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Codifying the Intent Test

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CODIFYING THE INTENT TEST

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I. INTRODUCTION

For the vast majority of children born in the United States, their legal parents are determined at birth.[1] In every state, there is a self-executing statute that identifies the woman who gives birth to a

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1. JAMES G. DWYER, THE RELATIONSHIP RIGHTS OF CHILDREN 26 (2006) ("The state directly determines who a child's legal parents will be at the time of birth and then at every moment of a person's childhood."); JEFFREY SHULMAN, THE CONSTITUTIONAL PARENT: RIGHTS, RESPONSIBILITIES, AND THE ENFRANCHISEMENT OF THE CHILD 58 (2014) (noting that all parental power is a function delegated by the state).

child as the child's legal mother.[2] Also in every state, there are self-executing statutes that apply a set of presumptions to identify the child's legal father.[3] These statutes solidify family relationships at the moment of birth, which not only avoids the costly and time-consuming process of obtaining a court order to determine the legal parents of every child born, but also avoids the legal uncertainty that the child and parents would endure before such an order were issued.[4] Through these self-executing parentage statutes, children, parents, and the state know, at the moment of birth, who the child's legal parents are and, thereby, who is legally responsible for the care and nurturing of the child.[5]

The process of a self-executing statute identifying the legal parents of a child at the moment of birth is so automatic that it is rarely considered.[6] The process of determining legal parentage through a self-executing statute is nearly identical in every state and, it is fair to say, universally accepted by legislators, judges, parents, and commentators. This is as it should be: self-executing parentage statutes are widely published, accessible to the public, create predictable results, and result in an efficient determination of parentage at the moment of birth.

Unfortunately, state parentage statutes fall short of accomplishing their intended goals because they do not provide legal parents at the moment of birth to every child. It is often only children conceived via sexual reproduction who reap the stabilizing benefits of state parentage statutes. In contrast, children conceived via assisted reproductive technology (ART) most often begin their

2. *See, e.g.*, CAL. FAM. CODE § 7610(a) (West, Westlaw through 2014 Sess.); 750 ILL. COMP. STAT. ANN. 45/4(1) (West, Westlaw through P.A. 98-1125 of the 2014 Sess.); MINN. STAT. § 257.54(a) (2012); WASH. REV. CODE ANN. § 26.26.101 (West, Westlaw through 2014 legislation).

3. *See, e.g.*, FAM. § 7611(a) (Westlaw); 750 ILL. COMP. STAT. ANN. 45/5(a) (Westlaw); MINN. STAT. § 257.55; WASH. REV. CODE ANN. § 26.26.116 (Westlaw); *see also* Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 233 (2006).

4. *See* J. Herbie Difonzo & Ruth C. Stern, *The Children of Baby M.*, 39 CAP. U. L. REV. 345, 410 (2011) (describing a legal system that did not provide clear parentage rules as "chaotic and dysfunctional").

5. *See* SHULMAN, *supra* note 1, at 30 (discussing the duties and obligations that accompany legal parenthood).

6. Dara E. Purvis, *The Origin of Parental Rights: Labor, Intent, and Fathers*, 41 FLA. ST. U. L. REV. 645, 649 (2014) ("The vast majority of the time, parentage law invisibly supports uncomplicated relationships: a baby is born at a hospital to a woman whose male partner is on hand and joyfully identifies himself as father.").

lives without clearly identified legal parents.[7] It is our contention that the time has come for state legislatures to provide comprehensive, self-executing parentage statutes that determine the legal parents at the moment of birth for all children—including those conceived via ART. In the past, state legislatures might have rationalized that they had not updated their parentage statutes to provide legal parents for ART children because ART was new, and they were not yet aware of the issue. ART, however, has been used in the conception of children for over one hundred years[8] and, for the past thirty years, has been written about in law review articles, debated in state legislatures, and confronted by family court judges.[9] In the past, state legislatures also might have rationalized that they were reluctant to update their parentage statutes to provide legal parents for children conceived via ART because they wanted to give commentators, legal experts, and courts time to experiment with the issue so that the best possible approach could be determined. Even assuming that it is good legislative practice to let legal parentage of children blow in the wind while waiting for someone else to figure out a solution, this explanation also is past its prime. For thirty years, legal scholars have debated, legislatures have experimented, and courts have applied various tests to determine legal parentage of ART children.[10] Legislatures no longer need to wait to determine the best method for determining legal parentage of children conceived via ART.[11] The overwhelming majority of legal scholars, legislatures,

7. ART, broadly speaking, encompasses any means to achieve pregnancy other than sexual intercourse. The most common ART procedures are alternative insemination and *in vitro* fertilization.

8. JUDITH DAAR, REPRODUCTIVE TECHNOLOGIES AND THE LAW 27–28 (2006) (noting the use of alternative insemination as early as the late-eighteenth century); Kara W. Swanson, *Adultery by Doctor: Artificial Insemination, 1890–1945*, 87 CHI.-KENT L. REV. 591, 592 (2012) ("While the number of assisted conceptions was increasing in the 1940s, doctors had been using this technically simple technique of family formation for decades.").

9. *See infra* Part II.B; *see also* Albert P. Massey, Jr., *Artificial Insemination: The Law's Illegitimate Child?*, 9 VILL. L. REV. 77, 78–80 (1963). *See generally* B. Fain Tucker, *Legal Problems of Artificial Insemination*, 33 WOMEN L.J. 57 (1947) (providing early commentary on ART).

10. *See infra* Part II.B.

11. Janet L. Dolgin, *An Emerging Consensus: Reproductive Technology and the Law*, 23 VT. L. REV 225, 225–26 (1998) ("[T]he hesitancy of American legislatures to take on the task of regulating reproductive technology may well prove to have been more beneficial than detrimental. In effect, American law has had a few

and courts have reached a consensus: When determining legal parentage of children conceived via ART, state legislatures should adopt self-executing parentage statutes that identify the intended parents as the legal parents of the child at the moment of birth.

Twenty-five years ago, Professor Marjorie Shultz introduced the intent test as a means to determine parentage of children conceived via ART.[12] According to Professor Shultz, when a child is conceived via ART, the persons who intended to bring the child into the world and raise the child should be the child's legal parents.[13] Since then, numerous legal scholars have endorsed Professor Shultz's intent test.[14] In 1993, the California Supreme Court first applied the intent test in *Johnson v. Calvert*.[15] In *Johnson*, both the surrogate who gestated the child and the woman who provided the egg used to conceive the child claimed to be the child's legal mother.[16] The court held that the genetic mother was the legal mother, as opposed to the gestational surrogate, because the genetic mother was the woman who intended to raise the child at the time the child was conceived.[17] Since *Johnson*, over 20% of disputed ART parentage cases have applied the intent test,[18] and over 74% of disputed ART parentage cases have awarded parentage to the intended parents, regardless of which test the court used to

decades to try various approaches, to discard those that did not work, and to elaborate those that did.").

12. Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 323–26 (1990).

13. *Id.* at 323 ("Within the context of artificial reproductive techniques, intentions that are voluntarily chosen, deliberate, express and bargained-for ought presumptively to determine legal parenthood.").

14. *See infra* Part II.B.

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

16. *Id.* at 778. A gestational surrogate is "a woman who is not an intended parent into whom an embryo formed using eggs other than her own is transferred." *See infra* Part III, § 101(4); *see also* BLACK'S LAW DICTIONARY 1168 (10th ed. 2014) (defining "gestational surrogate" as "[a] woman who carries out the gestational function and gives birth to a child for another . . . and who relinquishes any parental rights she may have upon the birth of the child.").

17. *Johnson*, 851 P.2d at 782.

18. Mary Patricia Byrn & Lisa Giddings, *An Empirical Analysis of the Use of the Intent Test to Determine Parentage in Assisted Reproductive Technology Cases*, 50 HOUS. L. REV. 1295, 1309 tbl.1 (2013) (analyzing the 208 cases on Westlaw in which parentage of a child conceived via ART was determined).

determine parentage.[19] In addition, since Professor Shultz published her article, every model parentage act that has been drafted in the United States has incorporated the intent test to determine legal parentage for children conceived via ART.[20]

Part II of this article argues that states should adopt self-executing parentage statutes based on the intent test to provide legal parents at the moment of birth to all children conceived via ART.[21] As support for this proposition, Part II discusses the underlying goals of self-executing parentage statutes, and how, for children conceived via ART, the intent test best effectuates those goals. Part II also discusses results from a recent empirical study showing that, in over 74% of ART disputed-parentage cases, the intended parents were determined to be the legal parents.[22] Part II concludes that consensus has been reached among scholars, legislatures, and courts in favor of using the intent test to determine legal parentage at the moment of birth for children conceived via ART.

Part III of this article proposes a comprehensive ART statute that incorporates the intent test and provides legal parents at the moment of birth to all children conceived via ART as an example for states to adopt.[23]

II. DETERMINING LEGAL PARENTAGE OF CHILDREN CONCEIVED VIA ASSISTED REPRODUCTIVE TECHNOLOGY AT THE MOMENT OF BIRTH

States have been using self-executing statutes to determine parentage of children conceived via sexual reproduction for hundreds of years. In all fifty states, when a child is conceived via sexual reproduction, the woman who gives birth to the child is deemed the child's legal mother.[24] All fifty states also have a set of

19. *Id.* at 1318.

20. *See, e.g.*, UNIF. PARENTAGE ACT §§ 703, 801, 807 (2000) (amended 2002), 9B U.L.A. 356, 362–63, 368 (Supp. 2014); MODEL ACT GOVERNING ASSISTED REPROD. TECH. §§ 603–604 (2008); *see also* Gestational Surrogacy Act, 750 ILL. COMP. STAT. ANN. 47/15 (West, Westlaw through P.A. 98-1125 of the 2014 Sess.) (basing parentage on intent when gestational surrogacy is used); UNIF. PROBATE CODE § 2–121(a)(4) (amended 2010) (using the intent test to determine parentage in a gestational surrogacy).

21. *See infra* Part II.

22. *See* Byrn & Giddings, *supra* note 18, at 1317–18.

23. *See infra* Part III.

24. *See, e.g.*, CAL. FAM. CODE § 7610(a) (West, Westlaw through 2014 Sess.);

presumptions that identify the child's legal father at the moment of birth.[25] These statutory mechanisms provide a predictable means of determining parental rights and obligations at the moment of birth, and they avoid the costly and time-consuming process of obtaining a court order identifying the legal parents every time a child is born.

When it comes to children conceived via ART, however, self-executing parentage statutes are rare. As a result, most parents that use ART to create a family must obtain a court order to formalize their legal parent-child relationship. Thus, while legal parentage for children conceived via sexual reproduction is determined at birth through automatic, efficient, and predictable statutes, legal parentage for children conceived via ART typically is not determined at birth and requires the intervention of a court, which can be costly, time-consuming, and unpredictable.[26]

It is our contention that it is time to bring the benefits of automatic, efficient, and predictable statutes to the determination of legal parentage for all children conceived via ART.[27] We base this

750 ILL. COMP. STAT. ANN. 45/4(1) (Westlaw); MINN. STAT. § 257.54(a) (2012); WASH. REV. CODE ANN. § 26.26.101 (West, Westlaw through 2014 legislation).

25. Typically, the person deemed the child's legal father is: the man who is married to the biological mother at the time of the child's birth; the man who, along with the biological mother, expressly acknowledges his paternity; or the man who receives the child into his home and openly holds out the child as his biological child. *See, e.g.*, FAM. § 7611(a) (Westlaw); 750 ILL. COMP. STAT. ANN. 45/5(a) (Westlaw); MINN. STAT. § 257.55; WASH. REV. CODE ANN. § 26.26.116 (Westlaw); *see also* Appleton, *supra* note 3, at 233 (noting that the marital presumption "instantly designates a man as a child's legal father at the time of birth").

26. Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. C.R. & C.L. 201, 216 (2009) (arguing that parentage laws should provide children of same-sex couples "certainty and stability . . . without requiring those parents to spend the money or time necessary for a court proceeding."); *see* Rebecca Aviel, *A New Formalism for Family Law*, 55 WM. & MARY L. REV. 2003, 2007 (2014) (asserting that family law's emphasis on "formal legal status has been needlessly tethered to a traditionalist view of legitimate family composition" and arguing that parentage laws should be "determinate but not traditional" so as to include, *inter alia*, children conceived via ART).

27. Professor Rebecca Aviel, in arguing for extending formal rules for identifying legal parents at birth to children conceived via ART, asserts that "[w]hatever differences we may sustain regarding how best to promote child welfare . . . it is difficult to argue that children are best served by a regime that cannot identify their parents prospectively and cannot ensure that any given

argument on two rationales: (1) self-executing ART parentage statutes can achieve the same social goals as the statutes that determine legal parents for children conceived via sexual reproduction;[28] and (2) the past thirty years of study and experimentation have led scholars, legislatures, and courts to a consensus in favor of self-executing ART parentage statutes based on the intent test.[29]

A. Achieving the Social Goals of Self-Executing Parentage Statutes

For children conceived via sexual reproduction, state legislatures designate legal parentage via self-executing statutes that are based on a set of presumptions that identify legal parents in the same way for every child. For children conceived via sexual reproduction, the traditional basis for legal parentage is a presumption in favor of genetics.[30] The woman who gives birth to a child conceived via sexual reproduction is the genetic mother and the legal mother.[31] In addition, the marital presumption vests legal parentage in the birth-mother's husband—the man presumed to be the genetic father.[32] In the wake of the 1973 Uniform Parentage Act (1973 UPA), in an effort to remove the legal stigma attached

individual is vested with parental status without a complex, multi-factor judicial determination." Aviel, *supra* note 26, at 2063.

28. *See infra* Part II.A.

29. *See infra* Part II.B.

30. DWYER, *supra* note 1, at 31–32 ("That biological parenthood remains the predominant focus even with marital births is evidenced by the fact that throughout the West, a husband's presumption of paternity remains rebuttable on the basis of—and only on the basis of—genetic tests showing that he is not in fact the biological father."); Elizabeth Bartholet, *Guiding Principles for Picking Parents*, 27 HARV. WOMEN'S L.J. 323, 329 (2004) (noting that "traditional family law . . . makes biology extremely important").

31. *E.g.*, MINN. STAT. § 257.54(a) (2012); s*ee* Shultz, *supra* note 12, at 316 ("In the main, the law's assignment of parental status has followed nature. Biology provided definitive identification of the mother of a particular child. Bearing and birthing a child were physically apparent; motherhood was simply a fact.").

32. *E.g.*, MINN. STAT. § 257.55, subdiv. 1(a). The reliance on the marital presumption as a proxy for genetics is demonstrated by the traditional exceptions to the presumption. The presumption did not apply if: (1) the husband and wife were not cohabitating; (2) the husband was sterile or impotent; (3) the husband was "beyond the four seas" at the time of conception; or (4) the race of the child did not match the husband's. Appleton, *supra* note 3, at 251. In other words, if the child could not have been the husband's genetic child, then the marital presumption identifying him as the legal father did not apply.

to non-marital births, every state added additional paternity presumptions to their parentage statutes.[33] With these additional presumptions, men who were not married to the birth mother could assert their likely genetic relationship to the child, resulting in legal parentage at birth.[34] The impact of these additional presumptions was that thousands of children who otherwise would not have had a legal father without a court proceeding had the benefit of two legal parents at the moment of birth. Parentage statutes for children conceived via sexual reproduction work so well not because they vest parentage in the genetic parent, per se, but because they include a presumption that applies in every case that avoids a post-birth factual inquiry and grants parentage to the persons that, in the majority of cases, will act in the best interests of the child. Although the exact details of the parentage presumptions have changed over time, self-executing parentage

33. Under common law, a child born out of wedlock was considered illegitimate and therefore ineligible for many of the benefits available to children of married couples. In creating the 1973 UPA, the Uniform Law Commissioners addressed a number of problems related to parentage of non-marital children. Section 2 of the 1973 UPA states that the goal was to ensure that "[t]he parent and child relationship extends equally to every child and every parent, regardless of the marital status of the parent." UNIF. PARENTAGE ACT § 2, 9B U.L.A. 390 (1973). The 1973 UPA, however, included ART only to the extent that it provided legal parents to children conceived by alternative insemination to a married, heterosexual couple. *Id.* § 2, 9B U.L.A. 407–08. If a child was conceived via ART outside those narrow parameters, the "parent and child relationship" did not extend equally to her. *Id.* prefatory note, 9B U.L.A. 378; *see id.* § 5, 9B U.L.A. 407–08.

34. In Minnesota, the paternity presumption statute makes clear that the presumption is based on an assumption about biology: "A man is presumed to be the *biological father* of a child if:" (1) he is married to the woman at the time of the child's birth, (2) he, along with the biological mother, expressly acknowledges his paternity, or (3) "he receives the child into his home and openly holds out the child as his biological child" as the presumptive legal father. MINN. STAT. § 257.55, subdiv. 1 (emphasis added). *See* Appleton, *supra* note 3, at 258 (discussing how the traditional views of the paternity presumptions sought to "connect men and their likely genetic offspring"); *see also* Janet L. Dolgin, *Choice, Tradition, and the New Genetics: The Fragmentation of the Ideology of Family*, 32 CONN. L. REV. 523, 527 (2000) ("For centuries . . . courts determined paternity by relying on a presumption about biological facts."). Referring to the "holding out the child as his own" presumption, Appleton suggests that "[t]he rule most likely reflected a common-sense inference: Why would a man undertake such responsibility and public acknowledgment of a child unless he knew he had fathered this child?" Appleton, *supra* note 3, at 257.

statutes have always sought to achieve the same well-accepted social goals of vesting legal parentage in the persons that: (1) are responsible for bringing the child into the world; (2) are most likely to care for the child; and (3) are the ones expecting to be the child's legal parents.[35] As explained below, the intended parents fulfill these same roles for children conceived via ART.

1. Granting Legal Parentage to the Persons Responsible for Bringing the Child into the World

One goal of statutory parentage presumptions is to grant legal parentage to the persons responsible for bringing the child into the world.[36] It makes sense that legal parentage should be awarded—along with its attendant financial and social responsibilities—to the persons responsible for bringing the child into the world.[37] Pursuant to the doctrine of *parens patriae*, states are obligated to ensure that all children are cared for.[38] Although states take this obligation very seriously, they strongly prefer not to be the actual care providers for children. Instead, states fulfill their *parens patriae* obligations by establishing legal parent-child relationships, thereby shifting the duty to care for the child to the persons responsible for bringing the child into the world.[39] For children conceived via sexual reproduction, the genetic parents always will

35. Elizabeth Bartholet identified similar guidelines for determining legal parents: (1) provide children early in life with permanent parents; (2) provide children with nurturing parents; and (3) hold parents responsible. Bartholet, *supra* note 30, at 337–42; *see also* Dara E. Purvis, *Intended Parents and the Problem of Perspective*, 24 YALE J.L. & FEMINISM 210, 218 (2012) (identifying three "threads" for parentage rules: (1) parentage rules should provide stability; (2) the parents are responsible for the child, not the state; and (3) "parentage determinations are not made on a case-by-case basis").

36. Purvis, *supra* note 6, at 661–63; *see also* Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children*, 81 NOTRE DAME L. REV. 325, 329 (2005).

37. *See* SHULMAN, *supra* note 1, at 30–31.

38. James G. Dwyer, *A Constitutional Birthright: The State, Parentage, and the Rights of Newborn Persons*, 56 UCLA L. REV. 755, 766 (2009) ("The state acts vis a vis every newborn baby in a protective and provisional role, pursuant to its long-recognized *parens patriae* authority . . . ." (internal quotation marks omitted)); *see also* Ruth-Arlene W. Howe, *Race Matters in Adoption*, FAM. L.Q., Fall 2008, at 465, 467 n.10 (noting that *parens patrie* refers to the state's role as protector of children's interests).

39. *See* Howe, *supra* note 38, at 467.

be the persons responsible for bringing the child into the world. Accordingly, using genetics as a basis for parentage determinations of children conceived via sexual reproduction best effectuates this first underlying goal.

For children conceived via ART, the intended parents always will be the persons ultimately responsible for bringing the child into the world. Indeed, conceiving a child using ART is one of the most intentional acts a person or couple undertakes. The intended parents must secure a means to fund the process, which, in the case of *in vitro* fertilization, typically costs tens of thousands of dollars.[40] The intended parents must also research and choose gamete providers (sperm donors and egg donors) and, in some cases, a surrogate. Although gamete providers and surrogates play vital roles in bringing the child into the world, it cannot be said that these adults are "responsible" for doing so. In fact, in nearly all cases, sperm donors, egg donors, and surrogates expressly relinquish any responsibility beyond their role of providing gametes or gestating the child. Thus, for children conceived via ART, awarding parentage to the intended parents best effectuates the goal of awarding parentage to the persons responsible for bringing the child into the world.

2. *Granting Legal Parentage to the Persons Most Likely to Care for the Child*

Another goal of statutory parentage presumptions is to award parentage to the persons most likely to care for the child.[41] For children conceived via sexual reproduction, genetics is the most reliable and consistent indicator of whether an adult is likely to care for a child throughout the child's minority.[42] That is not to say

40. Polina M. Dostalik, *Embryo "Adoption"? The Rhetoric, the Law, and the Legal Consequences*, 55 N.Y.L. SCH. L. REV. 867, 874 (2011).

41. DWYER, *supra* note 1, at 33 ("As with mothers, a state's decision to make the biological connection determinative where a man seeks paternity might be based in part on an empirical assumption that a biological connection predisposes an adult to care for a child.").

42. MARY LYNDON SHANLEY, MAKING BABIES, MAKING FAMILIES: WHAT MATTERS MOST IN AN AGE OF REPRODUCTIVE TECHNOLOGIES, SURROGACY, ADOPTION, AND SAME-SEX AND UNWED PARENTS 63 (2001) (stating that "since biological parents have a variety of incentives to care for their children to the best of their ability, assigning custody to them tends to protect children's interests"); Shultz, *supra* note 12, at 319 (stating that "legal assignment of parental status has, typically drawn

that adults always will be devoted to caring for the children to whom they are genetically related. In some cases, a *non*-geneticly-related adult may be the adult most capable of caring for the child. The goal of statutory parentage presumptions, however, is to establish a factor, or set of factors, that consistently and reliably predicts, at the moment of birth, who is most likely to care for a child. If that prediction turns out to be incorrect, the law provides mechanisms to terminate or limit parental rights down the road.[43] For children conceived via sexual reporoduction, all fifty states rely on a genetic relationship as the best proxy for effectuating the underlying social goal of awarding parentage to the persons most likely to care for the child throughout his or her minority.

For children conceived via ART, the intent test is the most reliable and consistent indicator of who is most likely to care for the child. Intended parents who spend the time, energy, and money to conceive a child via ART assume that they also are responsible for supporting the child and caring for the child's best interests. This conclusion is supported by a recent empirical study examining case outcomes in ART parentage determination cases.[44] The study examined over 200 cases and found that regardless of the stated basis for the court's decision, in over 74% of cases, the court granted parentage to the intended parents.[45] Since a best-interests analysis is the cornerstone of nearly all legal determinations regarding children, it is safe to assume that these courts would not have placed children with their intended parents were it not, in fact, in the child's best interests and if it were not

legitimacy from its reflection of and alignment with biological givens"); *see* Annette Ruth Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J.L. REFORM 683, 685–86 (2001) (defending a system that bases legal parentage, at least in part, on genetic relationship).

43. *See* June Carbone & Naomi Cahn, *Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 WM. & MARY BILL RTS. J. 1011, 1025–26 (2003). Codified next to parentage presumptions is an extensive series of laws concerning legal custody, physical custody, and parenting time—recognizing that genetic parents often do not properly care for their genetic children. If a genetic parent fails to act in the best interest of her child, or if a different adult would more likely act in the child's best interest, the state is granted permission to make such legal determinations after the child is born. *See, e.g.*, MINN. STAT. § 260C.301, subdiv. 1(b) (2012); OHIO REV. CODE ANN. § 2151.414(B) (West, Westlaw through 2014 legislation); WIS. STAT. ANN. § 48.415 (West, Westlaw through 2013 legislation).

44. Byrn & Giddings, *supra* note 18, at 1317–18, 1324.

45. *Id.* at 1317–18.

likely that these adults would care for the child. Courts that expressly used a best-interests analysis to determine legal parentage of children conceived via ART awarded parentage to the intended parents nearly 80% of the time.[46] Thus, for children conceived via ART, granting parentage to the intended parents best effectuates the goal of granting parentage to the persons most likely to care for the child.

3. Granting Legal Parentage to the Persons Expecting to Be the Child's Parents

A third goal of statutory parentage presumptions is to grant parentage to the persons expecting to be the child's parents.[47] For children conceived via sexual reproduction, those adults are the child's genetic parents. When a woman gives birth to a child conceived via sexual reproduction, no one at the hospital wonders who is the child's legal mother. It is evident that the woman who just gave birth is the child's legal mother. This is the outcome the mother, her family, the community, and the law expects. Moreover, this outcome does not change, even if the birth mother has decided to place the child for adoption. The birth mother is still deemed to be the child's legal mother, and her legal parental rights must be terminated in order for the child to be legally adopted by another.[48]

It may be somewhat less evident who the child's presumptive legal father is at the moment of the child's birth. The laws in most states provide that the child's presumptive legal father is: (1) the man who is married to the woman at the time of the child's birth; (2) the man who, along with the biological mother, expressly acknowledges his paternity; or (3) the man who receives the child into his home and openly holds out the child as his biological child.[49] These three presumptions serve as a proxy for determining

46. *Id.* at 1317–18 tbl.7b.

47. *See* DWYER, *supra* note 1, at 33 (asserting that determining parentage based on a "biological connection . . . . rests in part on beliefs about the natural entitlement of adults to possess their genetic offspring"); *see also* Purvis, *supra* note 35, at 211 ("Traditional rules of identifying parents codify intuitive presumptions about parental status . . . ."); Dwyer, *supra* note 38, at 763 ("One might think it natural, even divinely ordained, that biological parents become the custodians of a baby.").

48. *See* MINN. STAT. § 257.74.

49. *See, e.g.*, *id.* § 257.55.

who is genetically related to the child,[50] thereby granting parentage to the man expecting to be the child's legal parent.[51] Accordingly, these presumptions best effectuate the underlying social goal of awarding parentage to the persons expecting to be the child's parents.

For children conceived via ART, it is the intended parents who expect to be declared the legal parents. Take, for example, a couple consisting of two men who decide to conceive a child using a gestational surrogate and the egg of an anonymous gamete provider. At the time of transfer,[52] the two men manifest their intent to be the legal parents of the resulting child, and the gamete provider and gestational surrogate manifest their intent not to be the legal parents of the child. Upon the birth of the child, a statutory parentage presumption based on the intent test would create a legal parent-child relationship between the child and both intended parents.[53] This is the outcome the intended parents, their families, the gamete provider, the gestational surrogate, and the community expect. Thus, for children conceived via ART, granting parentage to the intended parents best effectuates the goal of granting parentage to the persons who expect to be declared the legal parents.

Once a state decides to adopt self-executing parentage statutes for all children conceived via ART, it must determine whom those statutes should designate as the presumptive legal parents at the moment of birth. An examination of current parentage statutes for children conceived via sexual reproduction reveals that genetics is used as the presumptive proxy to effectuate the social goals of vesting legal parentage in the persons who are responsible for bringing the child into the world, the persons most likely to care for the child, and the persons expecting to be the child's parents. These same social goals can be effectuated for children conceived via ART by enacting self-executing statutes that award legal parentage to the child's intended parents at the moment of birth.

50. *See supra* notes 24–35 and accompanying text.

51. *See supra* note 34.

52. "Transfer" means the placement of gametes or embryos into a woman's reproductive tract for the purpose of achieving pregnancy and a live birth. *See infra* Part III, § 101.

53. *See* Shultz, *supra* note 12, at 322–23.

B. The Consensus in Favor of the Intent Test

For the past thirty years, legal commentators, legislatures, and courts have been exploring the contours of the intent test and how best to apply it in cases involving ART. Dozens of law review articles have been written on the subject, with the vast majority favoring the use of the intent test for ART.[54] As early as 1998, Janet Dolgin discussed an "emerging consensus" that was forming around the intent test.[55] Eleven years later, Nancy Polikoff described the intent test as having "support from the mainstream of the legal profession."[56] The following year, Courtney Joslin joined the growing chorus of legal scholars advocating for the intent test, questioning why the law has been so resistant to keeping up with developments around ART.[57]

In addition, the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Bar Association (ABA) have empaneled groups of experts in the field of family law to consider parentage determinations of children conceived via ART. Both groups incorporated the intent test into their model statutes.[58]

NCCUSL's 2002 Uniform Parentage Act (2002 UPA) expanded coverage of children conceived via ART. The 2002 UPA

54. *See, e.g.*, Linda S. Anderson, *Adding Players to the Game: Parentage Determinations when Assisted Reproductive Technology is Used to Create Families*, 62 ARK. L. REV. 29, 54–56 (2009); Difonzo & Stern, *supra* note 4, at 405–11; Linda D. Elrod, *A Child's Perspective of Defining a Parent: The Case for Intended Parenthood*, 25 BYU J. PUB. L. 245, 266–70 (2011); Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177, 1222–29 (2010); Pamela Laufer-Ukeles, *Mothering for Money: Regulating Commercial Intimacy*, 88 IND. L.J. 1223, 1255–59 (2013); Yehezkel Margalit et al., *The New Frontier of Advanced Reproductive Technology: Reevaluating Modern Legal Parenthood*, 37 HARV. J.L. & GENDER 107, 136–39 (2014); Polikoff, *supra* note 26, at 233–34, 265–67; Purvis, *supra* note 35, at 227–30, 252–53; Catherine E. Smith, *Equal Protection for Children of Same-Sex Parents*, 90 WASH. U. L. REV. 1589, 1638–40 (2013); Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 675–79 (2002).

55. Dolgin, *supra* note 11, at 235–36, 280–81.

56. Polikoff, *supra* note 26, at 234 ("A brief history of the law of assisted reproduction demonstrates that the groundwork for a statute making consent [with the intent to parent] the key to parentage . . . is in place and has support from the mainstream of the legal profession.").

57. Joslin, *supra* note 54, at 1180–81, 1222–23.

58. *See* UNIF. PARENTAGE ACT (2000) (amended 2002), 9B U.L.A. 299–376 (Supp. 2014); MODEL ACT GOVERNING ASSISTED REPROD. TECH. (2008).

addresses ART issues such as excluding gamete donors from parentage, awarding parentage to the intended parents in a gestational surrogacy, and covering situations in which a child is conceived via ART after death or divorce.[59] Although the 2002 UPA makes progress toward incorporating the intent test, it falls short. First, Article 7 (Child of Assisted Reproduction) uses language making it applicable exclusively to heterosexual couples.[60] Second, although Article 8 (Gestational Agreements) incorporates an intent element, it specifies that the intended parents must be married, in turn alienating single parents and unmarried couples, including same-sex couples in places where marriage is not possible.[61] As a result, the 2002 UPA fails to provide legal parents to all children at the moment of birth.[62]

Another attempt at legislating parentage in light of emerging reproductive technologies is the ABA's Model Act Governing Assisted Reproductive Technologies (ABA Model Act). Article 6 of the ABA Model Act roughly mirrors Article 7 of the 2002 UPA, but takes additional steps in the right direction by using the intent test and gender-neutral language to determine parentage of children conceived via ART.[63] Article 7 of the ABA Model Act closely resembles Article 8 of the 2002 UPA regarding gestational

59. It added language stating that, in addition to male sperm donors, female egg donors should be excluded from parentage. UNIF. PARENTAGE ACT § 702, 9B U.L.A. 355–56. The 2002 UPA also addresses gestational surrogacy; specifically, Article 8 grants legal parentage to the intended parents, provided they are married and have a court-approved gestational agreement. *Id.* § 801, 9B U.L.A. 362–63.

60. *See id.* § 703, 9B U.L.A. 356 ("A man who provides sperm for, or consents to, assisted reproduction by a woman . . . with the intent to be the parent of her child, is a parent of the resulting child.").

61. *See id.* § 801, 9B U.L.A. 362–63.

62. For a critique of the 2002 UPA, see Mary Patricia Byrn, *From Right to Wrong: A Critique of the 2000 Uniform Parentage Act*, 16 UCLA WOMEN'S L.J. 163, 170–71 (2007).

63. "An individual who . . . consents to[] assisted reproduction by a woman as provided in [this Act] with the intent to be a parent of her child is a parent of the resulting child." MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 603. In 2008, the Uniform Law Commissioners drafting the Uniform Probate Code also addressed ART and incorporated the intent test. UNIF. PROBATE CODE § 2-120(f) (1969) (amended 2010), 8 U.L.A. 129–31 (2013). "[A] parent-child relationship exists between a child of assisted reproduction and an individual other than the birth mother who consented to assisted reproduction by the birth mother with intent to be treated as the other parent of the child." *Id.*

surrogacy agreements, with the exception that under the ABA Model Act, the intended parents need not be married.[64] Both Articles 6 and 7 of the ABA Model Act are closer to an ideal statute, although there are still unnecessary limitations including a requirement of written consent and court approval for gestational surrogacy agreements.[65] Here again, progress is made, but the Act is ultimately too narrow to provide legal parents to all children at the moment of birth.

Individual state legislatures also have moved toward the intent test. Illinois has incorporated the intent test into its Gestational Surrogacy Act.[66] Delaware's Uniform Parentage Act includes a provision for the paternity of children conceived via ART, which states, "The child shall be considered the child of the intended parent or parents immediately upon the birth of the child."[67] Likewise, New Mexico's Uniform Parentage Act grants parentage to the intended parents provided they sign a required consent form before conception.[68]

Finally, based on an empirical study completed last year, we now know that courts, too, favor awarding legal parentage of children conceived via ART to the intended parents. In 2013, researchers conducted an empirical study of all cases on Westlaw addressing parentage of ART children.[69] Each case was coded and analyzed based on which test the court used to determine legal parentage and which factors were statistically significant in making

64. *Compare* MODEL ACT GOVERNING ASSISTED REPROD. TECH. art. 7, *with* UNIF. PARENTAGE ACT § 801–809, 9B U.L.A. 362–70.

65. MODEL ACT GOVERNING ASSISTED REPROD. TECH. arts. 6–7.

66. This Act, which went into effect in 2005 and applies exclusively to surrogacy, allows for the intended parents to be the legal parents immediately upon the birth of the child. The parties must create a valid surrogacy contract meeting the requirements set forth in the statute, but unlike the 2002 UPA and the Model Act, the agreement does not need court approval. This simplifies the process for everyone involved. However, the Gestational Surrogacy Act could use some refining in order to make the language less ambiguous. In some provisions it uses "intended mother" and "intended father," while in others it uses "intended parent or parents." Although this seems to say that the Act would apply to a single parent, it may cause some confusion in determining whether it extends to same-sex couples. 750 ILL. COMP. STAT. ANN. 47/10 (West, Westlaw through 2014 Sess.).

67. DEL. CODE ANN. tit. 13, § 8-703(b) (West, Westlaw through 2014 legislation).

68. N.M. STAT. ANN. § 40-11A-704 (West, Westlaw through 2014 Sess.).

69. Byrn & Giddings, *supra* note 18, at 1297.

that determination.[70] The empirical data demonstrates two important findings. First, when faced with determining parentage of ART children, most judges will apply a state statute to make their decision, even if the statute did not originally contemplate the situation before them.[71] Second, and more importantly, regardless of the test used by the court, in over 74% of the cases, the outcome was the same as if the intent test had been used.[72] Both of these findings are discussed below.

Without clear guidance from the legislature, finding a basis for parentage determinations for children conceived via ART has been left to the courts.[73] The empirical data shows that, over the past 30 years, courts have developed five different tests to determine parentage of children conceived via ART: (1) applying a state statute; (2) relying on public policy; (3) determining what is in the best interests of the child; (4) awarding parentage to the genetic parents; and (5) awarding parentage to the adults who, at the time of conception, intended to raise the child.[74]

Judges used a statutory approach in over 51% of the cases surveyed, even if the statute did not expressly cover the particular situation before them.[75] For example, the Oregon Court of Appeals expanded the application of its alternative insemination statute, which applied only to a woman and her husband, to include the same-sex domestic partner of a woman who gave birth to a child conceived via alternative insemination.[76] The court recognized that the presumptions in Oregon's parentage statute were designed, in part, "to protect children conceived by artificial insemination from

70. *Id.*

71. *See id.* at 1301–04.

72. *Id.* at 1316–18.

73. *See, e.g.*, Difonzo & Stern, *supra* note 4, at 376–77 ("Courts are the beachhead for this revolution, because society is evolving faster than the formal legal system, and disputes are often presented to judges who have little statutory or case law guidance in these new areas."); Dolgin, *supra* note 11, at 234 ("Courts have spearheaded and sustained the law's response to reproductive technology in the United States. Legislatures have been slow to respond, and when they have responded, they have rarely created comprehensive regulatory schemes.").

74. Byrn & Giddings, *supra* note 18, at 1301.

75. *Id.* at 1304. Over 20% of judges applied the intent test, 16% applied a best-interests-of-the-child analysis, 8% relied on public policy, and 3% based their decision on genetics. *Id.* at 1309 tbl.1.

76. Shineovich & Kemp, 214 P.3d 29, 40 (Or. Ct. App. 2009); *see* OR. REV. STAT. ANN. § 109.243 (West, Westlaw through 2014 Sess.).

being denied the right to support by the mother's husband or to inherit from the husband."[77] The court concluded that this presumption should apply regardless whether the couple was comprised of a woman and her husband, or a woman and her same-sex partner.[78]

The judiciary's desire to take a statutory approach makes sense in light of the fact that parentage laws always have been matters for the legislature, and applying a statute is the standard protocol when it comes to determining parentage. The cases in the empirical study show that judges are willing to go to great lengths to find and apply a statute, as opposed to, say, using a best-interests-of-the-child approach, because they do not believe that establishing initial parentage should be determined by a case-by-case, factual inquiry.

The judiciary's preference for a statutory approach highlights the need for each state to adopt a comprehensive parentage statute that covers all children conceived via ART. When there is a dispute over parentage, courts should be able to apply a state statute in a straightforward and predictable manner. Such statutes would remove the legal uncertainty, for both the parent and the child, currently present in ART cases. Moreover, comprehensive parentage statutes that cover all children conceived via ART would largely eliminate the need for the courts to be involved at all. When a child is conceived via sexual reproduction, there is no post-birth factual inquiry; a judge is not required to weigh facts before declaring the mother and father legal parents. Rather, a self-executing parentage statute, based on a set of presumptions, operates to create the legal parent-child relationship. Parenting determinations for children conceived via ART should be no different than parentage determinations for children conceived via sexual reproduction—no less automatic, no less predictable, and no less equitable.

The most significant finding of the empirical study was the fact that, in the overwhelming majority of ART parentage cases, legal parentage was granted to the intended parents.[79] In over 20% of

77. *Shineovich*, 214 P.3d at 40.

78. *Id.* ("There appears to be no reason for permitting heterosexual couples to bypass adoption proceedings by conceiving a child through mutually consensual artificial insemination, but not permitting same-sex couples to do so.").

79. Byrn & Giddings, *supra* note 18, at 1316–18.

cases, judges applied the intent test.[80] Of the remaining cases, regardless of the stated basis of the judge's decision—statute, best interests of the child, public policy, or genetics—in over 66% of cases, the result was the same as if the judge had used the intent test.[81] These results confirm that the intent test is a common-sense approach to determining parentage that is consistent with the overarching goals of determining legal parentage. These results also confirm that adopting ART statutes based on the intent test will, in the majority of circumstances, lead to outcomes that are aligned with how judges currently determine parentage in ART cases.

III. PROPOSED MODEL ACT GOVERNING PARENTAGE OF CHILDREN CONCEIVED VIA ASSISTED REPRODUCTIVE TECHNOLOGY

Following is a model parentage act regarding ART that, if adopted, would determine legal parentage of all children conceived via ART at the moment of birth. The provisions draw from prior uniform and model acts—in particular, the 2002 UPA[82] and the ABA Model Act[83]—both of which utilize the intent test but ultimately fall short of covering all children concevied via ART. Some of the differences between these acts and our provisions are:

- Our provisions acknowledge the parentage of same-sex couples who intend to be legal parents.[84]
- Our provisions rely more comprehensively on the intent test, granting legal parentage even in the absence of formalities such as a written contract.[85]
- When surrogacy is used, our provisions automatically provide legal parentage to the intended parents upon the birth of the child, without requiring judicial intervention.[86]

80. *Id.* at 1309 tbl.1.

81. *Id.* at 1316–19.

82. UNIF. PARENTAGE ACT (2000) (amended 2002), 9B U.L.A. 299–376 (Supp. 2014).

83. MODEL ACT GOVERNING ASSISTED REPROD. TECH. (2008).

84. *Contra* UNIF. PARENTAGE ACT § 704, 9B U.L.A. 356–57 (contemplating consent to assisted reproduction by "a woman and a man").

85. *Contra* MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 604 ("Consent by an individual who intends to be a parent of a child born by assisted reproduction must be in a signed record.").

86. *Contra* UNIF. PARENTAGE ACT § 803, 9B U.L.A 364 ("If the requirements of subsection (b) are satisfied, a court may issue an order validating the gestational

The main difference between the 2002 UPA and ABA Model Act and our model act is that our model act provides a simpler and more comprehensive set of provisions that determines legal parentage of all children conceived via ART at the moment of birth. We offer this proposed model act with the hope that state legislatures will modify their existing parentage statutes to include these provisions.

SECTION 101. DEFINITIONS

(1) "Assisted reproduction" means a method of achieving pregnancy through means other than sexual intercourse.

(2) "Gamete provider" means an individual who provides eggs or sperm to be used for assisted reproduction, whether or not the gamete provider also is an intended parent, whether or not the gametes are provided for consideration, and whether or not the gamete provider is known by the intended parent(s) or is anonymous.

(3) "Gestational agreement" means an agreement between the intended parent(s) and a gestational carrier regarding the use of assisted reproduction for the purpose of achieving pregnancy and a live birth.

(4) "Gestational carrier" means a woman who gestates a child that was conceived via assisted reproduction. This definition includes a "traditional surrogate" (a woman who is not an intended parent who undergoes insemination and fertilization of her own eggs), a "gestational surrogate" (a woman who is not an intended parent into whom an embryo formed using eggs other than her own is transferred), and a "gestational mother" (a woman who is an intended parent who carries the child by any means of assisted reproduction).

(5) "Intended parent" means an individual, married or unmarried, who manifests the intent to be the legal parent of a child conceived via assisted reproduction. The intent to be a legal parent must be manifested at the time of transfer.

(6) "Legal parent" means an individual who has a legally recognized parent-child relationship with a child.

(7) "Legal spouse" means an individual married to another, or who has a legal relationship to another that this state accords rights

agreement and declaring that the intended parents will be the parents of a child born during the term of the agreement.").

and responsibilities equal to, or substantially equivalent to, those of marriage.

(8) "Posthumous conception" means the transfer of gametes or embryos for the purpose of achieving pregnancy and a live birth after a gamete provider who is also an intended parent has died.

(9) "Transfer" means the placement of gametes or embryos into a woman's reproductive tract for the purpose of achieving pregnancy and a live birth.

Authors' Commentary[87]

Section 101 draws from 2002 UPA section 102[88] and ABA Model Act section 102.[89]

Subsection (2), "gamete provider." Both the 2002 UPA and the ABA Model Act use the term "donor." These statutory provisions use "gamete provider" because many people who provide gametes do not "donate" their genetic material. A variety of individuals provide gametes to be used for assisted reproduction, including: (1) men and women who provide gametes to known and unknown third parties for compensation; (2) men and women who provide gametes to known and unknown third parties for no compensation; and (3) men and women who provide gametes for the purpose of becoming an intended parent.

Subsection (3), "gestational agreement." These statutory provisions do not contain specific requirements of a gestational agreement. In order to protect the interests of everyone involved, we recommend that a gestational agreement be in writing, which is often the clearest way to manifest intent. See the Illinois Gestational Surrogacy Act[90] for an example of a comprehensive statute governing gestational agreements. Each state that adopts these provisions may specify the necessary components of a gestational agreement.

SECTION 102. SCOPE OF STATUTORY PROVISIONS

These statutory provisions apply only to children conceived via assisted reproduction. These provisions do not apply to children conceived via sexual intercourse.

87. The commentary after each section is for the reader's own use. It is not meant to be enacted along with the statutory provisions.

88. UNIF. PARENTAGE ACT § 102, 9B U.L.A 303–06.

89. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 102.

90. 750 ILL. COMP. STAT. ANN. 47/1–75 (West, Westlaw through 2014 Sess.).

Authors' Commentary

Section 102 draws from 2002 UPA section 701[91] and ABA Model Act section 601.[92]

SECTION 103. PARENTAL STATUS OF GAMETE PROVIDER

A gamete provider may or may not also be a legal parent of a child conceived via assisted reproduction. A gamete provider is also a legal parent only if he or she meets the requirements of section 105.

Authors' Commentary

Section 103 diverges from 2002 UPA section 702[93] and ABA Model Act section 602,[94] which provide that a "donor" is never a legal parent of a child conceived via assisted reproduction.

Some gamete providers provide gametes to third parties with the express intention of not becoming a legal parent. Other gamete providers may be intended parents pursuant to section 105—for instance, a woman who provides her fertilized eggs to her same-sex spouse or partner and intends to be the legal parent of the resulting child immediately upon birth of the child.

SECTION 104. PARENTAL STATUS OF GESTATIONAL CARRIER

A gestational carrier may or may not also be a legal parent of a child conceived via assisted reproduction. A gestational carrier is also a legal parent only if she meets the requirements of section 105.

Authors' Commentary

Section 104 diverges from 2002 UPA section 801(a)(2)[95] and ABA Model Act section 701(1)(b),[96] which use a narrower definition of gestational carrier than section 104 employs.[97]

91. UNIF. PARENTAGE ACT § 701, 9B U.L.A. 354.
92. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 601.
93. UNIF. PARENTAGE ACT § 702, 9B U.L.A. 355–56.
94. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 602.
95. UNIF. PARENTAGE ACT § 801(a)(2), 9B U.L.A. 362.
96. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 701(1)(b).
97. *See id.* § 102(16) ("'Gestational carrier' means an adult woman, *not an intended parent*, who enters into a gestational agreement to bear a child . . . ." (emphasis added)).

Some gestational carriers bear children with the express intention of not becoming a legal parent. Other gestational carriers may be intended parents pursuant to section 105—for instance, a woman who bears a child using fertilized eggs provided to her by her same-sex spouse or partner and who intends to be the legal parent of the resulting child immediately upon birth of the child.

SECTION 105. PARENTAGE OF CHILD CONCEIVED VIA ASSISTED REPRODUCTION

An individual who intends to be a legal parent of a child conceived via assisted reproduction is a legal parent of the resulting child immediately upon birth of the child. An individual's intent to be a legal parent must be objectively manifested and mutually agreed-upon by all intended parents at the time of transfer. A written agreement between the intended parents may serve as evidence of intent.

Authors' Commentary

Section 105 draws from 2002 UPA section 704[98] and ABA Model Act sections 603 and 604.[99] This section codifies the intent test, which provides that the adult or adults who intended to bring a child into the world through the use of assisted reproduction and who intended to parent the child are the legal parents of the resulting child immediately upon birth.[100]

To be as inclusive as possible to the individuals who use assisted reproduction, this section is gender-neutral and makes no distinction between married and unmarried individuals. The marital presumption of paternity does not establish parentage of a child conceived via assisted reproduction. Nor does a woman's giving birth to a child conceived via assisted reproduction establish maternity of the resulting child. Under this section, an individual may establish parentage only through intent.

98. UNIF. PARENTAGE ACT § 704, 9B U.L.A. 356–57.

99. MODEL ACT GOVERNING ASSISTED REPROD. TECH. §§ 603–04.

100. *See* Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993) (vesting legal parentage in the party or parties that affirmatively intended to conceive a child via assisted reproduction and to raise the resulting child because the child would not exist "[b]ut for their acted-on intention"); *see also* Shultz, *supra* note 12, at 323 ("Within the context of artificial reproductive techniques, intentions that are voluntarily chosen, deliberate, express, and bargained-for ought presumptively to determine legal parenthood.").

Often, a written agreement among the intended parents is used to objectively manifest intent to be a legal parent of a child conceived via assisted reproduction.[101] However, there are cases in which intent to be a legal parent is objectively manifested and mutually agreed-upon by each intended parent in the absence of a written agreement. This section does not require a written agreement because some intended parents do not have the legal knowledge or financial means to execute a written agreement, or choose not to have a written agreement for other reasons. Not requiring a written agreement ensures that the intended parents are protected and that their children conceived via assisted reproduction have legal parents at birth.

Courts increasingly recognize that families sometimes include more than two parents.[102] These statutory provisions do not preclude recognition of more than two intended parents. The language requiring mutual agreement among all intended parents, however, provides a limiting factor as to the number of intended parents recognized under this section. States may choose to include a provision expressly limiting the number of intended parents a child may have.

SECTION 106. WITHDRAWAL OF INTENT TO BE A LEGAL PARENT

An individual's intent to be a legal parent via assisted reproduction may be withdrawn by that individual at any time before transfer by objectively manifesting the withdrawal to the other intended parent (or parents). An individual who withdraws

101. An example of a statute that requires a written agreement in order to vest parentage in the intended parent(s) is the Illinois Gestational Surrogacy Act. *See* 750 ILL. COMP. STAT. ANN. 47/10 (West, Westlaw through 2014 Sess.) ("'Intended parent' means a person or persons who enters into a gestational surrogacy contract with a gestational surrogate pursuant to which he or she will be the legal parent of the resulting child.").

102. *See, e.g.*, Jacob v. Shultz-Jacob, 923 A.2d 473, 475–76 (Pa. Super. Ct. 2007) (granting the biological mother, her former lesbian partner, and the known male gamete provider custody rights); *see also* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03 (2002) (recognizing "legal parents," "parent[s] by estoppel," and "de facto parents" in its definitions); Susan Frelich Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11, 17–19 (2008); Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J.L. & FAM. STUD. 309, 327–32 (2007); Laura T. Kessler, *Community Parenting*, 24 WASH. U. J.L. & POL'Y 47, 74–75 (2007).

intent before transfer is not a legal parent of the resulting child. An individual may not withdraw intent to be a legal parent after transfer.

Authors' Commentary

Section 106 draws from 2002 UPA section 706[103] and ABA Model Act section 606.[104]

SECTION 107. EFFECT OF DISSOLUTION OF MARRIAGE

(a) If a marriage is dissolved before transfer, any prior intent to be a legal parent of a child conceived via assisted reproduction is presumed revoked. If, after dissolution, former legal spouses objectively manifest the intent to be legal parents of the resulting child at the time of transfer, both are legal parents of the resulting child pursuant to section 105.

(b) If a marriage is dissolved after transfer, and both legal spouses intended at the time of transfer to be legal parents of the resulting child, they are both legal parents of the resulting child.

Authors' Commentary

Section 107 draws from 2002 UPA section 706[105] and ABA Model Act section 606.[106]

SECTION 108. DISPUTE OF PARENTAGE

The legal parent of a child conceived via assisted reproduction may not challenge his or her parentage of the child under section 105 unless a proceeding is commenced to adjudicate parentage within two years after the legal parent learns of the birth of the child.

Authors' Commentary

Section 108 draws from 2002 UPA section 705[107] and ABA Model Act section 605.[108] Unlike the 2002 UPA and ABA Model Act, this provision is not limited to legal spouses.

103. UNIF. PARENTAGE ACT § 706 (2000) (amended 2002), 9B U.L.A. 358 (Supp. 2014).
104. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 606.
105. UNIF. PARENTAGE ACT § 706, 9B U.L.A. 358.
106. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 606.
107. UNIF. PARENTAGE ACT § 705, 9B U.L.A. 357–58.
108. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 605.

SECTION 109. PARENTAL STATUS OF DECEASED INDIVIDUAL

Except as otherwise provided in this state's probate code, if an individual who intended to be a legal parent pursuant to section 105 dies before transfer of that individual's gametes, the deceased individual is not a legal parent of a child resulting from posthumous conception unless the deceased individual objectively manifested the intent that if assisted reproduction were to occur after death, the deceased individual would be a legal parent of the child. If an intended parent dies after transfer, he or she is a legal parent of the resulting child.

Authors' Commentary

Section 109 draws from 2002 UPA section 707[109] and ABA Model Act section 607.[110]

In *Astrue v. Capato ex rel. B.N.C.*, the Supreme Court endorsed the Social Security Administration's interpretation of 42 U.S.C. §§ 416(e) and 416(h)(2)(A), which are used to determine whether a posthumously conceived child meets the definition of a "child" under the Social Security Act and is thus eligible for survivor benefits.[111] The Social Security Administration's longstanding policy is to "'apply [the intestacy law of the insured individual's domiciliary State].'"[112]

Given the limited means of ascertaining the intent of a deceased gamete provider who is also a purported intended parent, it is recommended that a state require clear and convincing evidence that the deceased individual objectively manifested intent that if transfer were to occur after death, the deceased individual would be a legal parent of the child.

A state may also wish to impose a time limit, after death, within which the surviving intended parent(s) must act.[113]

109. UNIF. PARENTAGE ACT § 707, 9B U.L.A. 358–59.

110. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 607.

111. 132 S. Ct. 2021, 2033 (2012).

112. *See id.* at 2028 (quoting 42 U.S.C. § 416(h)(2)(A)).

113. *See* Benjamin C. Carpenter, *A Chip Off the Old Iceblock: How Cryopreservation Has Changed Estate Law, Why Attempts to Address the Issue Have Fallen Short, and How to Fix It*, 21 CORNELL J.L. & PUB. POL'Y 347, 425 (2011) ("It is important to establish a limitation period to provide finality to the administration process in those scenarios where a posthumously conceived child could 'divest' others of all or part of their share of the decedent's estate. Without this, an estate could remain open indefinitely while the executor waits for a posthumously conceived child to be

IV. CONCLUSION

For several decades, parentage of children conceived via ART has been left to the courts. During that time, legal scholars have advocated for the application of the intent test to determine parentage of children conceived via ART. In addition, model acts have incorporated the intent test, as have several state legislatures. New empirical data shows that in over 74% of disputed parentage cases involving ART, judges awarded parentage to the intended parents. A consensus has been reached. Scholars, legislatures, and courts agree that the intent test is the appropriate means for determining legal parentage at the moment of birth for children conceived via ART. Using the intent test as the basis for parentage statutes for children conceived via ART provides an automatic, efficient, and predictable means of determining parentage that is consistent with the overarching goals of determining legal parentage and will ensure that all children have legal parents at the moment of birth. The time has come for state legislatures to codify the intent test.

born—an event which may never happen.").