1995

United States: Deconstructing the American Family - Developments in Family Law During 1993

Lynn D. Wardle

Margaret F. Brinig
Notre Dame Law School, mbrinig@nd.edu

UNITED STATES: DECONSTRUCTING THE AMERICAN FAMILY — DEVELOPMENTS IN FAMILY LAW DURING 1993

Margaret F. Brinig* and Lynn D. Wardle**

I. INTRODUCTION

Persons unfamiliar with the American legal system might be dismayed by the variety and inconsistency of developments in domestic relations law during 1993. The key to comprehending family law in the United States is to know that, within the broad parameters set by the Constitution and minimal federal legislation, each of the fifty American states retains substantial constitutional autonomy when regulating domestic relations. As a result, "a hundred flowers bloom" in American family law—in the form of tremendously varied (sometimes diametrically inconsistent) statutes, policies and doctrines. Despite national trends, novelties or developments of potentially broad interest that occur every year, the family law in any particular state may differ significantly from that in any other state as to almost any topic or detail of domestic relations. Given space limitations, this article reviews only the most notable developments in American family law during 1993.[1]

II. SPOUSAL AND QUASI-SPOUSAL RELATIONS

There was no "landmark" decision regarding regulation of marriages in America in 1993. The cases reflected many different themes, but perhaps the most dominant undercurrent was the continuing devaluation and the loss of understanding of the role of marital relations in the United States. However, the "marginalization of marriage" is not

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* Professor, George Mason University School of Law.

** Professor, J. Reuben Clark Law School, Brigham Young University.

[1] *See* Linda D. Elrod, *Summary of the Year in Family Law*, 27 FAM L Q 485 (1994); Linda D. Elrod & Timothy B. Walker, *Family Law in the Fifty States*, 27 FAM L Q 515 (1994); Paul M. Kurtz, *Annual Survey of Periodical Literature*, 27 FAM L Q 747 (1994).

new; it has been a dominant pattern in American legal culture for twenty-five years.

A. Regulation of Marriage Formation and Premarital Arrangements

1. Same-Sex Marriage

The most widely discussed case dealing with marriage was *Baehr v. Lewin*,[2] which involved a suit by homosexual couples seeking relief against Hawaii's marriage requirement statute permitting only heterosexual marriages.[3] The trial court upheld the requirement as a matter of law. The Hawaii Supreme Court vacated and remanded, finding unresolved factual questions.

The first issue raised in the case was whether the "right to marry" protected by the Hawaii Constitution extended to same-sex couples.[4] Although the plaintiffs based their claim on only state law, the Hawaii Supreme Court relied primarily on decisions defining the fundamental right of marriage under the United States Constitution.[5] The court concluded that there is no "fundamental constitutional right to same-sex marriage" because such a relationship is not "rooted in tradition" or "at the base of all our civil and political institutions."[6]

Next, the court examined whether homosexuals seeking marriage licenses were denied the "equal protection" guarantee of the Hawaii Constitution, which is "more elaborate" than that in the U.S. Constitution.[7] Relying on a U.S. Supreme Court decision invalidating an interracial marriage law, the Hawaii Supreme Court summarily declared that Hawaii's marriage regulation statute facially "discriminates based on sex against the applicant couples," thus violating the state guarantee

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[2] 852 P.2d 44 (Haw. 1993).

[3] HAW. REV. STAT. § 572-1(3) (1985) (referring to "the man" and "the woman" as the applicants for marriage license).

[4] *Baehr*, 852 P.2d at 55.

[5] The Hawaii Supreme Court's exhaustive opinion discussing the major privacy decisions of the U.S. Supreme Court failed to mention, much less analyze and discuss, the only decision of the Supreme Court considering whether homosexual behavior is a constitutionally protected fundamental right. Bowers v. Hardwick, 478 U.S. 186 (1986).

[6] *Baehr*, 853 P.2d at 57.

[7] *Id.* at 57, 60. The plaintiffs alleged, and the Hawaii court considered, only whether the state constitution was violated. The state equal rights amendment was also invoked. Tactically, this prevented federal court review (and possible reversal) of a pro-homosexual decision.

of equal protection. Same-sex couples are denied many legal advantages available to married couples.[8]

Although American courts unanimously have rejected legal claims for same-sex marriage recognition,[9] the Hawaii court concluded that none of the prior cases had addressed equal protection claims directly. The definitional argument (that marriage, by definition, must involve spouses of different sex) accepted in some previous cases was dismissed as "tautological and circular."[10] Relying on the Equal Rights Amendment to the Hawaii Constitution, the Hawaii Supreme Court held that sex is a "suspect category," and that laws discriminating on the basis of sex must be subject to "strict scrutiny."[11] Because the court had already found the denial of marriage licenses to these couples facially discriminatory,[12] the court declared that the heterosexual marriage requirement was presumed unconstitutional unless, on remand, the state shows compelling state interests and narrowly drafted restrictions that avoid unnecessary abridgments of constitutional rights.[13]

Justice Burns, concurring, acknowledged that discrimination on the basis of sexual relationship is not necessarily the same as discrimination on the basis of gender. He suggested, however, that if homosexuality were "biologically fated," then discrimination against homosexual relations would be equivalent to discrimination on the basis of sex.[14]

Dissenting, Judge Heen urged the court to defer to the legislature in the making of marriage policy. He also suggested that the heterosex-

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[8] *Id.* at 57-62. However, an applicant for a marriage license for a same-sex relationship is not denied a marriage license on account of his or her sex, but on account of the "marriage" relationship he or she wishes to have. Both men and women equally may marry persons of the other sex, while same-sex couples of both sexes equally are denied marriage licenses. The court apparently confuses discrimination on account of sex with discrimination on account of sexual relationship—not an insignificant mistake.

[9] Jones v. Hallahan, 501 S.W.2d 588 (Ky. 1973); Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972); De Santo v. Barnsley, 476 A.2d 952 (Pa. Super. Ct. 1984); Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974).

[10] *Id.* (This phrase, of course, is tautological and redundant.)

[11] *Baehr*, 852 P.2d at 67.

[12] The Hawaii court declared that the argument that heterosexual marriage requirements do not discriminate on the basis of sex "was expressly considered and rejected in *Loving [v. Virginia*, 388 U.S. 1 (1967)]." *Baehr*, 852 P.2d at 67-68. With this summary misstatement, the court attempted to evade analysis by erroneously invoking *stare decisis*.

[13] *Id.*

[14] However, a "biologically-fated" trait need not be suspect. It would be no more accurate to say that discrimination based on sexual orientation is the same as discrimination against gender than to say that discrimination on account of race, hair color, height and IQ (which, of course, are "biologically fated" characteristics) are all the same.

ual marriage requirement promotes the legislative purpose of fostering and protecting the propagation of the human race through heterosexual marriage.[15]

The Hawaii Supreme Court remanded the case to the trial court to apply "strict judicial scrutiny." Thus, at this time *Baehr* is still essentially a non-decision. However, inasmuch as it represents the latest and most sympathetic review of claims to same-sex marriage, it has provoked widespread enthusiasm among gays and lesbians.

2. *Antenuptial Agreements*

The many cases involving antenuptial agreements reveal that American courts in 1993 generally were more inclined to circumvent or invalidate antenuptial agreements than to enforce them. Often the courts narrowly construed premarital contracts to protect parties from an unforeseen and apparently unintended consequence of the agreements. For example, an Alabama court ruled that an antenuptial agreement waiving all claims against the respective estates of each spouse did not bar a wife from sharing in a wrongful death recovery.[16] Likewise, a federal court held that a premarital agreement, in which each party waived any survivor's interest in probate property, did not operate to waive the wife's claim to her husband's pension following his death.[17] In other cases, state courts declined to enforce agreements limiting judicial power to achieve "economic justice" upon divorce.[18] However, the Ohio Supreme Court ruled that a prenuptial contract providing for arbitration of alimony and child support disputes was enforceable.[19]

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[15] *Id.* at 74.

[16] Steele v. Steele, 623 So. 2d 1140 (Ala. 1993).

[17] Petro Enter., Inc. v. Perdue, 998 F.2d 491 (7th Cir. 1993).

[18] *See* Hess v. Hess, 1993 WL 453692 (Ariz. Ct. App., Nov. 4, 1993) (antenuptial agreement leaving wife of twelve years with little of doctor-husband's $2 million assets violates public policy); *In re* Marriage of Dechant, 867 P.2d 193 (Colo. 1993) (award of maintenance despite antenuptial agreement if contract provisions unconscionable); *see also In re* Foran, 834 P.2d 1081 (Wash. Ct. App. 1992) (premarital agreement not enforced because evidence of domestic violence and inadequate provision for wife).

[19] Kelm v. Kelm, 623 N.E.2d 39 (Ohio 1993) (mutual consent to arbitrate disputes is widely recognized, and other jurisdictions generally have upheld the arbitration of support issues).

B. Regulation of Ongoing Marriages and Quasi-Marital Relations

Legal protection for a zone of privacy around ongoing marriage continued to erode during 1993, for both good and ill. Courts showed no reluctance to "intervene" to prevent or punish spousal abuse. The Supreme Court of the United States ruled that prosecution of a man for criminally assaulting his wife, after he was punished for the same acts with criminal contempt for violating a protective order, did not necessarily violate the double jeopardy prohibition of the Constitution.[20] The Ninth Circuit Court of Appeals held that spouse abuse is a crime of "moral turpitude" for which an alien may be deported.[21] In two separate cases, state courts punished violation of protective orders with criminal sanctions.[22] The Michigan Court of Appeals ruled that the spousal testimonial privilege does not preclude a divorcing wife from testifying against her husband in his prosecution for violating a restraining order and breaking into the marital home with intent to commit larceny.[23]

Three significant 1993 decisions limited interspousal immunity. In a case in which a wife sued her husband for her paralysis resulting from an automobile accident when he was driving, the Delaware Supreme Court abolished the doctrine of interspousal immunity for negligence cases.[24] Likewise, the Florida Supreme Court abolished interspousal immunity in cases involving intentional attacks (in this case a machete attack by the husband on the wife).[25] Also, the Maine Su-

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[20] United States v. Dixon, 113 S. Ct. 2849 (1993). The fragmented Court ruled that there cannot be subsequent prosecution for offenses containing the same elements. Because the man's criminal contempt prosecution explicitly required proof that he had committed criminal assault, the Court ruled that his subsequent prosecution for criminal assault was barred by the double jeopardy clause. However, later charges against him for threatening to injure and assault with intent to kill, because they did not involve the identical elements, were not barred, even though based on the same acts as the criminal contempt.

[21] Grageda v. United States Immigration and Naturalization Serv., 12 F.3d 919 (9th Cir. 1993).

[22] *See, e.g., Dixon*, 113 S. Ct. 2849 (both criminal contempt and criminal prosecution for assault with intent to kill); People v. Szpara, 492 N.W.2d 804 (Mich. 1992) (breaking and entering own home); *see also* Dawson v. Kentucky, 867 S.W.2d 413 (Ky. Ct. App. 1993) (statements wife made to police properly admitted after she declined to testify at trial of husband for assaulting her).

[23] Michigan v. Pohl, 507 N.W.2d 819 (Mich. Ct. App. 1993).

[24] Beattie v. Beattie, 630 A.2d 1096 (Del. 1993).

[25] Waite v. Waite, 618 So. 2d 1360 (Fla. 1993). *See also* Cater v. Cater, 846 S.W.2d 173 (Ark. 1993) (affirming verdict of $20,000 compensatory and $350,000 punitive damages for injuries inflicted during marriage).

preme Court ruled that interspousal immunity did not bar a claim for intentional infliction of emotional distress.[26]

However, protection for marriages from the actions of third parties weakening spousal relations was diminished in some cases.[27] A California court ruled that a husband had no claim against the therapist who seduced his wife because the therapist did not specifically intend to hurt the husband.[28] Likewise, the Oklahoma Supreme court rejected a husband's claim against a church whose minister gave allegedly harmful marital counsel to him while having an affair with his wife.[29]

C. *Regulation of Marriage Termination and Relations Between Former Spouses*

Alimony opinions reveal no clear trend in emerging doctrine or theory. Judicially determined need is still the touchstone for alimony awards in most courts,[30] while "fault" remains a significant consideration in many.[31] Several courts invalidated short and stingy awards of rehabilitative alimony following long-term marriages.[32] Regarding

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[26] Henriksen v. Cameron, 622 A.2d 1135 (Me. 1993); *see also* Thompson v. Dulaney, 970 F.2d 744 (10th Cir. 1992) (no "interspousal" immunity from or exception to federal law prohibiting wiretapping telephone conversations).

[27] *But c.f.*, Boyles v. Kerr, 855 S.W.2d 593 (Tex. 1992) (rejecting a claim for negligent infliction of emotional distress by an unmarried woman whose boyfriend secretly videotaped their sexual trysts and showed the tape to third parties).

[28] Smith v. Pust, 23 Cal. Rptr. 2d 364 (Ct. App. 1993). The court reasoned (in Carrollian logic that would make Alice proud): "People usually have sex for other reasons than to annoy third parties." *Id.* at 372.

[29] Bladen v. First Presbyterian Church, 857 P.2d 789 (Okla. 1993). *See also* D.D. v. C.L.D., 600 So. 2d 219 (Ala. 1992) (intentional infliction of emotional distress claim barred because plaintiff really claimed alienation of affections); Saunders v. Alford, 607 So. 2d 1214 (Miss. 1992) (abolishing criminal conversation but retaining alienation of affections); Russo v. Sutton, 422 S.E.2d 750 (S.C. 1992) (abolishing alienation of affections). *But see* Kirk v. Koch, 607 So. 2d 1220 (Miss. 1992) (upholding alienation of affections award); USAA Property & Casualty Co. v. Rowland, 435 S.E.2d 879 (S.C. Ct. App. 1993) (insurer not obligated under homeowners policy to defend insured in an action for alienation of affections).

[30] *See, e.g., In re* Marriage of Olson, 17 Cal. Rptr. 2d 480 (Ct. App. 1993); Downs v. Downs, 621 A.2d 229 (Vt. 1993).

[31] Matthews v. Matthews, 614 So. 2d 1287 (La. Ct. App. 1993) (abandonment); Smith v. Smith, 847 P.2d 827 (Okla. Ct. App. 1993) (fault relevant to need); Brabec v. Brabec, 510 N.W.2d 762 (Wis. Ct. App. 1993) (murder contract); *but see* Barnes v. Barnes, 428 S.E.2d 294 (Va. Ct. App. 1993) (post-separation adultery did not bar alimony).

[32] *See, e.g.*, Mathis v. Mathis, 620 A.2d 174 (Conn. App. Ct. 1993) (18-month award inadequate); Rabie v. Ogaki, 860 P.2d 785 (N.M. Ct. App. 1993) (maximum four-year award inadequate after 18-year marriage). *See also In re* Marriage of Pearson, 603 N.E.2d 720 (Ill. App. Ct. 1992) (36-month award inadequate where wife has medical problems); Kapfer v. Kapfer, 419

property division, courts in 1993 tended to exclude disputed items of property from the marital estate.[33]

III. THE PARENT-CHILD RELATIONSHIP

Several strands run through the law relating to children in the United States. Two of the most important filaments involve the coincidence of children's and parents' rights and the question of how family law functions in a federal system. The noteworthy cases primarily involve creation and termination of the parent-child relationship.

A. Regulation of the Creation of the Parent-Child Relationship

1. Jurisdiction

Even the "special proficiency developed by state tribunals"[34] has not prevented substantial jurisdictional uncertainty in custody and adoption cases. The geographic mobility of Americans has caused interjurisdictional family law problems that plague legislators[35] and courts.[36]

The celebrated case of *In re Baby Girl Clausen (Schmidt v. DeBoer)*,[37] is an example of these jurisdictional problems in the adoption context. The child (known as "Baby Jessica") was born in February of

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S.E.2d 464 (W. Va. 1992) (remanding rehabilitative award to 51-year-old housewife who had not worked outside of home in twenty years).

[33] *See* Fields v. Fields, 625 N.E.2d 1266 (Ind. Ct. App. 1993) (assets of business started by husband after separation preceding unsuccessful reconciliation attempt excluded); Alston v. Alston, 629 A.2d 70 (Md. 1993) (man's lottery winnings between prior dismissed divorce and present divorce not included); Hartog v. Hartog, 605 N.Y.S.2d 749 (App. Div. 1993) (annual employment bonuses accrued before filing excluded); Miller v. Miller, 428 S.E.2d 547 (W. Va. 1993) (farm and house deeded to husband by his mother is exempt from equitable distribution). *But see In re* Bekooy, 846 P.2d 1183 (Or. Ct. App. 1993) (including husband's post-divorce inheritance from his mother).

[34] Ankenbrandt v. Richards, 112 S. Ct. 2206, 2215 (1992).

[35] *See, e.g.*, Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A (1994); Family Support Act of 1988, 42 U.S.C.A. § 651 (1994); The Uniform Child Custody Jurisdiction Act, 9 U.L.A. § 115 (1988); OR REV. STAT § 109.700 (1993); S.D LAWS §§ 26-5A-5 to -26 (1994); VA. CODE ANN. §§ 20-125 to -144 (Michie 1994); The Uniform Reciprocal Enforcement of Support Act, 9B U.L.A. § 381 (1988). *See, e.g.*, VA CODE ANN §§ 20-88.32-82 (Michie 1994) and the new Uniform Interstate Family Support Act, enacted by the National Conference on Uniform State Laws in August, 1992, and the House of Delegates of the American Bar Association on February 9, 1993.

[36] *See, e.g.*, Kulko v. Superior Court, 436 U.S. 84 (1978); Schmidt v. DeBoer, 502 N.W.2d 649 (Mich. 1993).

[37] 501 N.W.2d 193 (Mich. Ct. App. 1993), *aff'd in part, vacated in part, and remanded*, 502 N.W.2d 649 (Mich. 1993).

1989, in Iowa. Her biological mother, Cara, immediately placed the child for adoption. When asked to name the father, Cara gave the name of another man. After she and the named "father" executed consent for adoption, the DeBoers were granted custody of the child and returned to their home in Michigan. In February of 1991, the DeBoers filed for adoption in Iowa. Shortly thereafter, Cara sought to revoke her consent. She then revealed that she had lied about the identity of the child's biological father, Daniel Schmidt. Schmidt worked at the same place as Cara and knew she was pregnant but believed that he was not the father. Schmidt filed in Iowa seeking to intervene in the DeBoer's adoption proceeding. In January of 1992, the Iowa trial court voided the adoption because Schmidt's parental rights had never been terminated and because Cara had signed her consent to adoption before the statutory post-birth waiting period had expired. The DeBoers appealed to the Iowa Supreme Court, which rejected their argument that a "best interests of the child" analysis governed the issue of termination.[38]

On the same day their rights were terminated in Iowa, the DeBoers filed a petition in Michigan under the Uniform Child Custody Jurisdiction Act (UCCJA),[39] arguing that Michigan had jurisdiction because the child had resided there for all but three weeks of her life. The Michigan court entered an *ex parte* order that Schmidt not remove the child from the county. Schmidt filed an action to dissolve the preliminary injunction and to recognize and enforce the Iowa order granting him custody. Schmidt argued that he had been denied his parental right to develop a relationship with the child[40] and that the DeBoers lacked standing to initiate a custody dispute. Schmidt ultimately prevailed because, under the UCCJA, Michigan was precluded from exercising jurisdiction if there was a pending proceeding in another state.[41] Further, the court reasoned that the DeBoers lacked

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[38] *Schmidt*, 501 N.W.2d at 195.

[39] 9A U.L.A. 123 (1988), MICH. COMP. LAWS §§ 600.651-673 (1981).

[40] The right of unwed fathers to develop relationships with their children unless unfit is required by Stanley v. Illinois, 405 U.S. 645 (1972). By this time, Schmidt had married the child's natural mother. The opposite result was reached on the merits in Robert O. v. Russell K., 604 N.E.2d 99 (N.Y. 1992). *See also* In re Karen A.B., 513 A.2d 770 (Del. 1986). In both cases, the court did not void the adoption although the natural father remained unaware of child's existence until after the adoption was granted.

[41] *Schmidt*, 501 N.W.2d at 196.

standing to bring their Michigan action because the Iowa decision had stripped them of any legal claim to custody.[42]

When the DeBoers appealed to the Michigan Supreme Court, it affirmed because the UCCJA and the Parental Kidnapping Prevention Act (PKPA)[43] deprived Michigan courts of jurisdiction over the custody dispute and required enforcement of Iowa orders granting the Schmidts custody.[44] Further, the Supreme Court of Michigan found that the DeBoers lacked standing to sue.

This decision is based upon the presumption that children's rights do not conflict with their parents' absent a showing of unfitness.[45] The court concluded that "it is now time for the adults to move beyond saying that their only concern is the welfare of the child" and to assure that the transfer of custody causes minimal disruption of the child's life.[46] The practical effect, however, was to forcibly remove a two-year-old child from the stable home into which her biological mother had voluntarily placed her just days after her birth and in which she had lived happily all of her life. The human dimension provoked a firestorm of public controversy.

2. *Unorthodox Adoptive Couples*

Recently, several state courts have confronted cases in which gay or lesbian couples wished to adopt children.[47] During 1993, several

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[42] *Id.* at 197.

[43] 28 U.S.C. § 1738A (1994).

[44] The court reasoned that if the PKPA mandated a best interests analysis in Iowa, that would permit the forum state's view of the merits to determine jurisdiction. The court found such a result in direct conflict with Congress' directive that each state is free to fashion its own substantive family law within constitutional limitations. *Schmidt*, 502 N.W.2d at 658.

[45] *Id.* at 666.

[46] *Id.* at 668. The decision is criticized in Joan Hollinger, *A Failed System is Tearing Kids Apart*, NAT'L L.J., Aug. 9, 1993, at 17. A dissenting opinion concluded that because Iowa was not the home state having jurisdiction within the meaning of the PKPA, Michigan need not enforce the Iowa decree transferring custody. Further, the Michigan action did not involve the same issue as the Iowa decision (i.e. that Schmidt was the biological father and not unfit). *Schmidt*, 502 N.W.2d at 678 (dissenting opinion).

[47] Although a few states explicitly prohibit homosexual adoption (*See* FLA. STAT. ANN. § 63.042(8) (West 1994); N.H. REV. STAT. ANN. § 170-B:4 (1993); *see also* Roe v. Roe, 324 S.E.2d 691 (Va. 1985); *In re* Interest of Z.J.H., 162 Wis. 2d 1002 (1991)) most do not. *See, e.g.*, CONN. GEN. STAT. ANN. § 45a-726a (West 1994); MASS. GEN. LAWS. ANN ch. 151B, § 4 (West 1994). *See generally* Judith A. Lintz, *The Opportunities, or Lack Thereof, for Homosexual Adults to Adopt Children*, 16 U. DAYTON L. REV. 471 (1991); Shaista Parveen, *Homosexual Parenting: Child Custody and Adoption*, 22 U.C. DAVIS L. REV. 1009 (1989).

courts allowed one partner to adopt the other's child. For example, the Massachusetts Supreme Court finalized adoption in *Adoption of Tammy*,[48] in which the two women in question both were related biologically to the five-year-old child.[49] The court further held that "when a natural parent is a party to a joint adoption petition, that parent's legal relationship to the child does not terminate on entry of the adoption decree."[50] Although the adults' sexual preferences dominated this court's analysis in this case, and the potentially serious effects on children of being raised in a lesbian home were not seriously examined, some would argue that children always benefit from the greater stability and financial security that adoption provides.[51]

Finally, in *Adoption of BLVB*,[52] the Vermont Supreme Court held that "when the family unit is comprised of the natural mother and her partner, and the adoption is in the best interests of the children, terminating the natural mother's right is unreasonable and unnecessary." A psychologist who had evaluated the family unit testified that "it was essential for the children to be assured of a continuing relationship" and recommended that the "adoptions be allowed for the psychological and emotional protection of the children."[53]

3. *Surrogate Mothers*

Legal recognition of surrogate parenting continues to be contentious in the United States. Several states have enacted legislation prohibiting or otherwise regulating surrogacy.[54] In *Johnson v. Cal-*

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[48] 619 N.E.2d 315 (1993). *See also In re* Evan, 538 N.Y.S.2d 997 (Surr. Ct N.Y. Co. 1992).

[49] The sperm donor was one woman's cousin, while the other was the child's natural mother.

[50] *Adoption of Tammy*, 619 N.E.2d at 321.

[51] *See generally* Susan Golornbok et al., *Children in Lesbian and Other Single Parent Households: Psychosexual and Psychiatric Appraisal*, 24 J. CHILD PSYCHOLOGY & PSYCHIATRY 531 (1983); Nancy P. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459 (1990).

[52] 628 A.2d 1271 (Vt. 1993).

[53] *Id.* at 1272

[54] *See, e.g.*, ALA. CODE § 26-10A-34 (1994); ARIZ. REV. STAT. ANN. § 25-218 (1994); ARK. CODE ANN. § 19-10-201 (Michie 1993); CAL. REV. CODE §§ 8502, 8609 (1994); IND. CODE ANN. § 31-8-2-1 (Burns 1994); N.J. REV. STAT. ANN. § 9:3-39.1 (West 1994) (allowing so long as not for financial gain); N.Y. DOM. REL. LAW §§ 122 (McKinney 1994) (prohibiting); VA. CODE ANN. § 63.1-220.3 (Michie 1994) (regulating); WASH. REV. CODE ANN. § 26.26.230 (West 1994) (not for financial gain). *See generally* Walter Wadlington, *Contracts to Bear a Child: The Mixed Legislative Signals*, 29 IDAHO L. REV. 383 (1993).

vert,[55] the California Supreme Court found the surrogacy agreement between the genetic parents and the surrogate implanted with their fertilized embryo did not offend the state or federal constitution nor public policy. The surrogate was therefore not the "natural parent" entitled to custody or visitation with the child. The court suggested that the legislature resolve the public policy questions, because it could study empirical data and develop values of general applicability.[56]

4. *Revoking Consent to Adoption*

In several recent cases, prospective adoptive fathers refused to continue the adoption when their marriages ended. In two of the cases,[57] the father's adoption was not completed, and he was not required to make child support payments following the divorce. In the third,[58] the father was estopped under very similar circumstances. "The father's actions in bringing the babies halfway around the world" plus his "indications of financial ability and commitment to her upbringing"[59] effectively estopped him from revoking, because the children's welfare might be jeopardized.

B. *Regulating Ongoing Parent-Child Relations*

Courts continued to pierce parent-child immunity to allow claims against parents for sexual abuse of children.[60] Courts in Alaska, Mas-

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[55] 851 P.2d 776 (Cal. 1993).

[56] Recent articles on surrogacy include Alexander M. Capron & Margaret Radin, *Choosing Family Law over Contract Law as a Paradigm for Surrogate Motherhood*, SURROGATE MOTHERHOOD: POLITICS AND PRIVACY (Larry O. Gostin, ed. 1990); Anne Goodwin, *Determination of Legal Parentage in Egg Donation, Embryo Transplantation and Gestational Surrogacy Arrangements*, 26 FAM. L.Q. 275 (1992); Herbert T. Krimmel, *Can Surrogate Parenting Be Stopped? An Inspection of the Constitutional and Pragmatic Aspects of Outlawing Surrogate Mother Arrangements*, 27 VAL. U.L. REV. 1 (1992); Marjorie Schultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV 297.

[57] Fenn v. Fenn, 847 P.2d 129 (Ariz. 1992); Stein v. Stein, 831 S.W.2d 684 (Mo. App. 1992). The *Fenn* court noted that under some circumstances he might be estopped from denying an obligation to support a putative child. *Fenn*, 847 P.2d at 135.

[58] *In re* Baby Boy C., 596 N.Y.S.2d 56 (Ct. App. 1993).

[59] *Id.* at 58.

[60] Roberts v. Caton, 619 A.2d 844 (Conn. 1993) (statute of limitations extension applied retroactively to allow sexual abuse claims against grandfather). *See also* Barnes v. Barnes, 603 N.E.2d 1337 (Ind. 1992) (parental immunity does not apply to sexual assault claims); Doe v. Holt, 418 S.E.2d 511 (N.C. 1992) (no parental immunity for sexual molestation claims).

sachusetts and Michigan approved unconventional trial procedures and admission of disputed evidence in child abuse cases.[61]

C. *Termination of Parental Rights*

Several states have enacted legislation detailing ways in which children may become emancipated.[62] In addition, some recent cases have discussed ways in which children can free themselves from parental ties while they are minors.

Despite the enormous publicity when a Florida lower court apparently allowed him to "divorce" his parents, Gregory Kingsley ultimately was barred from bringing an action on his own behalf to terminate the rights of his parents.[63] However, after Gregory's attorney had filed a petition on his behalf as his next friend, the court terminated his mother's parental rights.[64]

In another well-known case from Florida,[65] fourteen-year-old Kimberly Mays, who had been switched at birth with another baby, was significantly more successful in her suit to terminate her relationship with her natural parents. The court found that it would be detrimental to her to force any contact with the Twiggs[66] or to declare them to be her biological parents.[67] In this case, the court stated specifically that the interests of the child were its most important concern, and the court rejected the natural parents' contention "that their interests,

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[61] Nunn v. State, 845 P.2d 435 (Alaska Ct. App. 1993) (admission of videotaped interviews after witness recanted her sexual abuse allegations against stepfather); Commonwealth v. Twitchell, 617 N.E.2d 609 (Mass. 1993) (Christian Science couple could be guilty of involuntary manslaughter for failing to provide medical treatment for son, but reversing conviction because of erroneous evidentiary ruling); *In re* Brock, 499 N.W.2d 752 (Mich. 1993) (videotaped interviews of child may be examined after expert testifies that child will suffer psychological harm if required to testify).

[62] *See, e.g.*, CONN. GEN. STAT. ANN. § 46b-150d (West 1994); ILL. REV. STAT. ch. 750, acts 30/1-11 (1994); LA. CIV. CODE ANN. art. 366 (West 1994); MICH. COMP. LAWS ANN. § 722.4 (West 1994); NEV. REV. STAT. § 129.080 (1993); N.M. STAT. ANN. § 28-6-2 to -8 (Michie 1994); OR. REV. STAT. § 109.565 (1993). *See also Emancipating Children in Modern Times*, 25 U. MICH. J.L. REF. 239 (1992).

[63] Kingsley v. Kingsley, 623 So. 2d 780, 783 (Fla. Dist. Ct. App. 1993). *See generally* Jerri A. Blair, *Gregory K. and Emerging Children's Rights*, 29 TRIAL 22 (1993); Mark Hansen, *Boy Wins 'Divorce' from Mom; Critics Claim Ruling will Encourage Frivolous Suits by Dissatisfied Kids*, 78 B.A.J. 16 (1992); Georgia Sargeant, *'Parental Divorce' Cases Highlight Need for Children's Advocates*, 29 TRIAL 88 (1988).

[64] *Kingsley*, 623 So. 2d at 784.

[65] May v. Twigg, 1993 WL 330624 (Fla. 1993).

[66] *Id.* at *3.

[67] *Id.* at *6.

whatever they might be, are paramount."[68] Ironically, just months after the court severed all contact between Kimberly and her biological parents, Kimberly left the man who had raised her and for whom she had in court professed unending filial commitment, and voluntarily moved in with her biological parents, the Twiggs.

IV. CONCLUSION

American courts in 1993 did little to slow the rampant and growing lack of appreciation for families and the sacrifices and investments made by spouses and parents. Many courts approached the consequences of family disintegration with an "anything goes" attitude. Dilemmas resulting from abandoning children to their "rights" continued to stump the courts. Homosexual relationships are the latest alternative lifestyle to mimic and claim parity with marital and parental relations. In short, the identity crisis of American family law was not resolved in 1993.

[68] *Id.* at *5.