentially capable of developing into human beings) enjoy under the law. On one level, the "building blocks" of an embryo, gametes (e.g., sperm and ova), are treated as mere "property" under the law.<sup>71</sup> As a consequence, "donated" sperm relieves the male donor of all rights and responsibilities for subsequent use.<sup>72</sup> Unless the donation involves a third party intermediary like a sperm bank, however, a question may arise as to whether providing the semen specimen included the intent to relinquish all parental rights. For example, a California statute provides that the donor of semen supplied to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.<sup>73</sup> In a case where the semen specimen provided directly to a woman for her self-administered artificial insemination, the semen

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IZATION AND EMBRYO TRANSFER 3 (Alan Trounson & Carl Wood eds., 1984) (providing history).

68. See Paulson, *supra* note 56, at 820. ZIFT is an acronym for zygote intrafallopian tube transfer. *Id.*

69. See *id.* TET is an eponym for tubal embryo transfer.

70. Bragdon v. Abbott, 118 S. Ct. 2196 (1998).

71. Hecht v. Superior Court, 20 Cal. Rptr. 2d 275 (Ct. App. 1993).

72. See generally McDonald v. McDonald, 608 N.Y.S.2d 477 (App. Div. 1994) (divorce proceeding holding wife as natural mother even though she did not provide eggs in IVF procedure). Donation implies an intention to relinquish all rights to the thing donated. For example, when one donates blood, one relinquishes all rights and claims to any further use of that donated blood. Donation should not be confused with provision or providing. Providing sperm to an end user does not, in and of itself, relinquish rights to the product of that use. Hence, a male providing a semen specimen to a lady friend so that she may self-inseminate does not sever the male's rights to a paternity claim, including visitation of his genetic offspring.

73. CAL. FAM. CODE § 7613(b) (West 1994).

provider was granted paternity rights for the resulting child.<sup>74</sup> The court held that the woman's failure to utilize a physician intermediary, as provided by statute, precluded her claim for exclusive parental rights.<sup>75</sup>

### A. *Liability of a Sperm Bank*

A sperm bank exemplifies the classic third party intermediary.<sup>76</sup> Although frozen sperm may be stored by the owner for possible future use, more commonly the sperm bank pays the sperm donor to provide a specimen which then becomes the property of the sperm bank.<sup>77</sup> The donor signs a contract relinquishing all rights to the sperm. The sperm may be cryopreserved for future commercial sale by the sperm bank.

The sperm bank is liable for negligence for mistakes made in record-keeping when a recipient receives semen which is not that of the purported donor.<sup>78</sup> In addition, the question of whether the commercial provider of the sperm is also liable for negligent infliction of emotional distress caused by insemination with semen not selected by the recipient was answered in *Harnicher v. University of Utah Medical Center*.<sup>79</sup> The court in that case held as a matter of law that, because no physical injury occurred to the wife or child, no negligent infliction of emotional distress cause of action could lie.<sup>80</sup>

The question of whether cryopreserved semen could be the subject of a devise in a will was litigated in 1993.<sup>81</sup> A divorced attorney with two adult children committed suicide and devised his cryopreserved semen to his girlfriend, accompanied by a letter indicating his intention that she produce his posthumous offspring.<sup>82</sup> The court held the frozen sperm to be the decedent's "property" and thus, subject to testamentary disposition.<sup>83</sup> In so doing, the probate court specifically

74. *Jhordan C. v. Mary K.*, 224 Cal. Rptr. 530 (Ct. App. 1986).

75. *Id.*

76. For information on sperm banks, see California Cryobank, Inc.'s website (visited on Sept. 22, 1998) <<http://www.cryobank.com>>.

77. Commercial sperm donors provide extensive information on personal medical and family medical history which is made available to potential purchasers.

78. *Harnicher v. University of Utah Med. Ctr.*, 962 P.2d 67 (Utah 1998).

79. *Id.*

80. *Id.* at 71-72.

81. *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275 (Ct. App. 1993). The probate court commented that "we are all agreed that we are forging new frontiers because science has run ahead of the common law. And we have got to have some sort of appellate decision telling us what rights are in these uncharted territories." *Id.* at 280 n.3. This sentiment must be very common today in courts addressing the legal issues raised by all expanding scientific frontiers.

82. *Id.* at 277.

83. *Id.* at 283.

recognized that it was "forging new frontiers because science has run ahead of the common law."<sup>84</sup> The court also added it needed "some sort of appellate decision telling us what rights are in these uncharted territories."<sup>85</sup>

### B. Ova "Banks": Now a Technological Possibility

Until recently, ova extracted from the ovaries required immediate fertilization because storage was not technically possible.<sup>86</sup> When implanted into the same woman's uterus (such as might occur in a woman with obstructed fallopian tubes), the woman would necessarily be the genetic mother and the gestational mother (the birth mother). Where the ovum is obtained by a another woman, fertilized by sperm of the intended father, and implanted into the wife, the wife is the gestational/birth mother but not the genetic mother.

The latter situation presented itself in *McDonald v. McDonald*,<sup>87</sup> a New York divorce and custody dispute. In *McDonald*, the ovum was obtained from another woman, fertilized with the husband's sperm, and implanted into the wife's uterus.<sup>88</sup> The husband claimed that, because the wife was not genetically related to the child, she was not the mother and therefore not entitled to custody or visitation rights.<sup>89</sup> The court held that, because the ovum was "donated," any rights or claims of the genetic mother were severed.<sup>90</sup> Because a child can only have one legal mother, the gestational mother (the soon to be former wife) was held to be the natural and legal mother, entitled to custody and visitation rights equal to those of the father.<sup>91</sup> Essential to the holding was the court's finding of "donation" of the ovum by the egg provider.<sup>92</sup>

Thus, in the past gamete cryopreservation had been limited to sperm. Now elective cryopreservation of ova provides the ovulating

84. *Id.* at 280 n.3.

85. *Id.*

86. Two scientific articles published in early 1998 demonstrated that cryopreservation of the human ovum for later thawing and *in vitro* fertilization had become a practical reality. Laura Bonetta, *Postponing Pregnancy by Freezing Oocytes*, 4 NAT. MED. (no. 2) 138 (1998); Kutluck Oktay, M.D. et al., *Cryopreservation of Immature Human Oocytes and Ovarian Tissue: An Emerging Technology?*, 69 FERTILITY & STERILITY 1 (1998); E. Young et al., *Triplet Pregnancy After Intracytoplasmic Sperm Injection of Cryopreserved Oocytes: Case Report*, 70 FERTILITY & STERILITY (no. 2) 360 (1998).

87. 608 N.Y.S.2d 477 (App. Div. 1994).

88. *Id.* at 478.

89. *Id.* at 479. No state permits a child to have more than one *legal* mother (and one *legal* father).

90. *Id.* at 480.

91. *Id.*

92. *Id.*

female the option of cryopreserving her eggs for her own future use or donating the frozen eggs for another's use. The procedure portends the establishment of ova banks where consumers can select preferred maternal phenotypes,<sup>93</sup> just as consumers currently choose between desired sperm donor phenotypes.

### C. Embryos

While male and female gametes are considered property, zygotes and embryos can be considered property, persons, or something in between property or persons. The classification applied will govern the viability of ART contracts<sup>94</sup> and the rights of ownership and control of the fate of the embryo.

For example, in one case a California couple went to a Virginia fertility clinic where several of the wife's ova were fertilized with the husband's sperm.<sup>95</sup> Two attempts at implantation were unsuccessful, and the remainder of the embryos were cryopreserved.<sup>96</sup> Later the couple sought to have the frozen embryos transferred to a California fertility clinic for possible future implantation.<sup>97</sup> The Virginia fertility clinic refused to transfer the couple's frozen embryos.<sup>98</sup> The court held the frozen embryos to be the "property" of the couple.<sup>99</sup> As their property, the court ruled the couple had a right to have the embryos transferred.<sup>100</sup>

This holding sustains the American Fertility Society's ethical statement on IVF that embryos are the "property" of the gamete providers.<sup>101</sup> As such, the property owners had the right to decide, at their sole discretion, the disposition of their property.

The only state to pass legislation attempting to regulate the legal rights provided to embryos is Louisiana.<sup>102</sup> It declares that embryos are "persons" entitled to all the usual protections of any "juridical

93. A phenotype is the term used to describe genetic expression in a person. See MILLER-KEANE, *supra* note 52, at 1146. Because an individual's actual genotype is not known, all that is available is a description of the expression of that genetic constituency such as hair color, height, weight, race, etc. See *id.*

94. See *infra* Part VII.

95. *York v. Jones*, 717 F. Supp. 421, 423-24 (E.D. Va. 1989).

96. *Id.* at 420.

97. *Id.* at 424.

98. *Id.*

99. *Id.* at 425.

100. *Id.* at 426-27.

101. American Fertility Soc'y, *Ethical Statement on In Vitro Fertilization*, 41 FERTILITY & STERILITY (no. 1) 12 (1984).

102. LA. REV. STAT. ANN. § 9:121-130 (West 1991). Thus, the only time an embryo can be discarded is when it shows no signs of life at 36 hours after fertilization. *Id.* § 9:129. At this time, no cases have been published interpreting this statutory scheme.

person” unless an “in vitro fertilized human ovum that fails to develop further over a thirty-six hour period except when the embryo is in a state of cryopreservation.”<sup>103</sup> Specifically, the statute states that the fertilized human ovum is deemed to be a biological human being “which is not the property of the physician which acts as an agent of fertilization, or the facility which employs him or the donors of the sperm and ovum.”<sup>104</sup> If the IVF gamete providers renounce, “by notarial act,” their parental rights for in utero implantation, the embryo thereby becomes available for adoption.<sup>105</sup> In this circumstance, the physician becomes the temporary guardian of the embryo “person.”<sup>106</sup> The physician’s responsibility to safeguard the embryo is only relieved by the court appointing a “curator” to guard the interests of the embryo awaiting adoption.<sup>107</sup>

Rejecting both the property and person characterizations of embryos, many jurisdictions have adopted the “special respect” status accorded embryos by the Tennessee Supreme Court in *Davis v. Davis*.<sup>108</sup> The court concluded that “pre-embryos”<sup>109</sup> are not, strictly speaking, either persons or property, but occupy an interim category that entitles them to special respect because of their potential for human life.<sup>110</sup> The gamete providers have an ownership interest in that they have decision-making authority concerning disposition of the embryos, within the scope of the applicable law.<sup>111</sup> This position appears to give courts of equity maximum flexibility in deciding the difficult issues of, among others, ownership and disposition of embryos.

#### IV. LIABILITY RESULTING FROM THE CONTROL AND OWNERSHIP OF CRYOPRESERVED EMBRYOS

The potential liability resulting from the control and ownership of embryos may turn on the legal status afforded to an embryo. For example, if an embryo is treated as mere property, the gamete providers perhaps may have a cause of action for conversion for the mishandling of the embryo. If, on the other hand, the embryo is deemed a person, there may be a cause of action for injury or destruction of the embryo

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103. *Id.*

104. *Id.* § 9:126.

105. *Id.* § 9:130.

106. *Id.* § 9:126.

107. *Id.*

108. 842 S.W.2d 588 (Tenn. 1992).

109. Biologically, this is a correct term because the organism has not developed the primary streak which characterizes the embryo. Most courts use the more generic term embryo to mean an organism greater than the four cell stage and less than a fetus.

110. *Davis*, 842 S.W.2d at 597.

111. *Id.*

under the same common law theory as damages for mishandling the body of a close relative.

Some courts appear to avoid the issue altogether. In one case, a Virginia couple brought a cause of action for negligent infliction of emotional distress when their newly created embryos were washed with an albumin solution contaminated with the virus of Creutzfeldt-Jakob disease.<sup>112</sup> An FDA letter directing withdrawal of the albumin had been overlooked by the IVF clinic.<sup>113</sup> Washing the embryos in the contaminated albumin rendered the embryos unusable.<sup>114</sup> The district court held that, because the plaintiffs themselves had not sustained physical injury, there was no cause of action for negligent infliction of emotional distress.<sup>115</sup>

Other courts have recognized a cause of action for emotional distress for the mishandling or destruction of embryos. Indeed, the first purported attempt in the United States at IVF and embryo freezing occurred in the early 1970s at no less a prestigious institution than Columbia Presbyterian Hospital in New York.<sup>116</sup> Believing that IVF was unethical and immoral, the department chair unilaterally destroyed the embryo when he learned of the planned implantation.<sup>117</sup> He did this on his own initiative and without notice or consultation with the couple or the doctors involved.<sup>118</sup> A year later, the couple sued the department chair and Columbia Presbyterian for intentional infliction of emotional distress.<sup>119</sup> This ignominious inauguration of frozen embryo IVF in the United States resulted in the jury awarding the couple \$500,000 in damages.<sup>120</sup>

Oftentimes embryos become the subject of dispute between the two gamete providers. Two state supreme courts have ruled on the ownership and control of cryopreserved human embryos in divorce settings. In 1992, the custody of the frozen embryos of Junior and Mary Sue Davis was decided by the Tennessee Supreme Court.<sup>121</sup> The court held that, absent prior agreement of the embryos' disposition, the male gamete provider had equal rights to determine the fate of the

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112. *Doe v. Irvine Scientific Sales Co.*, 7 F. Supp. 2d 737, 738 (1998).

113. *Id.*

114. *Id.* at 738.

115. *Id.* at 741.

116. *Del Zio v. Columbia Presbyterian Med. Ctr.*, No. 74 Civ. 3588 (S.D.N.Y. Nov. 14, 1978) (on file with Authors).

117. *Id.* at 3.

118. *Id.* at 4.

119. *Id.* at 5.

120. See Deborah Kay Walther, "Ownership" of the Fertilized Ovum In Vitro, 26 FAM. L.Q. 235, 240 (1992) (discussing the *Del Zio* case).

121. *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992).



couple's frozen embryos.<sup>122</sup> The court reasoned that the male gamete provider husband had no right to demand that their embryo be implanted into his wife.<sup>123</sup> Likewise, the female gamete provider had no right to require the male gamete provider to become a father.<sup>124</sup>

While Mary Sue Davis initially had wanted the embryos for her own future use, by the time the court heard the case she had changed her mind and professed a desire to donate the embryos for adoption by another couple.<sup>125</sup> The court weighed Junior Davis' interest in avoiding parenthood against Mary Sue's interest in donating the embryos to another couple for adoptive implantation.<sup>126</sup> The court concluded that disputes involving the disposition of embryos produced by IVF and preserved should first be resolved by the gamete providers.<sup>127</sup> Absent that resolution, their prior agreement should control.<sup>128</sup> In the event that there was no prior agreement, the interests of the parties should be balanced.<sup>129</sup> Assuming the other party has a reasonable possibility of achieving parenthood by means other than by using the disputed embryos, the party wishing to avoid procreation should prevail.<sup>130</sup> Thus, Junior Davis was granted ownership and control of the frozen embryos.<sup>131</sup>

Recently, New York's highest court faced a situation similar to that in *Davis*. In *Kass v. Kass*,<sup>132</sup> the former wife demanded sole custody of five frozen embryos and contended that "these were her only chance for genetic motherhood."<sup>133</sup> The former husband objected to the burdens of unwanted fatherhood.<sup>134</sup> According to the court, a woman's constitutional autonomy was implicated only upon pregnancy with the implanted embryo.<sup>135</sup> The New York Court of Appeals agreed with the *Davis* holding that the parties' pre-IVF agreement controlled.<sup>136</sup> Thus, per this prior written agreement, the

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122. *Id.* at 604.

123. *Id.*

124. *Id.*

125. *Id.* at 590.

126. *Id.* at 603-04.

127. *Davis*, 842 S.W.2d at 603-04.

128. *Id.* at 604.

129. *Id.*

130. *Id.*

131. *Id.* at 604-05.

132. 696 N.E.2d 174 (N.Y. 1998).

133. *Id.* at 175.

134. *Id.*

135. *Id.* at 177.

136. *Id.*

embryos were donated to an IVF program where they could be used for legitimate research purposes.<sup>137</sup>

The status of embryos of decedents received notoriety when a California couple died in a plane crash leaving behind several frozen embryos.<sup>138</sup> The couple died intestate, leaving an estate valued at \$8,000,000.<sup>139</sup> The Australian government, having jurisdiction over the embryos, ultimately decided that the embryos could be donated for adoption without any rights of inheritance.<sup>140</sup>

The California Probate Code is inconsistent with this decision, stating that "relatives of the decedent conceived before the decedent's death but born thereafter inherit as if they had been born in the lifetime of the decedent."<sup>141</sup> An embryo conceived during the decedent's life but implanted some months or years later would appear to have the rights of a pretermitted heir.<sup>142</sup> This issue has not yet been litigated, but such children resulting from previous frozen embryos appear to have standing to test the statute.

No state has regulated or proscribed embryo donation for adoption. Indeed, this has been the source of triplets for one New Jersey couple.<sup>143</sup> The fate of embryos not donated for adoption, but abandoned by their progenitors, is less certain. Some scholars believe that if embryos are considered property, the state laws of abandoned personal property should apply to determine the fate of the embryos.<sup>144</sup>

Great Britain assumed governmental control over frozen embryos when promulgating a law providing for the destruction of abandoned embryos.<sup>145</sup> The British government announced that 3,000 frozen embryos more than five years old, unclaimed by August 1, 1996, would be destroyed.<sup>146</sup> Italian doctors offered to purchase and transport these embryos to Italy for implantation into women willing to receive

137. *Id.*

138. James Lieber, *The Case of the Frozen Embryos*, SAT. EVENING POST, Oct. 1989, at 50.b.

139. *Id.*

140. *Id.*

141. CAL. PROB. CODE § 6407 (West 1994).

142. *Id.*

143. See *Dateline*, *supra* note 14.

144. See Lynne M. Thomas, Comment, *Abandoned Frozen Embryos and Texas Law of Abandoned Personal Property: Should There Be a Connection*, 29 ST. MARY'S L.J. 255, 264 (1997).

145. Human Fertilization and Embryology Act, 1990, ch. 37 (Eng.).

146. In the United States, a live birth has occurred from an embryo frozen for seven and one-half years. See Heesun Wee, "Oldest" Embryo Brought to Life, L. A. DAILY NEWS, Feb. 17, 1998, at N1. A healthy 8 pound, 15 ounce boy was born at a Tarzana hospital to a woman, 44, and her husband, 54, who asked to remain anonymous to protect their privacy. *Id.* Not reported was whether the embryo was genetically theirs or an adopted embryo.

them.<sup>147</sup> The Catholic Church denounced the planned destruction as a "prenatal massacre."<sup>148</sup> On August 1, 1996, the British destroyed the 3,000 embryos as scheduled.<sup>149</sup> Britain has subsequently amended its law to require ten years of abandonment mandating embryo destruction.<sup>150</sup> However, Britain has not recanted from its position of governmental control of abandoned embryos.<sup>151</sup>

In contrast, Louisiana has provided the destruction of frozen embryos to be unlawful.<sup>152</sup> Under Louisiana law, the control over the frozen embryo vests in the IVF physician as the temporary guardian of the embryo, if the parents do not assume that responsibility.<sup>153</sup> This control and stewardship of the frozen embryo continues until either adoptive implantation occurs, or the court appoints a "curator" for the embryo who then controls the fate of the embryo.<sup>154</sup> Frozen embryos may not be destroyed under the Louisiana statute.<sup>155</sup>

## V. GENDER OR SEX SELECTION OF OFFSPRING

Selective pregnancy reduction, a medical procedure used in multiple pregnancies, has been used to select the gender of the fetus brought to birth. The euphemistic "selective pregnancy reduction" can more honestly and accurately be labeled sex or gender selection abortion.<sup>156</sup> There is an intuitive disfavor accompanying this mode of gender selection. Fortunately, an advance in ART apparently will render the offensive practice obsolete. Scientists in 1996 published articles on the availability of a technique to separate sperm of mammals into those carrying an X chromosome and those carrying a Y chromosome.<sup>157</sup> In February of 1998, a group of Spanish scientists demon-

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147. See Youssef M. Ibrahim, *Ethical Furor Erupts in Britain: Should Embryos Be Destroyed?*, N.Y. TIMES, Aug. 1, 1996, at A1.

148. *Id.*

149. *Id.*

150. Human Fertilization and Embryology Act Regulations of 1990, 1996, ch. 37, § 314 (Eng.).

151. *Id.*

152. LA. REV. STAT. ANN. § 9:129 (West 1991).

153. *Id.* § 9:126.

154. *Id.* § 9:130.

155. *Id.* § 9:128.

156. Jodi Danis, *Sexism and the Superfluous Female: Arguments for Regulating Pre-implantation Sex Selection*, 18 HARV. WOMEN'S L.J. 219, 219 (1995).

157. D.G. Cran & L.A. Johnson, *The Predetermination of Embryonic Sex Using Flow Cytometrically Separated X and Y Spermatozoa*, 2(4) HUM. REPROD. UPDATE 355 (1996); L.A. Johnson, *Gender Preselection in Mammals: An Overview*, 103(8-9) DTW DEUTSCH TIERARZTL WOCHENSCHR 288 (1996). The studies were based on the fact that a sperm with an X chromosome contains about 3% more DNA than a sperm with a Y chromosome. Simply, the DNA is stained with fluorescein dye and separated with the use of a laser light measuring the amount of DNA, and then separated using flow cytometry and cell sorting instrumentation. Studies in cat-

strated that the fluorescent in-situ hybridization ("FISH") technique would produce 80 to 90% purity for X spermatozoa and 60 to 70% for Y spermatozoa.<sup>158</sup>

This remarkable advance resulted in the Genetics and IVF Institute, based in Fairfax, Virginia, reporting an 85% success rate in selecting girls (thirteen of fourteen pregnancies) and a slightly lower rate of success in those desiring male fetuses.<sup>159</sup> One obvious benefit of this procedure is that it enables parents to avoid having children with sex-linked or X-linked diseases, such as common hemophilia and a progressive blindness known as X-linked retinitis pigmentosa, simply by selecting female offspring. Among the troubling aspects of this new technique is a strong preference in some cultures for male offspring and the social disruptions this may engender. The Authors foresee a plethora of scholarly articles in the near future regarding the ethical and moral aspects of gender selection using this new ART technology.

## VI. REGULATION OF *IN VITRO* FERTILIZATION, EMBRYO RESEARCH, AND THE DISPOSITION AND SALE OF EMBRYOS

### A. Federal Regulation

In 1992, the Fertility Clinic Success Rate and Certification Act became effective.<sup>160</sup> The Act requires ART clinic programs to report their success rates to the Centers for Disease Control ("CDC") by sending the data through the Department of Health and Human Services ("HHS").<sup>161</sup> Standards for reporting pregnancy success rates are to be established by the CDC.<sup>162</sup> In the past, voluntary reporting often led to exaggerated claims of success. These success rates are to be made available by the CDC to the general public.<sup>163</sup> Thus, the public desiring ART would have a more accurate prediction of the chances to obtain a live baby.

Another provision required the CDC to develop a model program for the certification of IVF laboratories, which could be adopted by

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tle and rabbits produced greater than 90% predictability of the desired gender. Studies in pigs averaged predictions over 85%.

158. F. Vidal et al., *Efficiency of MicroSort Flow Cytometry for Producing Sperm Populations Enriched in X- or Y- Chromosome Haplotypes: A Blind Trial Assessed by Double and Triple Colour Fluorescent In-situ Hybridization*, 13(2) HUM. REPROD. 308 (1998).

159. See Diane Lore, *Procedure Lets Couple Pick Sex of Their Child*, ATLANTA J. & CONST., Sept. 10, 1998, at 1D.

160. Fertility Clinic Success and Certification Act, 106 Stat. 3146 (codified as amended at 42 U.S.C. §§ 201, 263(a)(1) (1994)).

161. *Id.* § 263(a)(1)(a).

162. *Id.* § 263(a)(1)(b).

163. *Id.*

each state.<sup>164</sup> Certification would theoretically maximize the quality of IVF, assure consistent application of established procedures, and guarantee accurate reporting. Unfortunately, the program lacked implementation funding until 1996, when a mere \$1,000,000 was allocated by HHS to the CDC. While the work has begun, to date there have been no model regulations promulgated or reports of clinic success available from the CDC.

Federal funding for embryo research has run onto a regulatory brick wall. In 1993, the National Institutes of Health Revitalization Act provided for the elimination of the HHS Ethical Advisory Board.<sup>165</sup> While the Board had specifically concluded that embryo research was theoretically ethical, the National Institute of Health ("NIH") never allocated any funds for embryo research.<sup>166</sup> Elimination of this Board evidently was a signal to NIH to proceed with funding embryo research experiments. Ever cautious and politically prudent, the NIH convened another group of experts, the Human Embryo Research Panel, consisting of experts in the fields of medicine, law, ethics, and public policy.<sup>167</sup> On the basis of this panel's recommendation to fund embryo research (including intentionally creating embryos solely for research purposes), the Advisory Committee to the Director of the NIH advised the NIH Director to begin funding research.<sup>168</sup> In response, President Clinton directed the NIH not to allocate any funds for embryo research.<sup>169</sup> Subsequently, Congress passed Public Law 105-78 statutorily prohibiting the use of federal funds for embryo research of any kind, including destroyed, discarded, or otherwise unusable embryos.<sup>170</sup> Thus, while the law proscribes the use of federal funds for embryo research, there is no federal legislation regulating embryo research in the private sector. As a result, whatever benefits are distilled from private sector embryo

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164. *Id.* § 263(a)(2).

165. National Institutes of Health Revitalization Act, 107 Stat. 122 (codified as amended in scattered sections of 42 U.S.C., 21 U.S.C., 8 U.S.C.) (1994).

166. 42 U.S.C. § 289(g).

167. NATIONAL INSTS. OF HEALTH, REPORT OF THE HUMAN EMBRYO RESEARCH PANEL D-4 (1994) (copies of this report may be obtained by contacting NIH). For a summary on the panel's findings, see George J. Annas et al., *The Politics of Human Embryo Research: Avoiding Ethical Gridlock*, 334 NEW ENG. J. MED. 1329 (1996).

168. R. Alta Charo, *The Hunting of the Snark: The Moral Status of Embryos, Right-to-Lifers, and Third World Women*, 62 STAN. L. & POL'Y REV. 11, 14 (1995).

169. *Id.* (quoting Statement by the President on NIH Recommendation Regarding Human Embryo Research, U.S. Newswire, Dec. 2, 1994).

170. Departments of Labor, Health and Human Services, Education and Related Agencies Appropriations Act, 1998, 111 Stat. 1467 (codified as amended in scattered sections of 42 U.S.C.) (1997).

research are likely to cost the American public a great deal more due to commercial patents.

### *B. State Regulation*

All three of the state statutes criminalizing embryo experimentation which have been challenged in federal court have been held unconstitutional. The Fifth Circuit examined a Louisiana abortion statute criminalizing experimentation on any embryo or fetus unless such experiments were therapeutic.<sup>171</sup> The court found the terms "experiment" and "therapeutic" to be unconstitutionally vague.<sup>172</sup>

The Tenth Circuit reviewed a federal district court decision invalidating a Utah statute criminalizing embryo or fetus experimentation on grounds that the use of the terms "experimentation" and "benefit" were unconstitutionally vague.<sup>173</sup> Finally, the Northern District of Illinois held the failure to define the term "therapeutic" in the Illinois statute criminalizing embryo experimentation rendered it unconstitutionally vague.<sup>174</sup>

Subsequently, Louisiana<sup>175</sup> and Pennsylvania<sup>176</sup> passed laws criminalizing embryo experimentation, all containing more specific definitions of the terms previously declared vague. North Dakota<sup>177</sup> and Rhode Island<sup>178</sup> both maintain statutes criminalizing aspects of embryo experimentation. These statutes have not been subject to federal court constitutional challenges.

Florida,<sup>179</sup> Massachusetts,<sup>180</sup> Michigan,<sup>181</sup> and Minnesota<sup>182</sup> ban non-therapeutic embryo research. New Hampshire explicitly limits the maintenance of non-frozen embryos outside the uterus to fourteen days and prohibits the transfer of research embryos to a uterine cavity.<sup>183</sup>

171. *Margaret S. v. Edwards*, 794 F.2d 994 (5th Cir. 1986).

172. *Id.* at 999.

173. *Jane L. v. Bangerter*, 61 F.3d 1493, 1506 (10th Cir. 1995).

174. *Lifchez v. Hartigan*, 735 F. Supp. 1361, 1376 (N.D. Ill. 1990).

175. LA. REV. STAT. ANN. § 9:122 (West 1991).

176. 18 PA. CONS. STAT. ANN. § 3216 (West 1983 & Supp. 1998).

177. N.D. CENT. CODE § 14-02.2-01 (1997).

178. R.I. GEN. LAWS § 11-54-1 (1994).

179. FLA. STAT. ANN. § 390.0111(6) (West Supp. 1999).

180. MASS. GEN. LAWS ANN. ch. 112, § 12J (West 1996).

181. MICH. COMP. LAWS ANN. § 333.2685 (West 1992).

182. MINN. STAT. ANN. § 145.422 (West 1998).

183. N.H. REV. STAT. ANN. § 168-B:15 (1994).

Seven states and the District of Columbia specifically prohibit the sale of embryos.<sup>184</sup> Georgia permits payment for embryos to be used for health services education.<sup>185</sup> Michigan<sup>186</sup> and Rhode Island<sup>187</sup> prohibit payment for unlawfully used or transferred embryos. Four other states specifically prohibit the sale of embryos for research purposes.<sup>188</sup>

The regulation of ART has been lax, consistent with an apparent fundamental procreation "right of access" to ART. The United States Supreme Court has not yet ruled whether procreational privacy rights extend to the non-coital procedures of ART. Assuming these rights apply to non-coital reproduction, one would expect the Supreme Court to extend the onerous strict scrutiny standard of review to governmental regulation.

Few states have attempted general regulation of ART. The most benign attempt is Pennsylvania's requirement that ART clinics file reports on the number of personnel employed, and the number of eggs fertilized, implanted, and discarded at any given clinic site.<sup>189</sup> Virginia<sup>190</sup> and Massachusetts require written informed consents signed by ART patients before ART can be undertaken.<sup>191</sup> These consents must contain information specifying the success rates of the particular clinic.<sup>192</sup>

### C. *Industry Self-Regulation*

Self-regulation has occurred primarily through the American Society for Reproductive Medicine.<sup>193</sup> This organization developed laboratory guidelines and clinical standards which members are expected, but not required, to follow.<sup>194</sup> Membership, as well as adherence to

184. D.C. CODE ANN. § 6-2601(b) (1995); FLA. STAT. ANN. § 873.05(1)-(3) (West 1997); 755 ILL. COMP. STAT. 50/8.1 (West 1992); LA. REV. STAT. ANN. § 9:122 (West 1991); MINN. STAT. ANN. § 145.422(3) (West 1998); 18 PA. CONS. STAT. ANN. § 3216(b)(3) (West Supp. 1998); TEX. PENAL CODE ANN. § 48.02 (West 1994); UTAH CODE ANN. § 76-7-311 (1995); VA. CODE ANN. § 32.1-289.1 (Michie 1997).

185. GA. CODE ANN. § 16-12-160(b)(5) (1996).

186. MICH. COMP. LAWS ANN. § 333.2690 (West 1992).

187. R.I. GEN. LAWS § 11-54 1(f) (1994).

188. ME. REV. STAT. tit. 22, § 1593 (West 1992); MASS. GEN. LAWS ANN. ch. 112, § 12(J)(a)(IV) (1996); MICH. COMP. LAWS ANN. § 333.10204(1); N.D. CENT. CODE § 14-02.2-02(4) (1997).

189. 18 PA. CONS. STAT. ANN. § 3213(e) (West 1983).

190. VA. CODE ANN. § 54.1-2971.1 (Michie 1998).

191. H.B. 2863, Reg. Sess. (Mass. 1997).

192. *Id.*; VA. CODE ANN. § 54.1-2971.1 (Michie 1998).

193. American Society for Reproductive Medicine, Statement on Regulation of ART (Nov. 17, 1995).

194. *Id.*

the promulgated guidelines, is voluntary.<sup>195</sup> The director of the CDC, Dr. William Roper, testified that 90% of clinics were voluntarily reporting their success rates as of 1991.<sup>196</sup> However, the system lacks an audit mechanism assuring the accuracy of reported data.<sup>197</sup>

## VII. SURROGACY

### A. Traditional Surrogacy Contracts

Traditional surrogacy involves a contract between an infertile couple (H and W, for example) and a fertile woman (surrogate).<sup>198</sup> In the traditional surrogacy contract, the surrogate agrees to be inseminated with H's sperm and to carry the pregnancy to term. After the birth of the baby, the surrogate promises to relinquish all rights to the baby, transfer the baby to H and W, and facilitate W's adoption of the baby.<sup>199</sup> For this, all the surrogate's expenses are paid by H and W in addition to a fee for the surrogate's services. These traditional surrogate contracts have not been well received by the common law courts.

In 1988, *In re Baby M*,<sup>200</sup> was the first case to reach a state supreme court. In this case, the court was asked to determine the validity of a contract providing a new way to bring a child into a family.<sup>201</sup> In addition to expenses, the surrogacy contract provided for a fee of \$10,000 for the woman's services.<sup>202</sup> For this consideration, the woman promised to be inseminated with the contracting party husband's sperm and to carry the conceived child to birth.<sup>203</sup> She promised to then deliver

195. *Id.*

196. *Fertility Clinic Services: Hearing on H.R. 3940 Before the Subcomm. on Health and the Env't of the House Comm. on Energy and Commerce*, 102d Cong. 1, 17 (1992) (statement of Dr. William Roper, Director, CDC).

197. Judith F. Daar, *Regulating Reproductive Technologies: Panacea or Paper Tiger?*, 34 *Hous. L. REV.* 609, 637-38 (1997); Jean M. Eggen, *The "Orwellian Nightmare" Reconsidered: A Proposed Regulatory Framework for the Advanced Reproductive Technologies*, 25 *GA. L. REV.* 625, 667 (1991).

198. Surrogacy origin dates back as far as Genesis. Sarah, Abraham's infertile wife, directs him to "go into my maid," Hagar, so that Sarah "may found a family through her." Genesis 16:2. Thereby, Hagar became the first documented surrogate. What did Hagar have to say about this? We do not know.

The second documented surrogate was Rachel's slave Bilhah. Infertile Rachel encouraged her husband Jacob to "lie with [Bilhah], so that she may bear sons to be laid upon my knees, and through her I too may build up a family." *Id.* 30:3-5.

From these early surrogacy arrangements, exploitation of surrogates has been suspect. However, is there exploitation of the surrogate as a woman or exploitation of the surrogate as a slave that is the dominant concern?

199. Here the sperm provider is the undisputed father of the child.

200. 537 A.2d 1227 (N.J. 1988).

201. *Id.* at 1234.

202. *Id.*

203. *Id.*



the child to the husband-father, and assist with any formalities of adoption by the wife.<sup>204</sup> After the child was born, however, the gestational mother refused to honor the contract and demanded custody of the child.<sup>205</sup> The husband and wife sued for specific enforcement of the contract.<sup>206</sup>

The trial court held that the New Jersey statutes governing adoption, termination of parental rights, and the prohibition of the payment of money in connection with adoption did not apply to surrogacy contracts.<sup>207</sup> The trial court also held the surrogacy contract valid and ordered specific performance of the contract.<sup>208</sup> The trial court granted the husband sole custody of the child,<sup>209</sup> severed parental rights of the surrogate, and granted adoption of the child by the wife.<sup>210</sup>

On appeal, the New Jersey Supreme Court reversed.<sup>211</sup> The court invalidated the surrogacy contract, holding that it conflicted with the same laws the trial court found inapplicable.<sup>212</sup> Furthermore, the court held that the payment of money to a surrogate mother was illegal, contrary to public policy, and potentially "degrading to women."<sup>213</sup> While the court granted custody to the father, it voided the mother's parental rights, the wife's adoption of the child, and declared the surrogate to be the child's natural and legal mother.<sup>214</sup> The court, however, stated that where a woman "voluntarily and without payment agrees to act as a surrogate, provided she is not subject to a binding agreement to surrender her child, no New Jersey law is offended."<sup>215</sup>

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204. *Id.*

205. *Id.* at 1237.

206. *Baby M*, 537 A.2d at 1237.

207. *In re Baby M*, 525 A.2d 1128, 1157-58 (N.J. Super. 1987).

208. *Id.* at 1166.

209. The trial court found, among others, the following facts: The surrogate party fled the state with the baby to avoid service of process, lived in 20 different motels and homes in the next three months to avoid prosecution, threatened to kill herself, kill the child, and falsely accused the husband of sexually molesting the surrogate's other daughter. *Id.*

210. *Id.* at 1175.

211. *Baby M*, 537 A.2d at 1240.

212. *Id.*

213. *Id.* at 1234.

214. *Id.* at 1235.

215. *Id.* Florida, Nevada, New Hampshire, and Virginia have adopted statutes wherein unpaid surrogacy contracts are explicitly enforceable, although New Hampshire requires advance judicial approval of the agreement and even then permits the surrogate to opt out of the agreement within 72 hours of the birth of the child. See *infra* notes 334-39 and accompanying text. Virginia requires the intended mother to be infertile, and advance judicial approval of the agreement (but not opt out provision) for the contract to be enforceable. VA. CODE ANN. § 20-160(B), 20-160(B)(8) (Michie 1995).

A few years later, a California court ruled on the validity of "traditional surrogacy" contracts in California.<sup>216</sup> First, the court distinguished traditional surrogacy from an earlier California Supreme Court case addressing "gestational surrogacy."<sup>217</sup> The court relied on the California Family Code requirement that consent for adoption be given in the presence of a licensed social worker.<sup>218</sup> The court reasoned that because traditional surrogacy contracts necessarily are entered into before the child is born, they could not comply with the California Family Code provision.<sup>219</sup> Consequently, traditional surrogacy contracts are invalid in California.<sup>220</sup> Of course, a voluntary relinquishment of parental rights by the mother after the child's birth, in compliance with the family code, would be permitted because the elements of a statutory adoption would be satisfied.<sup>221</sup>

The settled common law provides that traditional surrogacy contracts are invalid or unenforceable. Slight unsettling of the common law occurred in the 1998 Connecticut Supreme Court case of *Doe v. Doe*.<sup>222</sup> The couple's advertisement for a surrogate in their local newspaper resulted in a woman's agreement to serve as their surrogate.<sup>223</sup> Of consequence was the fact that the surrogate was also married and living with her husband at the time.<sup>224</sup>

Not a couple to waste perfectly good medical insurance premiums, John Doe frequently accompanied the surrogate to her pre-natal doc-

216. *In re Marriage of Moschetta*, 30 Cal. Rptr. 2d 893 (Ct. App. 1994).

217. Gestational surrogacy contracts were addressed in *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993). Gestational surrogacy involves the IVF of husband's sperm with wife's egg which is then grown into an embryo. This embryo is then implanted in another woman's womb who gestates the child under the terms of the contract, and is generally paid for her services. The gestational mother, therefore, is not genetically related to the child. *Id.* at 777-78. The court also distinguished cases where a sperm supplier (ambiguously referred to as a sperm "donor") asserts parental rights as in *Jordan C. v. Mary K.*, 224 Cal. Rptr. 530, 531 (Ct. App. 1986). Here, as in the traditional surrogacy contract, the baby is genetically related to the sperm supplier. *Id.* at 532-33. The issue becomes whether the sperm "donor" was a true donor in that donation implies relinquishment of any rights such as what occurs when the source of sperm is a sperm bank. Indeed, direct donation of semen can be sticky in more than one way.

218. CAL. FAM. CODE § 8814 (West 1994).

219. *Id.*

220. *Marriage of Moschetta*, 30 Cal. Rptr. 2d at 894-95. The traditional surrogate contract child is the product of the intended father and the unintended mother, and genetically related to both.

221. *Id.* at 894.

222. 710 A.2d 1297 (Conn. 1998). Jane, having had three previous children in another country and a subsequent tubal ligation, met John. *Id.* at 1302. Together they decided to have a child. *Id.* A tubal reconstruction re-anastomosis procedure was unsuccessful and Jane's pregnancy via usual means was not possible. *Id.*

223. *Id.* at 1302. After the price was agreed upon, John and Jane inseminated the surrogate at her house, using a syringe filled with John's semen. *Id.*

224. *Id.* at 1303.

tor visits where the surrogate assumed Jane Doe's identity, using Jane's name and social security number.<sup>225</sup> Upon admission to the hospital for delivery, the surrogate identified herself as Jane and the birth certificate indicated Jane's name as the mother.<sup>226</sup> True to her bargain, the surrogate delivered the baby to John and Jane upon leaving the hospital, never to bother the couple again.<sup>227</sup>

The apparently successful ruse terminated when Jane filed for divorce and requested custody of the now fourteen-year-old child.<sup>228</sup> John countered with the uncontested fact that Jane was not the genetic mother and that Jane had never adopted the child.<sup>229</sup> The trial court held that the child was not an issue of the marriage and thus it had no subject matter jurisdiction to determine the custody dispute.<sup>230</sup>

To complicate matters, the surrogate was married and living with her husband during the course of the pregnancy and delivery.<sup>231</sup> Connecticut law provides that a child born to a married woman living with her husband is a presumed child of the (surrogate's) marriage.<sup>232</sup> The trial court concluded that this presumption had not been rebutted by the requisite clear and convincing evidence.<sup>233</sup> At that point, it appeared that neither John nor Jane could be declared the child's legal parent.<sup>234</sup>

After the trial court's ruling that the child was not a child of John and Jane's marriage, John brought a motion in probate court to be declared the child's father and to sever any (now uncontested) parental rights of the surrogate and her former husband.<sup>235</sup> This motion was granted by the probate court.<sup>236</sup> The trial court subsequently ruled that it, the trial court, did not have jurisdiction to decide custody and thereby accepted the probate court's action.<sup>237</sup> Thus, the trial court recognized the child's custody to be with the father by default.<sup>238</sup>

On appeal, the Connecticut Supreme Court reversed and concluded that the trial court did have subject matter jurisdiction over the cus-

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225. *Id.*

226. *Id.*

227. *Id.*

228. *Doe*, 710 A.2d at 1302.

229. *Id.* at 1301.

230. *Id.* at 1303.

231. *Id.*

232. *Id.*

233. *Id.* (citing *Schaffer v. Schaffer*, 445 A.2d 589 (1982)).

234. *Doe*, 710 A.2d at 1303.

235. *Id.* at 1304.

236. *Id.* at 1303.

237. *Id.* at 1300.

238. *Id.* at 1303.

tody matter.<sup>239</sup> Further, the court found the statutory presumption of a child's best interest to be with the natural parent did not apply.<sup>240</sup> The case was remanded back to the trial court for a determination of child custody solely based on the best interests of the child.<sup>241</sup> While specifying that Connecticut's equitable parent doctrine did not apply to the facts of this case, the court strongly suggested that the wife should receive custody of the child.<sup>242</sup> This, of course, is exactly the application of the equitable parent doctrine.

This case suggests that the invalidity of traditional surrogacy contracts does not preclude the non-gestational, non-genetically related wife from gaining custody of the child.<sup>243</sup> This is, indeed, new law. The court here suggested that the best interests of the child test trumps all common law and statutory law.<sup>244</sup> Evidently, the court would vest complete equity power in the trial courts regarding child custody regardless of whether the child was an issue of the marriage.

That same year, the Connecticut Supreme Court rendered another controversial holding. In *Doe v. Roe*,<sup>245</sup> the court ruled on whether the trial court had subject matter jurisdiction to render judgment in accordance with a stipulated agreement reached in the probate court.<sup>246</sup> That post-baby birth settlement agreement included a promise by the traditional surrogate mother to consent to the termination of her parental rights for additional consideration over that which was provided in the traditional surrogate contract.<sup>247</sup>

Here, a traditional surrogacy contract between a husband and a surrogate resulted in the birth of a healthy baby girl.<sup>248</sup> Four months later, the surrogate mother filed a motion for habeas corpus, in probate court, seeking custody of the child.<sup>249</sup> She also filed for declaratory judgment, requesting a determination that the surrogacy contract was void as both against public policy and as a coercive contract

239. *Id.* at 1300.

240. *Doe*, 710 A.2d at 1306-07.

241. *Id.* at 1324. While the court stated that Connecticut's equitable parent doctrine would not apply to these facts, the court remanded suggesting that joint custody would be in the best interests of the child. *Id.*

242. *Id.*

243. The courts in *Baby M* and *Moschetta* held surrogacy contracts invalid or unenforceable and implied that genetic relationships controlled with the non-gestational wife having no parental rights notwithstanding the intention of the parties at the time of contract. These cases suggest that intention coupled with time can prevail over established common law.

244. *Doe*, 710 A.2d at 1324.

245. 717 A.2d 706 (Conn. 1998).

246. *Id.* at 708.

247. *Id.*

248. *Id.*

249. *Id.*

signed under duress and false pretenses.<sup>250</sup> The father counter-claimed, asking the court for specific performance of the surrogacy contract.<sup>251</sup> During the course of the litigation, a settlement was reached in which the surrogate mother agreed to relinquish her parental rights for additional consideration.<sup>252</sup> The probate court accepted the settlement agreement, terminated the surrogate's parental rights, and authorized the beginning of proceedings for step-parent adoption.<sup>253</sup>

Because the surrogate refused to sign the adoption papers or relinquish custody of the child eight months later, the husband and wife filed a motion asking the court to hold the surrogate in contempt for failing to comply with the terms of the settlement agreement.<sup>254</sup> The surrogate countered with a motion requesting the court to declare the agreement to be a nullity as based on a void surrogacy contract.<sup>255</sup>

Ultimately, the Connecticut Supreme Court determined that the lower court had jurisdiction to enforce the settlement agreement and to order its specific enforcement.<sup>256</sup> This case suggests that if a surrogate sues to invalidate a traditional surrogacy contract, it would be prudent for the husband and wife party to delay the case until the baby's birth. After the birth of the baby, a surrogate's judicially accepted settlement providing for the "voluntary" termination of her parental rights (in consideration for more money, of course) would be enforced and husband and wife would become the legal parents.

Thus, even though a traditional surrogacy contract would be unenforceable, the effect of enforcement may be attained through a settlement agreement, which will likely include more than just the original pecuniary consideration. This apparently does not violate the prohibition against "buying a baby" adoption laws.<sup>257</sup> The Connecticut courts will view this type of settlement as a valid accord and satisfaction of a disputed claim. The critical difference is the post-birth settlement agreement compared to the pre-birth surrogacy contract.

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250. *Id.*

251. *Doe*, 717 A.2d at 708.

252. *Id.*

253. *Id.* at 709.

254. *Id.*

255. *Id.*

256. *Id.* at 711.

257. *See* Surrogate Parenting Assoc. v. Kentucky, 704 S.W.2d 209, 211 (Ky. 1986).

### B. Gestational Surrogacy Contracts

Gestational surrogacy differs significantly from traditional surrogacy.<sup>258</sup> In gestational surrogacy, an ovum is fertilized with sperm *in vitro*.<sup>259</sup> The zygote is grown into an eight cell (or more) organism (embryo) where it is either placed into the uterus of a woman unrelated to the gamete providers, or frozen for such future use. The gestational surrogacy contract occurs between the couple desiring to bring a child into the world and the uterus provider who is genetically unrelated to the embryo. The gestational surrogate provides the incubator facilitating the development (gestation) of another man and woman's genetic child.<sup>260</sup>

California's landmark case of *Johnson v. Calvert*<sup>261</sup> was the first to address the enforceability of gestational surrogacy contracts. Crispina Calvert underwent a hysterectomy a few weeks prior to her marriage to husband Mark.<sup>262</sup> Mark and Crispina both desired to beget their own child.<sup>263</sup> Although without a uterus, Crispina's functioning ovaries continued to produce healthy eggs.<sup>264</sup> A sympathizing co-worker of Crispina's mentioned this sad situation to a friend of the co-worker who suggested that she, the co-worker's friend, could serve as the couples' surrogate.<sup>265</sup> The gestational surrogacy contract provided that for a fee,<sup>266</sup> the surrogate, Ms. Johnson, would have Mark and

258. Because gestational surrogacy is clearly distinguished, in law and in biology, from traditional surrogacy, authors and legislatures would do well to avoid the generic term "surrogacy." With the advances in IVF and the proximity of human cloning, gestational surrogacy will become increasingly common. Gestational surrogacy, and its associated contractual arrangements, will cease to be an issue only by the advent of an effective artificial uterus.

259. The fertilization occurs in a petri dish (outside the body).

260. Corollaries exist in the animal world. As one example, a genetically unrelated penguin is driven by instinct to incubate an exposed egg.

261. 851 P.2d 776 (Cal. 1993).

262. *Id.* at 778.

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.* Some authors declare that surrogacy contracts are an exploitation of the poor. See, e.g., G.R. Dunstan, *Social and Ethical Aspects, in DEVELOPMENTS IN HUMAN REPRODUCTION AND THEIR EUGENIC ETHICAL IMPLICATIONS* 213 (Carter ed., 1983); Erika Hessenthaler, *Note: Gestational Surrogacy: Legal Implications of Reproductive Technology*, 21 N.C. CENT. L.J. 169, 174 n.9 (1995); Katherine B. Lieber, *Selling the Womb: Can the Feminist Critique of Surrogacy be Answered?*, 68 IND. L.J. 205 (1992). In the instant case, the fee of \$10,000 is calculated to be \$1.45 per hour for 24 hours per day for 40 weeks. The implication is that this "low" payment is exploitation.

This argument is spurious. Since when is a voluntary, non-coercive, mutually negotiated contract to be adjudged by an outside party as exploitation? Neither party is required to contract. Is pregnancy a full time occupation? Absent complications, most pregnant women work at their usual jobs during their pregnancy. Is it not a person's autonomous right to use their body as they desire (assuming it does not harm others)? Is a college athletic scholarship an exploitation of a

Crispina's *in vitro* produced embryo implanted into her uterus, would carry the fetus to term, and would relinquish all parental rights after the birth of the child.<sup>267</sup>

Just before delivery, a dispute arose over the financial terms of the contract.<sup>268</sup> Ms. Johnson threatened to refuse to give up the baby after the baby was born.<sup>269</sup> The Calverts sued to be declared the child's legal and natural parents.<sup>270</sup> Ms. Johnson sued to have the contract declared to be an unenforceable surrogacy contract.<sup>271</sup>

The trial court ruled in favor of the Calverts and ordered any parental rights of Ms. Johnson terminated.<sup>272</sup> The appellate court unanimously affirmed, holding that a woman who agrees to have a couple's fertilized egg implanted in her womb is neither the natural nor legal mother of the child.<sup>273</sup> The gamete suppliers were deemed the natural and legal parents of the child.<sup>274</sup> Further, the court held that the surrogate was not deprived of any constitutionally protected interests.<sup>275</sup>

The California Supreme Court affirmed the holdings of the two lower courts.<sup>276</sup> California's Uniform Parentage Act<sup>277</sup> was held inapplicable since, under the Act, a woman could claim legal motherhood by either giving birth or by proving genetic relation to the child with blood tests.<sup>278</sup> The court declared that its decision was governed by the "intent of the efforts of the parents" by which "the child would not have otherwise been born."<sup>279</sup> The court noted that "the parties' aim

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person who does not happen to be wealthy? Where is the evidence that only poor women agree to become surrogates? It appears that this contention of exploitation of poor women is non-meritorious speculation, at best.

267. *Johnson*, 851 P.2d at 778.

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. *Anna J. v. Mark C.*, 286 Cal. Rptr. 369 (Ct. App. 1991) (appellate court case of *Johnson v. Calvert*).

274. *Johnson*, 851 P.2d at 778.

275. *Id.*

276. *Id.*

277. CAL. CIV. CODE §§ 7000-7021 (West 1993) (act repealed since decision).

278. *Johnson*, 851 P.2d at 781-82.

279. *Id.* at 883. This reasoning seems a little weak because the intent of the husband and wife in a traditional surrogacy contract is to bring a child into being. But in a traditional surrogacy arrangement, the mother is not the intending wife, she is the contractual surrogate.

Since intent exists in both situations, it seems much better to rely on the genetic origins of the child as controlling. Genetic origin is objective, discoverable, and constant. Reliance on genetic origin is consistent with the result in traditional surrogacy contracts and with the outcome here. The *Johnson* dissent stated that the best interests of the child should control rather than consideration of intent. *Id.* at 789 (Kennard, J., dissenting).

was to bring Mark and Crispina's child into the world, not for Mark and Crispina to donate a zygote to the surrogate."<sup>280</sup>

The court stated that all the parties realized that a pregnant woman has a constitutionally protected right to abort any fetus which she is carrying, consistent with current law.<sup>281</sup> Any promise abrogating that right would be unenforceable.<sup>282</sup> Additionally, the court opined that "gestational surrogacy contracts do not exploit women of lower economic status any more than any other poorly paying and undesirable employment."<sup>283</sup> Therefore, "gestational surrogacy contracts are not unconscionable or coercive as a matter of law."<sup>284</sup>

The dissenting justice in *Johnson* concluded that the satisfaction of the strong desire to have one's own genetically related child was not worth the social price of the surrogacy arrangement.<sup>285</sup> The dissent argued to have the case remanded to the trial court where the surrogacy contractual dispute would be settled on "the best interests of the child" basis.<sup>286</sup> The dissent cautioned that the magnitude and severity of public policy considerations demand immediate legislative attention and action.<sup>287</sup>

An Ohio court found the state's statutory birth registration inapplicable in a gestational surrogacy arrangement.<sup>288</sup> In *Belsito v. Clark*,<sup>289</sup> the wife had also undergone a hysterectomy just before marriage.<sup>290</sup> Knowing of the couple's yearning to have a child, the wife's sister agreed to gestate the couples *in vitro* produced embryo, without compensation.<sup>291</sup> As the pregnancy neared term, the couple learned of an Ohio law providing that if the birth mother is not married to the father, the child is officially illegitimate.<sup>292</sup> Desperate to avoid stigmatizing their child as illegitimate, the genetic mother (wife) and genetic father (husband) filed a motion requesting a declaratory judgment finding them to be the legal and natural parents of the soon to arrive baby.<sup>293</sup>

280. *Id.* at 782.

281. *Id.* at 784.

282. *Id.*

283. *Id.*

284. *Johnson*, 851 P.2d at 784.

285. *Id.* at 800-01 (Kennard, J., dissenting).

286. *Id.* at 801.

287. *Id.* California has not yet statutorily addressed gestational surrogacy contracts.

288. *Belsito v. Clark*, 644 N.E.2d 760 (Ohio 1994).

289. *Id.*

290. *Id.* at 761.

291. *Id.*

292. *Id.* at 762.

293. *Id.*



The court found Ohio's birth registration statutes inapplicable in a gestational surrogacy setting.<sup>294</sup> Consistent with *Johnson*, the *Belsito* court noted the gestational mother was genetically unrelated to the embryo, and that the intent of the genetic providers (husband and wife) governed whether the child would be brought into being.<sup>295</sup> Because the husband and wife provided the child's genes and because the husband and wife intended to bring the child into being, the court held the husband and wife to be the natural and legal parents.<sup>296</sup> Therefore, the birth certificate was ordered to so indicate.<sup>297</sup>

Perhaps the ultimate gestational surrogacy contract, involving five parties, occurred in the case of *Buzzanca v. Buzzanca*.<sup>298</sup> In *Buzzanca*, a sterile husband and an infertile wife, desiring a child but wanting to have some choice over the child's genetic constituency, obtained a donated egg and selected donated sperm for IVF.<sup>299</sup> The resulting embryo was implanted into the uterus of another woman serving as a contractual gestational surrogate.<sup>300</sup> Thus, neither husband nor wife was genetically related to the embryo derived from an egg donor and sperm donor.<sup>301</sup> The gamete donors were neither related to the contracting couple nor to the gestational surrogate.<sup>302</sup>

Just before the birth of the child, Mr. Buzzanca filed for divorce.<sup>303</sup> Claiming she and her husband were the child's parents, Mrs. Buzzanca demanded paternal child support payments.<sup>304</sup> Mr. Buzzanca disclaimed any paternal responsibility on grounds that he was not genetically related to the child and that the gestational surrogacy contract was invalid since it was signed after the pregnancy had commenced.<sup>305</sup> The surrogate made it clear that her responsibilities were limited to

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294. *Belsito*, 644 N.E.2d at 762.

295. *Id.* at 763. The court here, as in *Johnson*, specified that the genetic provider's intent is of such critical significance that without it the baby would not have been born. *Id.* This intent is distinguished from the intent of the husband and wife in a traditional surrogacy arrangement where the wife's position sinks to the level of an intended third party beneficiary of the contract between the sperm providing husband and the ovum providing surrogate. In a gestational surrogacy contract, the gamete providing husband and wife's intent governs whether the embryo will be created.

296. *Id.* at 767-68.

297. *Id.* at 768.

298. 72 Cal. Rptr. 2d 280 (Ct. App. 1998).

299. *Id.* at 282.

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.*

304. *Buzzanca*, 72 Cal. Rptr. 2d at 282.

305. *Id.* Recall that under *Baby M*, the non-genetically related spouse had no claim of parenthood absent adoption. *In re Baby M*, 537 A.2d 1227, 1235 (N.J. 1988).

those of a contractual gestational surrogate.<sup>306</sup> The gamete providers were donors and had relinquished any rights at the time of their gamete donations.<sup>307</sup>

The trial court examined California's Uniform Parentage Act and determined that parenthood could be established by giving birth or by genetic relation proven by blood tests.<sup>308</sup> Because the Buzzancas were not genetically related to the child, the gametes were donated without intent to reserve parental rights and the gestational mother was only obligated to perform under the terms of the contract.<sup>309</sup> The trial court found that the baby was born parentless!<sup>310</sup>

On appeal, the appellate court held that, under California common law, fatherhood could be established if the husband "consented" to the artificial insemination of his wife.<sup>311</sup> The court held the rule pertinent to the case at issue.<sup>312</sup> Since Mr. Buzzanca consented to the IVF which was intended to result in a child, he was the lawful father.<sup>313</sup> Uncontested, Mrs. Buzzanca was held to be the child's mother.<sup>314</sup> Accordingly, the child's procreation was the product of a medical procedure initiated by intended parents.<sup>315</sup> The court reasoned that, as the legal father, Mr. Buzzanca was entitled to all the rights and responsibilities of fatherhood, including child support.<sup>316</sup>

### C. *Statutory Regulation of Surrogacy*

Some states have adopted the Uniform Parentage Act ("UPA"),<sup>317</sup> which appears to apply to surrogacy contracts. Under the UPA, a parent can be established by either proving a genetic relationship or by the woman bearing and delivering the child.<sup>318</sup> Applying the UPA to a traditional surrogacy situation, the surrogate and the semen provider (usually the husband) are the child's mother and father.<sup>319</sup> The wife, since she is neither genetically related nor the birth mother, has no legal parental status whatsoever. By contrast, in the gestational surro-

306. *Buzzanca*, 72 Cal. Rptr. 2d at 282.

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.* at 285.

312. *Buzzanca*, 72 Cal. Rptr. 2d at 285.

313. *Id.* at 286.

314. *Id.* at 282.

315. *Id.* at 286.

316. *Id.*

317. CAL. FAM. CODE §§ 7600-7700 (West 1994 & Supp. 1999).

318. *Id.* § 7610.

319. *See id.*

gacy contract, both husband and wife are genetically related to the child, thereby providing the wife with a claim under the UPA.

Presently, only the statutes of Florida specifically address gestational surrogacy. Florida statutes provide that a gestational surrogacy contract shall be binding if, inter alia, the surrogate is eighteen years old, the commissioning couple is legally married, and the commissioning mother is physically unable to gestate a pregnancy to term.<sup>320</sup>

Generally, state statutes addressing surrogacy contracts do not differentiate between traditional and gestational surrogacy. Consequently, one is left with the conclusion that these states' use of the term "surrogacy" applies to traditional surrogacy contracts, but may or may not apply to gestational surrogacy.

The District of Columbia,<sup>321</sup> Indiana,<sup>322</sup> Michigan,<sup>323</sup> New York,<sup>324</sup> North Dakota,<sup>325</sup> and Utah<sup>326</sup> deny enforcement of all surrogacy con-

320. FLA. STAT. ANN. § 742.15(2)(a) (West 1997).

321. D.C. CODE ANN. § 16-402 (1997).

Prohibitions and penalties.

(a) Surrogate parenting contracts are prohibited and rendered unenforceable in the District.

(b) Any person or entity who or which is involved in, or induces, arranges, or otherwise assists in the formation of a surrogate parenting contract for a fee, compensation, or other remuneration, or otherwise violates this section, shall be subject to a civil penalty not to exceed \$10,000 or imprisonment for not more than 1 year, or both.

322. IND. CODE ANN. § 31-20-1-1 (Michie 1997)

Legislative declarations.

The general assembly declares that it is against public policy to enforce any term of a surrogate agreement that requires a surrogate to do any of the following:

(1) Provide a gamete to conceive a child.

(2) Become pregnant.

(3) Consent to undergo or undergo an abortion.

(4) Undergo medical or psychological treatment or examination.

(5) Use a substance or engage in activity only in accordance with the demands of another person.

(6) Waive parental rights or duties to a child.

(7) Terminate care, custody, or control of a child.

(8) Consent to a stepparent adoption under IC 31-19 (or IC 31-3-1 before its repeal).

and § 31-20-1-2.

Surrogate agreements void.

A surrogate agreement described in section 1 of this chapter that is formed after March 14, 1988 is void.

323. MICH. COMP. LAWS ANN. § 722.855 (West 1993).

Contracts; void and unenforceable.

Sec. 5. A surrogate parentage contract is void and unenforceable as contrary to public policy.

324. N.Y. DOM. REL. LAW § 22:122 (McKinney 1997).

325. N.D. CENT. CODE § 14-18-05 (1997).

tracts. Kentucky,<sup>327</sup> Louisiana,<sup>328</sup> Nebraska,<sup>329</sup> and Washington<sup>330</sup>

Surrogate agreements.

Any agreement in which a woman agrees to become a surrogate or to relinquish that woman's rights and duties as parent of a child conceived through assisted conception is void. The surrogate, however, is the mother of a resulting child and the surrogate's husband, if a party to the agreement, is the father of the child.

326. UTAH CODE ANN. § 76-7-204 (1995).

Prohibition of surrogate parenthood agreements—Status of child—Basis of custody.

- (a) No person, agency, institution, or intermediary may be a party to a contract for profit or gain in which a woman agrees to undergo artificial insemination or other procedures and subsequently terminate her parental rights to a child born as a result.
- (b) No person, agency, institution, or intermediary may facilitate a contract prohibited by Subsection (1). This section does not apply to medical care provided after conception.
- (c) Contracts or agreements entered into in violation of this section are null and void, and unenforceable as contrary to public policy.
- (d) A violation of this subsection is a class B misdemeanor.
- (2) An agreement which is entered into, without consideration given, in which a woman agrees to undergo artificial insemination or other procedures and subsequently terminate her parental rights to a child born as a result, is unenforceable.
- (3) (a) In any case arising under Subsection (1) or (2), the surrogate mother is the mother of the child for all legal purposes, and her husband, if she is married, is the father of the child for all legal purposes.
- (b) In any custody issue that may arise under Subsection (1) or (2), the court is not bound by any of the terms of the contract or agreement but shall make its custody decision based solely on the best interest of the child.
- (4) Nothing in this section prohibits adoptions and adoption services that are in accordance with the laws of this state.
- (5) This section applies to contracts or agreements that are entered into after April 24, 1989.

327. KY. REV. STAT. ANN. § 199.590 (Michie 1995).

Prohibited acts and practices in adoption of children—Expenses paid by prospective adoptive parents to be submitted to court.

- (1) A person, corporation, or association shall not advertise in any manner that it will receive children for the purpose of adoption. A newspaper published in the Commonwealth of Kentucky or any other publication which is prepared, sold, or distributed in the Commonwealth of Kentucky shall not contain an advertisement which solicits children for adoption or solicits the custody of children.
- (2) A person, agency, institution, or intermediary shall not sell or purchase or procure for sale or purchase any child for the purpose of adoption or any other purpose, including termination of parental rights. This section shall not prohibit a child-placing agency from charging a fee for adoption services. This section shall not be construed to prohibit in vitro fertilization. For purposes of this section, "in vitro fertilization" means the process by which an egg is removed from a woman, and fertilized in a receptacle by the sperm of the husband of the woman in whose womb the fertilized egg will thereafter be implanted.
- (3) No person, association, or organization, other than the cabinet or a child-placing institution or agency shall place a child or act as intermediary in the placement of a child for adoption or otherwise, except in the home of a stepparent, grandparent, sister, brother, aunt, or uncle, or upon written approval of the secretary. This subsection shall not be construed to limit the Cabinet for Human Resources in carrying out its Aid to Dependent Children Program in accordance with KRS Chapter

deny enforcement only if the surrogate is to be compensated. Notably, the Kentucky Supreme Court ruled in *Surrogate Parenting Associ-*

205. This section shall not be construed to prohibit private independent adoption or the right to seek legal services relating to a private independent adoption.

- (4) A person, agency, institution, or intermediary shall not be a party to a contract or agreement which would compensate a woman for her artificial insemination and subsequent termination of parental rights to a child born as a result of that artificial insemination. A person, agency, institution, or intermediary shall not receive compensation for the facilitation of contracts or agreements as proscribed by this subsection. Contracts or agreements entered into in violation of this subsection shall be void.
- (5) A person, organization, group, agency, or any legal entity, except a child-placing agency, shall not accept any fee for bringing the adoptive parents together with the child to be adopted or the biological parents of the child to be adopted. This section shall not interfere with the legitimate practice of law by an attorney.
- (6) (a) In every adoption proceeding, the expenses paid, including but not limited to any fees for legal services, placement services, and expenses of the biological parent or parents, by the prospective adoptive parents for any purpose related to the adoption shall be submitted to the court, supported by an affidavit, setting forth in detail a listing of expenses for the court's approval or modification.
- (b) In the event the court modifies the expense request as it relates to legal fees and legal expenses only, the attorney for the adoptive parents shall not have any claim against the adoptive parents for the amount not approved.

328. LA. REV. STAT. ANN. § 9:2713 (West 1991).

Contract for surrogate motherhood; nullity.

- A. A contract for surrogate motherhood as defined herein shall be absolutely null and shall be void and unenforceable as contrary to public policy.
- B. "Contract for surrogate motherhood" means any agreement whereby a person not married to the contributor of the sperm agrees for valuable consideration to be inseminated, to carry any resulting fetus to birth, and then to relinquish to the contributor of the sperm the custody and all rights and obligations to the child.

329. NEB. REV. STAT. § 25-21,200 (1995).

Contract; void and unenforceable; definition.

- (1) A surrogate parenthood contract entered into shall be void and unenforceable. The biological father of a child born pursuant to such a contract shall have all the rights and obligations imposed by law with respect to such child.
- (2) For purposes of this section, unless the context otherwise requires, a surrogate parenthood contract shall mean a contract by which a woman is to be compensated for bearing a child of a man who is not her husband.

330. WASH. REV. CODE ANN. § 26.26.230 (West 1997)

Surrogate parenting — Compensation prohibited.

No person, organization, or agency shall enter into, induce, arrange, procure, or otherwise assist in the formation of a surrogate parentage contract, written or unwritten, for compensation.

and § 26.26.240

Surrogate parenting — Contract for compensation void.

A surrogate parentage contract entered into for compensation, whether executed in the state of Washington or in another jurisdiction, shall be void and unenforceable in the state of Washington as contrary to public policy.

ates v. *Commonwealth*<sup>331</sup> that compensated surrogate parenting contracts were enforceable.<sup>332</sup> The Kentucky legislature responded by passing a bill providing for the unenforceability of compensated surrogacy arrangements.<sup>333</sup>

Florida,<sup>334</sup> Nevada,<sup>335</sup> New Hampshire,<sup>336</sup> and Virginia<sup>337</sup> statutes specifically provide that unpaid surrogacy contracts are lawful and en-

331. 704 S.W.2d 209 (Ky. 1986) (providing these contracts did not violate the law prohibiting the selling the babies).

332. *Id.* at 213-14.

333. KY. REV. STAT. ANN. § 199.590 (Michie 1995).

334. FLA. STAT. ANN. § 742.15 (West 1997) (gestational surrogacy contract).

335. NEV. REV. STAT. ANN. § 126.045 (Michie 1998).

Contract requirements; treatment of intended parents as natural parents; unlawful acts.

1. Two persons whose marriage is valid under chapter 122 of NRS may enter into a contract with a surrogate for assisted conception. Any such contract must contain provisions which specify the respective rights of each party, including:
  - (a) Parentage of the child;
  - (b) Custody of the child in the event of a change of circumstances; and
  - (c) The respective responsibilities and liabilities of the contracting parties.
2. A person identified as an intended parent in a contract described in subsection 1 must be treated in law as a natural parent under all circumstances.
3. It is unlawful to pay or offer to pay money or anything of value to the surrogate except for the medical and necessary living expenses related to the birth of the child as specified in the contract.
4. As used in this section, unless the context otherwise requires:
  - (a) "Assisted conception" means a pregnancy resulting when an egg and sperm from the intended parents are placed in a surrogate through the intervention of medical technology.
  - (b) "Intended parents" means a man and woman, married to each other, who enter into an agreement providing that they will be the parents of a child born to a surrogate through assisted conception.
  - (c) "Surrogate" means an adult woman who enters into an agreement to bear a child conceived through assisted conception for the intended parents.

336. N.H. REV. STAT. ANN. § 168-B:16 (1994 & Supp. 1998).

Regulatory Procedures.

- I. A surrogate arrangement is lawful only if it conforms to the requirements of this subdivision, and if, before the procedure to impregnate the surrogate:
  - (a) The health care provider performing the procedure receives written certification that the parties successfully completed the medical and nonmedical evaluations and counseling pursuant to RSA 168-B:18 and 19;
  - (b) The surrogate arrangement has been judicially preauthorized pursuant to RSA 168-B:23; and
  - (c) All parties to the surrogacy contract provide the health care provider performing the procedure with written indication of their informed consent to the arrangement.
- II. The procedure to impregnate a surrogate shall be performed only in accordance with rules adopted by the department of health and human services.
- III. No woman shall be a surrogate, unless the woman has been medically evaluated and the results, documented in accordance with rules adopted by the division of department of health and human services, demonstrate the medical acceptability of the woman to be a surrogate.

forceable. All require that the intended mother must be infertile. Additionally, New Hampshire<sup>338</sup> and Virginia<sup>339</sup> require advance judicial approval of the surrogacy agreement and limit who may act as a surrogate.

Arkansas law presumes that a child born to a surrogate mother is the child of the intended parents and not the surrogate.<sup>340</sup> Therefore, Arkansas law presumes the validity of surrogacy contracts.

#### D. *Involuntary Surrogacy*

The misappropriation of embryos at University of California, Irvine's Center for Reproductive Health resulted in the unwitting gestation of genetically unrelated embryos.<sup>341</sup> Three fertility expert physicians<sup>342</sup> intentionally implanted non-genetically related embryos (frozen for future use of the genetic owners) into at least sixty non-consenting women who thought they were being implanted with genetically related embryos fertilized from their ova and their husbands'

IV. No person or entity shall promote or in any other way solicit or induce for a fee, commission or other valuable consideration, or with the intent or expectation of receiving the same, any party or parties to enter into a surrogacy arrangement.

337. VA. CODE ANN. §§ 20-159, 10-160(b)(4) (Michie 1995).

Surrogacy contracts permissible.

- A. A surrogate, her husband, if any, and prospective intended parents may enter into a written agreement whereby the surrogate may relinquish all her rights and duties as parent of a child conceived through assisted conception, and the intended parents may become the parents of the child as provided in subsection D or E of § 20-158.
- B. Surrogacy contracts shall be approved by the court as provided in § 20-160. However, any surrogacy contract that has not been approved by the court shall be governed by the provisions of §§ 20-156 through 20-159 and §§ 20-162 through 20-165 including the provisions for reformation in conformance with this chapter as provided in § 20-162.

338. N.H. REV. STAT. ANN. § 168-B:21 (1994).

Petition for Preauthorization Hearing.

- I. Prior to insemination, in vitro fertilization or preembryo transfer of a surrogate, the parties to a surrogacy contract, as specified in RSA 168-B:25, shall jointly petition the court for judicial preauthorization of the surrogacy arrangement.

339. VA. CODE ANN. § 20-159(B) (Michie 1998).

340. ARK. CODE ANN. § 9-10-201 (Michie 1998).

341. See *Fertility Doctor Says Partners Knew of Thefts, Eggs Were Taken From Patients of U.C. Clinic*, SAN DIEGO UNION & TRIB., Mar. 19, 1998, at A3. Drs. Ricardo Asch, Jose Balmaceda, and Sergio Stone were all preeminent scientists in the infertility area. *Id.* Drs. Asch and Balmaceda fled to Chile and Mexico after the closing of the clinic. *Id.* Both are currently practicing infertility medicine. *Id.* Dr. Stone remained in the United States where he was subject to a prosecution for fraud. *Id.*

342. *Id.*

sperm.<sup>343</sup> These misappropriations of embryos occurred during the period of 1988 to 1995.<sup>344</sup>

As evidence of these embryo thefts became apparent, the Orange County District Attorney refused to criminally charge these physicians with felony theft because felony theft in California requires the conversion of property with a value over \$400.<sup>345</sup> The prosecutor refused to characterize embryos as property and refused to place a dollar value on an embryo.<sup>346</sup> Consequently, no criminal charges were brought against these physicians.<sup>347</sup>

The question of legal parenthood became an issue because several babies were born to mothers gestating embryos owned by and intended for other couples.<sup>348</sup> Under California's statutory Uniform Parentage Act, a mother can claim maternal rights by delivering her child.<sup>349</sup> The California Supreme Court determined that maternity can also be established by proving a genetic relationship to the child as well.<sup>350</sup> Although the birth mothers in these cases are not genetically related to the child, the woman qualifies for legal status because she has gestated the child.

The birth mother's husband, however, cannot claim parentage under the Act since he is not genetically related to the baby. The absence of paternity (genetic fatherhood) may be proven with blood tests.<sup>351</sup> Although the husband is not genetically related to the child, under the California Family Code, a husband cohabiting with his wife is the presumed father of a child delivered by his wife.<sup>352</sup> Thus, the wife's husband has a presumptive paternal status.

343. Tracy Weber & Julie Marquis, *Fertility Doctors Face New Suit*, L.A. TIMES (Orange County ed.), May 26, 1995 at 1.

344. *Id.*

345. *Id.*

346. *Id.*

347. *Id.* As a result of the prosecutor's refusal to file criminal charges, California Senator Tom Hayden sponsored Senate Bill 1555 making the misappropriation of gametic material or the unconsented implantation of non-genetically related gametic material a felony in California. CAL. PENAL CODE § 367(g) (West Supp. 1999).

348. *Id.*

349. CAL. FAM. CODE § 7610 (West Supp. 1994).

Method of Establishment.

The parent and child relationship may be established as follows:

(a) Between a child and the natural mother, it may be established by proof of her having given birth to the child.

350. Johnson v. Calvert, 851 P.2d 776, 779 (Cal. 1993).

351. CAL. FAM. CODE § 7541 (West 1994 & Supp. 1999) (providing for blood testing to prove genetic paternity).

352. *Id.* § 7611.



In *Johnson v. Calvert*,<sup>353</sup> the California Supreme Court held that a child may only have one mother.<sup>354</sup> When two women are able to establish maternity under the Uniform Parentage Act, the law will declare the natural and legal mother to be the woman who “intended to bring about the birth of [the] child [and] raise [it] as her own.”<sup>355</sup> The *Johnson* court reiterated that the natural and legal mother is the woman who “intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own.”<sup>356</sup>

The obvious question in these cases is, did the birth mother intend to “procreate” *this* child and intend to raise *this* child as her own? To “procreate” can mean either to propagate (bring forth offspring) or to reproduce (implied genetic reproduction). Until recently, biologically, to propagate and to reproduce were synonymous. Clearly the birth mother intended to gestate and raise her own embryo. By implication, can one conclude that since this did not happen, the birth mother is not the intended mother and thus loses a dispute over maternity with the genetic mother?

Application of the “intent” test of *Johnson* leads to the conclusion that the birth mother did not intend to procreate this particular non-genetically related child. The birth mother’s intent was to bear and give birth to her own genetically related child, which the child in these circumstances clearly was not.

The providers of the gametic sources, the genetic mother and father of the embryo, who thought their embryo was still frozen awaiting their own personal use, have a maternal and paternal claim under the Uniform Parentage Act provable by blood tests. Their intentions were to bear this child sometime in the future. Should the fact that another woman unwittingly and unintentionally gestated their embryo deprive them of their genetically related child? The application of *Johnson* would likely result in the genetic parents’ rights trumping the (involuntary) gestational surrogate’s rights. *Johnson*, however, would likely be distinguished because it involved a consensual gestational surrogacy contract.

Should it make any difference how old the child is when the genetic facts are discovered?<sup>357</sup> In cases of inadvertent baby switching at hospitals, the age of the child is a factor courts consider in deciding

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353. 851 P.2d 776.

354. *Johnson v. Calvert*, 851 P.2d 776, 779 (Cal. 1993).

355. *Id.* at 782.

356. *Id.*

357. *Id.*

whether to change the custody of the child. Involuntary surrogacy can be analogized to these switched children cases. In both situations, the child taken home from the hospital is neither genetically related to the gestating (birth) mother, nor genetically related to her husband. Intuitively, it seems that the "best interests of the child" considerations of inadvertent "switching" custody disputes should be applied to cases of involuntary surrogacy.

### VIII. CONCLUSION

ART scientific advances afford increasing procreational opportunities to the United States' one in six couples likely to require infertility services at some point in their lives. Sperm storage, sperm sex selection, ova storage, IVF, and embryo cryopreservation now enable family planning options which would have been considered fantasy only a couple decades ago. The opportunities also portend huge oscillation in our society involving not only when to have children, but what children to have. The necessarily reactive common law courts are subject to being trumped by reactionary interested factions, such as religious zealots, who have demonstrated increasing influence upon legislators who are mandated to make informed, well-reasoned public policy. If past is prologue, however, our constitutional protections will trump the special interests' constraints sanctioning reasonably unimpeded scientific progress in ART.

Nonetheless, the Authors strongly believe that new, uniform legislation needs to be created which takes into account the rapidly advancing science of ART. At a minimum, this legislation should strive to develop consistency between the legal and biological definitions of the elements and procedures of ART.

The proposed legislation must also distinguish between the various ART techniques and regulate them accordingly. For example, as discussed in this Article, only Florida has passed legislation which distinguishes between gestational and traditional surrogacy arrangements, despite the significant biological differences between the two ART procedures.<sup>358</sup> Thus, it is the Authors' belief that the goal of achieving uniformity and consistency in the regulation of the science of ART will also require legislative recognition of the differences in the biology of the various ART procedures.

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358. One couple, Basilio and Loretta Jorge, former patients of the UCI fertility clinic, have commenced a fight for legal and physical custody of their seven year old genetically related children (actually twins) born to a couple receiving infertility treatment at the clinic. *Fertility Patients Seek Custody of Twins*, DAILY NEWS, Feb. 19, 1996, at A4.

Perhaps the single greatest obstacle to any proposed uniform ART legislation is the significant moral and ethical issues that necessarily arise as a result of the science itself. These issues come in many diverse forms. Presently, there is no legislation governing the rights of embryo adoption, and only the state of Louisiana has passed laws regulating embryo destruction.

It also seems as though news reports of multiple births (e.g., seven and eight children) to a single couple as a result of the "success" of ART is becoming more commonplace.<sup>359</sup> Is it possible to have ten children or more as a result of ART? How many is too many? Who will pay for the disastrous medical consequences of these multiple births? Undoubtedly, any legislation attempting to tackle the science of ART will be met with stern resistance from various special interest groups. The question then becomes: Is it better to leave such issues purposefully unresolved because they are political "hot potatoes"? The Authors believe the answer to that question is a resounding no. The science of ART will continue to advance and so too must the regulation of the technology.

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359. FLA. STAT. ANN. § 742.15(2)(a) (West 1997).