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ASSISTED REPRODUCTION AND THE LAW: DISHARMONY ON A DIVISIVE SOCIAL ISSUE

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I. INTRODUCTION

Thousands of children are born every year in the United States conceived with the use of assisted reproduction technology ("ART"), bringing sought-after babies to couples who would otherwise be childless. Along with this benefit, however, ART raises several difficult legal issues involving parentage, parental responsibilities, and jurisdictional conflicts.

In the most "traditional" situation involving ART—where a husband and wife use their own gametes and the wife gestates the child—there may be no issues regarding parentage. In the eyes of the law, the wife is the child's mother and the husband is the child's father. Even this situation, however, has raised thorny legal issues. For example, the couple may choose not to gestate all the embryos conceived from their gametes and instead leave some in frozen storage. Legal issues could arise if the couple later disagrees as to the disposition of those embryos.[1] If the couple divorces, one spouse may want to dispose of the embryos, but the other spouse (usually the wife) wants to gestate them and raise the child or children. The courts in this country have uniformly held for the spouse who wants to dispose of the embryos.[2] In other cases, even more difficult questions have arisen about parentage and the parties' rights and obligations toward the child. Examples include cases where third parties contribute the eggs or sperm (or both), where a woman agrees to be a surrogate and gestate a child for others to adopt, or where five parties are involved in the conception and birth of a child (the gamete donors, a surrogate, and a cou-

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[1] *See* Helene S. Shapo, *Frozen Pre-Embryos and the Right to Change One's Mind*, 12 DUKE J. COMP. & INT'L L. 75 (2002).

[2] Witten v. Witten, 672 N.W.2d 768, 783 (Iowa 2003); A.Z. v. B.Z., 725 N.E.2d 1051, 1059 (Mass. 2000); J.B. v. M.B., 751 A.2d 613, 620 (N.J. Sup. Ct. 2000), *aff'd in part*, 783 A.2d 707, 720 (N.J. 2001); Kass v. Kass, 696 N.E.2d 174, 182 (N.Y. 1998); Davis v. Davis, 842 S.W.2d 588, 604–05 (Tenn. 1992); Litowitz v. Litowitz, 10 P.3d 1086, 1094–95 (Wash. Ct. App. 2000).

ple that contracts with the surrogate). The volume of litigation regarding all of these issues is steadily increasing.

This Essay will review ongoing issues involving artificial insemination and surrogacy. After reviewing the current legal framework surrounding assisted reproduction, the Essay will examine the lack of uniformity surrounding those judicial decisions that address three issues related to assisted reproduction: whether the biological mother's husband or known sperm donor is legally recognized as the father of the child conceived by artificial insemination, whether the biological mother's same-sex partner is legally recognized as the child's second parent, and whether a surrogate is legally recognized as the mother of the child she has gestated.

II. CURRENT LEGAL FRAMEWORK

American courts have struggled with the issues that arise with ART, often resolving them with a mixture of common law and statutory law developed in a pre-ART age. Because domestic relations law is generally reserved for the states—unless the parties raise federal constitutional issues—a fractured, state-by-state approach to the subject has arisen, thus raising problems of national harmonization. As a result, many ART-related conflicts have arisen among the states, especially in the areas of single-sex couples and of surrogacy.

The primary attempts to harmonize various areas of law across the states have come from uniform acts and restatements.[3] The uniform act that is most relevant to this topic is the Uniform Parentage Act ("UPA"), Section 5, which was first adopted in 1973 and amended in 2000 and 2002 by Articles 7 and 8 (Article 8 concerns gestational agreements). The original Section 5 of the 1973 UPA was adopted in about eighteen states but dealt only with artificial insemination of a married woman with donor sperm ("AID"). Its purpose was to ensure that the woman's husband was "treated in law" as the natural father of the AID child and required the husband's written consent to the insemination as well as supervision of the insemina-

[3] The uniform acts are suggested statutes promulgated by the National Conference of Commissioners on Uniform State Laws (the "Conference"), an unofficial body composed of representatives of every state. Over the years, the Conference has passed numerous acts proposed for state legislative adoption, only one of which, the *Uniform Commercial Code*, has come near achieving uniformity by being adopted across the states. Restatements are the products of the American Law Institute ("ALI"), another unofficial group composed of self-selected judges, academic lawyers, and practitioners. Traditionally, restatements provide complete statements of an area of the common law, such as the *Restatement of Torts*. A restatement, or discrete sections of a restatement, must be adopted by a court in order to become part of the common law in that jurisdiction. In some of its recent adoptions, however, the ALI has ventured beyond the common law and into more statutory topics. One recently adopted example is the Principles of the Law of Family Dissolution, which deals with matters that are typically statutory and includes dissolution of domestic partnerships and the allocation of responsibility for their children. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2002).

tion by a licensed physician.[4] In addition, Section 5 shielded the sperm donor from the legal consequences of paternity; the sperm donor was not treated in law as the natural father. A few states adopted a version of Section 5 of the UPA that applied to unmarried women as well as to married ones.[5]

In 1988, the Conference passed another uniform act, the Uniform Status of Children of Assisted Conception Act ("USCACA"), which expanded the coverage of the 1973 UPA to determine the parenthood of children born of in vitro fertilization ("IVF") as well as AID, and included differing options for surrogacy arrangements. According to its drafters, the USCACA was a "child-oriented act" designed to benefit the increasing number of children born of ART by defining their status, "their rights, security and well being,"[6] especially by providing the child with two parents. One way it did so was to adopt the common law presumptions that a woman who gives birth to a child is the child's mother,[7] and the husband of a married woman is the father of a child born during the marriage. The USCACA permitted the husband to rebut the presumption by establishing within two years of learning of the birth that he did not consent to the assisted conception.[8] The USCACA, however, was adopted by only two states, North Dakota[9] and Virginia.[10] The Conference has now withdrawn the USCACA, and considers the 2002 UPA to be its official recommendation on this topic. North Dakota's and Virginia's statutes remain in force, however, unless legislatively repealed.

Responding to the increased use, since 1973, of assisted reproduction and surrogacy arrangements, the Conference's current recommendation, reflected in the 2002 UPA revision, includes among its topics such subjects as egg donors and sperm donors, children conceived by IVF, and gestational (surrogacy) agreements. It defines a donor as "an individual who produces egg or sperm used for assisted reproduction, whether or not for consideration,"[11] but that term does not include a husband or wife who gives sperm or eggs for assisted reproduction by the wife. Article 7 applies to unmarried as well as married women, and unlike Section 5, does not require that the procedures be supervised by a licensed physician.

Article 7 does require a husband's written consent for ART.[12] Unlike Section 5, however, a man who does not sign a consent still will be consid-

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[4] UNIF. PARENTAGE ACT § 5(a), 9B U.L.A. 407 (1973).

[5] *See, e.g.*, CAL. FAM. CODE § 7613 (West 1994); OR. REV. STAT. § 109.239 (2003).

[6] UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT prefatory note, 9C U.L.A. 363, 366 (1988) [hereinafter USCACA].

[7] *Id.* § 2, 9C U.L.A. at 370.

[8] *Id.* § 3, 9C U.L.A. at 370.

[9] N.D. CENT. CODE §§ 14-18-01 to -07 (2004).

[10] VA. CODE ANN. §§ 20-156 to -165 (2005).

[11] UNIF. PARENTAGE ACT § 102(8), 9B U.L.A. 304 (2000).

[12] *Id.* § 704(a), 9B U.L.A. at 356.

ered the child's father if he and the mother live together with the child during the first two years of the child's life and openly treat the child as their own.[13] Moreover, a husband who did not consent to his wife's ART may not challenge this presumed paternity unless he begins a proceeding to determine paternity within two years of learning of the child's birth.[14] If the nonconsenting husband never openly treated the child as his own, though, and did not cohabit with his wife since the time of an ART that used another man's sperm, there is no presumption of paternity and, as a result, adjudication of paternity is not limited to the two-year time frame.[15]

Four states have adopted the amended sections of the UPA,[16] approximately eighteen states still adhere to the 1973 version of the UPA, and two states have adopted the 1988 USCACA. Other states have legislated measures similar to the original UPA, but a substantial number of states have not yet enacted legislation to determine parentage where children have been conceived from donor sperm or eggs. Thus the statutory landscape is neither harmonized nor uniform.

III. ART-RELATED LEGAL ISSUES

A. Artificial Insemination by Donor ("AID")

Two sets of issues have predominated in earlier litigation concerning children conceived through AID. One category is litigation involving children born to married women whose husbands did not give written consent to the insemination and then dispute their paternity (and child support obligations). The other is litigation involving unmarried recipients whose known sperm donors or lesbian partners assert their parental rights.[17]

1. Paternity Disputes in Cases of No Written Consent.—Litigation involving married women whose husbands did not consent in writing usually occurs in divorce proceedings in which the husband contests a demand for child support by claiming that he is not the child's parent. There has been substantial uniformity among the states on this issue. Courts have strictly enforced the requirement of written consent, but have also concluded that the statute is not the exclusive means to determine paternity. Instead, courts have employed common law doctrines such as promissory

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[13] *Id.* § 704(b), 9B U.L.A. at 356–57.

[14] *Id.* §§ 705(a)(1), (2), 9B U.L.A. at 357.

[15] *Id.* §§ 705(b)(1)–(3), 9B U.L.A. at 357.

[16] *See* DEL. CODE ANN. tit. 13, §§ 8-101 to -904 (1999); TEX. FAM. CODE ANN. §§ 160.001–.763 (Vernon 2001); WASH. REV. CODE ANN. §§ 26.26.011–.913 (West 2005); WYO. STAT. ANN. §§ 14-2-401 to -907 (2005).

[17] *See* Helene S. Shapo, *Matters of Life and Death: Inheritance Consequences of Reproductive Technologies*, 25 HOFSTRA L. REV. 1091 (1997).

estoppel and an implied contract to impose a child support obligation,[18] based on the husband's oral consent and his course of conduct during the wife's pregnancy and their child-rearing years. Because of the importance of the state's interest in child support, courts also have used promissory estoppel and implied contract theories to impose a support obligation on a male partner who is not the mother's husband and who did not sign a consent form, but whose conduct evinces his consent.[19] Moreover, under Sections 704 and 705 of the amended UPA, a court may find that the mother's male partner who did not sign a consent may be deemed the child's father if he held the child out as his own.[20]

2. Parental Rights and Unmarried Women.—Another issue in the earlier AID cases involves unmarried women who have used a known sperm donor. Here, the donor initiates litigation to establish his paternity and, thus, his right to visitation. The legal argument in these cases will vary depending on state law. If the state has enacted a statute that does not recognize the paternity of a sperm donor but the statute applies only to married women, the statute does not cut off the sperm donor's paternity when an unmarried woman is involved. The same result occurs if the state has no parentage statute that cuts off the donor's paternity. If, instead, the state parentage statute applies to unmarried women as well, donors have argued—sometimes successfully—that the paternity of *known* donors should not be cut off.[21] Donors also have argued successfully that the statute does not apply if the parties have agreed to allow the donor to play a parental role.[22] In California, the parental rights of a known donor were not severed where the mother did not use a physician for the insemination.[23] When the donated sperm was provided to a physician, however, the statute has been found to bar a paternity claim by a known donor.[24] At least one court, though, has found a constitutional issue at stake—namely, that if application of the parentage statute would sever a known donor's paternity and would override an existing agreement between the parties to give the donor a parental role, the statute would violate due process because it would impose an absolute bar to the donor's paternity.[25]

Traditional AID cases have raised the question: "Who is the child's father?" Unmarried women, however, also are using AID and in significantly

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[18] *See, e.g.*, R.S. v. R.S., 670 P.2d 923, 926–27 (Kan. Ct. App. 1983); K.B. v. N.B., 811 S.W.2d 634, 638–39 (Tex. Ct. App. 1991).

[19] *In re* Parentage of M.J., 787 N.E.2d 144, 152 (Ill. 2003).

[20] UNIF. PARENTAGE ACT §§ 704–705, 9B U.L.A. at 356–58.

[21] C.O. v. W.S., 639 N.E.2d 523, 525 (Ohio Ct. App. 1994).

[22] *In re* R.C., 775 P.2d 27, 35 (Colo. 1989).

[23] Jhordan C. v. Mary K., 224 Cal. Rptr. 530, 533 (Ct. App. 1986).

[24] Steven S. v. Deborah D., 25 Cal. Rptr. 3d 482, 487 (Ct. App. 2005).

[25] McIntyre v. Crouch, 780 P.2d 239, 244–45 (Or. Ct. App. 1989).

increasing numbers.[26] Where the woman is in a same-sex relationship, an additional question must be asked: "Who is the child's mother?" If the mother's lesbian partner adopts the child that was conceived through AID, then that partner is legally the child's second parent. A number of states, but not all, now permit same-sex partners to adopt the child of one of them.[27] If, however, the partner has not adopted the child and the partners end their relationship, the partner who is not the biological mother may seek parental rights such as shared custody or visitation in parity with the child's biological mother.[28] If the nonbiological partner is successful, the child then has two legally recognized mothers.

Lesbian partners have found relief on various legal theories, such as de facto parenthood, psychological parenthood, and parenthood by estoppel. For example, they use estoppel to argue that the child's biological mother is estopped from denying the former partner's parental status. Several states have recognized the partner's parenthood under one or the other of these theories, although the courts define them similarly. For example, the courts often define a psychological parent similarly to a de facto parent.

One court summarized de facto parenthood as "limited to those adults who have fully and completely undertaken a permanent, unequivocal, committed, and responsible parental role in the child's life."[29] More expansive standards for de facto parenthood require that the biological parent consented to and fostered the partner's parent-like relationship with the child, that the couple lived together in the same household, that the de facto parent fulfilled the obligations of parenthood by taking significant responsibility for the child, and that the de facto parent fulfilled the parental role for a long enough time to have bonded with the child in a parental role.[30]

The American Law Institute ("ALI") has adopted de facto parenthood and parenthood by estoppel in the sections of its Principles of the Law of Family Dissolution that deal with allocation of custodial and decisionmaking responsibility for children. These principles of dissolution apply to both heterosexual and homosexual couples, married and unmarried. These parties have standing to bring proceedings regarding the child, such as visita-

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[26] UNIF. PARENTAGE ACT § 702 cmt., 9B U.L.A. 40 (Supp. 2005).

[27] *See, e.g.*, Sharon S. v. Superior Court, 73 P.3d 554 (Cal. 2003); *In re* K.M., 653 N.E.2d 888, 893 (Ill. App. Ct. 1995); Adoption of Tammy, 619 N.E.2d 315, 318–21 (Mass. 1993).

[28] In one recent case, an Ohio appellate court first had to remand to the trial court to determine who was the child's mother. One partner had gestated the child; the other had given the ovum, which was fertilized with donor sperm. *In re* J.D.M., No. CA2003-11-13, 2004 WL 2272063, at *4 (Ohio Ct. App. Oct. 11, 2004).

[29] C.E.W. v. D.E.W., 845 A.2d 1146, 1152 (Me. 2004).

[30] V.C. v. M.J.B., 748 A.2d 539, 555 (N.J. 2000); *see also In re* E.L.M.C., 100 P.3d 546, 551 (Colo. Ct. App. 2004) (holding that a woman was the psychological parent of the child her female partner had adopted).

tion.[31] Parents by estoppel and de facto parents are individuals who are not legal parents under state law (that is, not biological or adoptive parents or presumed parents) who have established a parent-like relationship with a child.

Under ALI principles, de facto parents are those who, although not necessarily holding themselves out as parents, have lived with the child not less than two years, and, with the legal parent's agreement that the person form a child-parent relationship, performs either "a majority of the caretaking functions for the child,"[32] or a share of those functions that were at least equal to those performed by the parent.[33] A parent by estoppel is one who is either liable for child support[34] or has lived with the child for at least two years, held himself out as the child's parent and accepted parenthood responsibilities,[35] has acted "pursuant to an agreement with the child's parent" or has lived with the child since the child's birth, and held out the child as his own and accepted parental responsibility.[36] A person can become a parent by estoppel only under an agreement with the child's legal parent to raise the child together, sharing parental rights and responsibilities,[37] and only so long as recognition as a parent is in the child's best interests.[38] A parent by estoppel has the same rights as does a legal parent, and rights that are superior to those of a de facto parent.

California courts had until recently not recognized the same-sex partner's claim to parenthood. This line of decisions has now been judicially overruled, and statutorily overruled by the state's domestic partner's registration act.[39] California courts had held that a child cannot have two mothers. This rule originated from an early and influential gestational surrogacy case, *Johnson v. Calvert*.[40] In *Johnson*, a child was conceived by IVF using ovum and sperm from a married husband and wife. The embryo was implanted in a surrogate who had contracted with the couple to gestate the child and then give the child to the couple to adopt. However, the surrogate refused to give up the child. The court stated that the child could not have two mothers, and thus three parents, including the contracting husband. Both women, the genetic mother and the gestational mother, could be de-

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[31] PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, *supra* note 3, § 2.04.

[32] *Id.* § 2.03(1)(c).

[33] *Id.*

[34] *Id.* § 2.03(1)(b)(i). Individuals who are not legal parents may be liable for child support if their prior conduct estops them from denying the obligation. *Id.* §§ 3.02(1)(c), 3.03. Section 3.03 supplies factors for a court to consider when imposing a support obligation.

[35] *Id.* § 2.03(1)(b)(iii).

[36] *Id.* § 3.03(1)(c).

[37] *Id.*

[38] *Id.*

[39] CAL. FAM. CODE § 297.5 (West 2005); *see infra* note 46.

[40] 851 P.2d 776 (Cal. 1993) (en banc).

fined as the child's mother under California's Parentage Act. In these circumstances, the court held that the genetic mother, and not the surrogate, prevailed because she was the woman who originally intended to raise the child as its mother.[41]

The *Johnson* precedent has now been distinguished in a recent case in which a third parent was not involved. In a recent California case, a mother who had been in a lesbian relationship at the time her child was born sought child support from her former partner.[42] Each woman had borne a child by AID; one of them cared for the children at home and the other worked outside of the home. The court evaluated the parties' relationship and noted that the women were supportive of each other's pregnancy, were present at each other's childbirth, had hyphenated their surnames, and had raised their children as one family unit.[43] The women separated after six years together. At that time, the non-wage-earning parent began receiving public assistance and the County sued to establish that the former partner was the child's other parent in order to impose a support obligation. California has adopted a version of the 1973 UPA that applies to unmarried couples.[44] The Court of Appeals had held that under the California Parent Act and California precedent, the children could have only one mother and that was the woman who had given birth to the child.[45] Thus a partner in a same-sex relationship could not acquire parental rights over the other partner's children and would not be liable for child support.

The California Supreme Court reversed, holding that, although a child can have only two parents, both those parents can be women,[46] and that the former partner who was not the biological mother was a parent by virtue of receiving the child into her home and holding the child out as her child.[47]

On the other hand, New York's highest court has held that its statute that gives standing to seek visitation to a child's "parent" does not confer that right on one who is not the biological or adoptive parent. New York case law defines the term "parent" restrictively, thus excluding a person who develops a parent-like relationship with a child.[48] New York courts have not recognized de facto parenthood, psychological parenthood, or eq-

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[41] *Id.* at 782.

[42] Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005).

[43] *Id.* at 663.

[44] CAL. FAM. CODE § 7613(b) (West 2004).

[45] Maria B. v. Emily B., 13 Cal. Rptr. 3d 494, 498 (Ct. App. 2004); *see also* Kathleen C. v. Lisa W., 84 Cal. Rptr. 2d 48 (Ct. App. 1999); Nancy S. v. Michele G., 279 Cal. Rptr. 212 (Ct. App. 1991).

[46] *Elisa B.*, 117 P.3d at 667. Effective January 1, 2005, registered domestic partners in California have the same rights and obligations with respect to the partner's children as do spouses. CAL. FAM. CODE § 297.5(d) (West 2005).

[47] The court applied the UPA presumption of paternity that a man is the child's presumed natural father if he "receives the child into his home and openly holds out the child as his natural child." CAL. FAM. CODE § 7611(d).

[48] Alison D. v. Virginia M., 572 N.E.2d 27, 29–30 (N.Y. 1991).

uitable estoppel to allow a partner who is not a biological parent and who has not adopted the child to attain visitation or custody.[49] However, a same-sex partner can adopt her partner's child so that the partner becomes legally a parent and the child can have two mothers.[50]

A few states now recognize domestic partnerships,[51] and Massachusetts law permits same-sex marriage.[52] If domestic partners acquire the same rights and responsibilities as married partners and become legal parents to their partner's children, their status obviates the difficult questions that courts increasingly must decide to determine parentage. Their domestic partnership, however, may not be recognized in other states, especially if the state has passed a defense of marriage statute. If the domestic partnership dissolves and the biological parent moves to a state that does not recognize domestic partnerships, and the biological parent seeks a determination of child custody, the nonbiological parent may lose all legal rights to child custody or visitation.

This is the controversy in *Miller-Jenkins v. Miller-Jenkins*.[53] In *Miller-Jenkins*, a Virginia county court exercised jurisdiction to determine parentage and parental rights to a child born by use of AID to a same-sex partner in a Vermont civil union. The couple had begun their partnership in Virginia in the late 1990s and entered into a civil union in Vermont in 2000. One partner, Lisa, gave birth to a baby in Virginia in 2002. The couple then moved to Vermont, but their relationship ended in 2003 when Lisa returned to Virginia with the baby. She filed in Vermont to dissolve the civil union, and the Vermont court issued a temporary custody order giving unsupervised visitation rights to Janet, the partner who is not the biological parent. In 2004, Lisa petitioned in a Virginia county court for the court to determine her sole parentage.

The Virginia court ultimately held that Janet had no parental rights to the child, and that neither the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA")[54] nor the Parental Kidnapping Prevention Act ("PKPA")[55] prevented the Virginia court's exercise of jurisdiction. These statutes were enacted to preclude a state from exercising jurisdiction over a custody dispute when a court of another state has already properly exercised

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[49] *See, e.g.*, Janis C. v. Christine T., 742 N.Y.S.2d 381, 383 (App. Div. 2002).

[50] *In re* Jacob, 660 N.E.2d 397, 406 (N.Y. 1995). California also permits same-sex partners to adopt a child; the California Supreme Court cited this as one reason to support its decision that a child can have two mothers. *Elisa B.*, 117 P.3d at 666.

[51] *See, e.g.*, CAL. FAM CODE §§ 297–299.6 (domestic partners); HAW. REV. STAT. §§ 572C-1 to -7 (2005) (reciprocal beneficiaries); N.H. REV. STAT. ANN. § 457.39 (2004) (cohabitation of heterosexual couple); VT. STAT. ANN. tit. 15, §§ 1201–1207 (2004) (civil unions).

[52] Goodridge v. Dept. of Pub. Health, 798 N.E.2d 941, 974 (Mass. 2003).

[53] Ch. No. CH04-280 (Va. Cir. Ct. Aug. 24, 2004) (order and certification for interlocutory appeal). The order is now on appeal to the Court of Appeals of Virginia.

[54] VA. CODE ANN. § 20-146.1 (2004).

[55] 28 U.S.C. § 1738A (1980).

jurisdiction, as long as a parent or "any person acting as a parent"[56] continues to live in the other state. The Virginia court held that because Virginia's Marriage Affirmation Act[57] renders same-sex civil unions null and void, Janet had no status as a "parent" or a "person acting as a parent," and thus neither the UCCJEA nor PKPA applied to preclude Virginia's jurisdiction.[58] The Virginia court order is now on appeal but demonstrates the impact that conflicting state laws can have on determining parental rights.

B. Surrogacy and Gestational Agreements

The use of a surrogate allows a couple to become parents of a child who is genetically related to at least one of them, where the female partner is not able to either gestate a child or provide eggs, or both. Surrogacy involves a minimum of three people in the conception and gestation of a child: the couple who initiates the surrogacy agreement and who intends to become the child's legal mother and father, and the surrogate who contracts with the couple to bear and give the child to them for adoption. The arrangement also can involve additional parties. If the surrogate is married, for example, her husband may be the presumed father of the child.[59] In addition, the child's conception may require an egg donor or a sperm donor, or both. The surrogate may become pregnant either by artificial insemination and thus be both the genetic and the gestational mother (sometimes called traditional surrogacy), or by implantation of an embryo conceived by IVF with the gametes of the couple or of one or more donors and thus be the gestational mother only. Gestational surrogacy cases also raise the question: Who is the mother? They have also deepened the disagreements among the states as to their treatment of surrogacy disputes.

Less uniformity exists among the states as to whether they recognize and enforce gestational agreements than as to how they determine parenthood when the parties use AID. The uniform acts reflect that disagreement. The 1973 UPA did not include a surrogacy provision. The 1988 USCACA offered alternative provisions. One alternative declared surrogacy agreements void;[60] the other enforced those agreements only if the parties had gone through a statutorily prescribed procedure of judicial review.[61] Of the two states that adopted the USCACA, one state adopted the version that voided surrogacy agreements;[62] the other adopted the version that regulated and recognized surrogacy agreements.[63] Currently, several states recognize

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[56] VA. CODE ANN. § 20-146.13(A).

[57] *Id.* § 20-45.3.

[58] *Miller-Jenkins*, Ch. No. CH04-280.

[59] The common law presumption is that a child born to a married woman is a child of the marriage.

[60] USCACA Alternative B § 5, 9C U.L.A. 373 (1988).

[61] USCACA Alternative A §§ 5, 6, 9(a), 9C U.L.A. 373, 374, 381 (1988).

[62] N.D. CENT. CODE §§ 14-18-01 to -07 (2004).

[63] VA. CODE ANN. §§ 20-156-165 (2004).

surrogacy agreements,[64] but several states statutorily void them[65] or judicially do not recognize them,[66] and some states do not allow the surrogate to be compensated.[67]

Article 8 of the 2000 UPA regulates gestational agreements and continues the USCACA approach of requiring a judicial hearing and court-ordered validation. If the court approves the arrangement, the contracting couple will be declared the child's legal parents without adopting the child. All parties must agree in writing to the surrogacy: the couple intending to be parents, the prospective surrogate and her husband, if she is married, and the gamete donor or donors, if known. The terms of agreement must include, inter alia, requirements that the surrogate, her husband, and the gamete donors relinquish any claims to parenthood, that the contracting couple will be the legal parents of the child, and that the surrogate may make all decisions regarding her health and that of the embryo during pregnancy. The agreement may provide for compensation for the surrogate.[68] The 2000 UPA required that the intending couple be married.[69] The 2002 amendment eliminated this prerequisite, but requires that the intended parents be a man and a woman.[70] Of the four states that have adopted the new version of the UPA, two states have omitted Article 8.[71]

Unless a state has statutorily approved surrogacy arrangements, an important hurdle to enforcement of the contract and the reason that several states do not enforce them is a state's adoption laws. These statutes forbid compensation for adoption and require a waiting period after the child's birth so that the mother may revoke her decision to place her child for adoption. It was on the ground that the parties' surrogacy contract violated the state's adoption laws that the New Jersey Supreme Court in the famous *In re Baby M* case[72] held that the parties' surrogacy contract was void. The contract provided compensation to the surrogate and did not include a waiting period after the baby's birth for the surrogate to change her mind.[73] The court also held that the contract was coercive because it required the surro-

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[64] *See, e.g.*, FLA. STAT. ANN. § 742.15 (West 2005); NEV. REV. STAT. § 126.045 (LexisNexis 2005); N.H. REV. STAT. ANN. § 168-B:16 (LexisNexis 2004); VA. CODE ANN. § 20-159, -160(B)(4) (2005).

[65] *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-218 (West 2005); D.C. CODE ANN. § 16-402(b) (LexisNexis 2005); IND. CODE ANN. § 31-20-1-2 (West 2005); N.Y. DOM. REL. L. § 122 (McKinney 2005); N.D. CENT. CODE § 14-18-05 (2005).

[66] *See, e.g.*, J.B. v. M.B., 783 A.2d 707, 718 (N.J. 2001); *In re* Baby M, 537 A.2d 1227 (N.J. 1988).

[67] *See, e.g.*, KY. REV. STAT. ANN. § 199.590(4) (LexisNexis 2004); NEB. REV. STAT. § 25-21,200 (2004); WASH. REV. CODE ANN. § 26.26.230 (West 2005).

[68] UNIF. PARENTAGE ACT § 801 (amended 2002), 9B U.L.A. 45 (Supp. 2005).

[69] *Id.* § 801(b), 9B U.L.A. 45 (2000).

[70] *Id.* § 801(b) (amended 2002), 9B U.L.A. 45 (Supp. 2005).

[71] DEL. CODE ANN. tit. 13, §§ 801–819 (2004); WYO. STAT. ANN. §§ 14-2-401 to -907 (2005).

[72] 537 A.2d 1227 (N.J. 1988).

[73] *In re* Baby M, 537 A.2d 1227, 1249–50 (N.J. 1988).

gate contractually to relinquish the child before the child had been conceived.

In *Baby M*, the surrogate conceived through AID using the contracting husband's sperm. The court treated the case as a custody dispute between the child's mother, that is, the surrogate, and her biological father,[74] the contracting husband. Thus the surrogacy agreement also violated New Jersey public policy which requires that a court resolve a custody dispute between parents according to the child's best interests.[75] Making that judgment, the court awarded primary custody to the father based on the stability that his family could provide.[76]

After *Baby M*, several states enacted legislation that declared surrogacy contracts void and unenforceable. This type of legislation provided that the surrogate is the child's mother and, if she is married, that her husband is the father.[77] Presumably, in the case of an unmarried surrogate, the contracting male would be listed as the father on the child's birth certificate.

In New Jersey, *Baby M* has been applied to gestational surrogacy as well.[78] The result has been that even a couple who has contracted with the surrogate to be the child's legal parents and obtained the surrogate's consent may be barred from getting a pre-birth order that lists the couple as the parents on the birth certificate, even though both of them are the baby's genetic parents and the surrogate has agreed. A pre-birth order to record the genetic parents on the birth certificate would mean that the genetic parents would not have to adopt the child in order to establish legal parenthood. A New Jersey court has denied such a pre-birth order and instead required the parties to a gestational surrogacy to wait the seventy-two-hour statutory waiting period for adoption.[79]

Other states, however, have distinguished the two types of surrogacy, and in a gestational surrogacy will issue pre-birth orders to list the contracting couple as the baby's parents on the birth certificate, at least where the surrogate has not contested their parenthood. One federal trial court held that the Utah surrogacy statute that conclusively presumed that a surrogate is the child's mother "for all legal purposes" unconstitutionally burdened the genetic parents' fundamental right to bear and raise children.[80] Utah's statute precluded the genetic parents from attaining legal recognition as parents unless they adopted the child. Contrary to the statute, the court required the state to provide a hearing in which the couple could present evidence to establish their genetic relationship to the child, and deferred to

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[74] *Id.* at 1256.

[75] *Id.* at 1258–59.

[76] *Id.* The contracting couple were both medical doctors.

[77] *See, e.g.*, UTAH CODE ANN. § 76-7-204 (1991), *repealed by* Laws 2005, ch. 150, § 100 (2005).

[78] A.H.W. v. G.H.B., 772 A.2d 948, 952 (N.J. Super. Ct. 2000).

[79] *Id.* at 954.

[80] J.R. v. Utah, 261 F. Supp. 2d 1268, 1293 (D. Utah 2002).

that forum the decision of whether to issue birth certificates declaring the couple as the parents.[81]

If a gestational surrogate changes her mind and decides to keep custody of the child, state law may differ considerably. The surrogate may prevail under the traditional presumption that the woman who gives birth to a child is the child's mother. A gestational surrogate, however, has a weaker claim to the child than a traditional surrogate because the gestational surrogate is not genetically related to the child. In California, where the state supreme court had determined maternity by intent in the influential *Johnson* case,[82] a court distinguished the gestational surrogacy at issue in *Johnson* from traditional surrogacy.[83] The court ultimately held that a traditional surrogacy contract was unenforceable because it did not comply with the state's adoption laws.[84]

Parentage by intent still holds some sway as a means to resolve parentage disputes. Maternity by intent has made its way to egg donor cases in which the wife of a couple gestates a child conceived by IVF from the husband's sperm and a donor egg. In two cases where spouses subsequently divorced, the husband claimed custody as the child's natural parent, labeling his wife as a gestational surrogate.[85] The courts denied these claims, recognizing the distinction between egg donation to the couple for the wife to gestate and gestational surrogacy, and stating that the wife was the child's mother because the couple intended that she be the mother.[86]

The Massachusetts Supreme Court, which had held that the state's adoption statute precluded enforcement of a surrogacy contract,[87] has limited its previous decision to traditional surrogacy. The court held that an adoption statute does not apply to gestational surrogacy, where the child has no genetic connection to the surrogate. In the later case, the court said that the child was not "[the gestational mother's] child to be surrendered for adoption."[88] The court held that the genetic parents were the child's legal parents and required that their names be listed on the birth certificate as the child's mother and father.[89]

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[81] *Id.* at 1297.

[82] *See supra* text accompanying note 40.

[83] Marriage of Moschetta, 30 Cal. Rptr. 2d 893 (Ct. App. 1994). In traditional surrogacy, the surrogate is the legal mother.

[84] *Id.*

[85] McDonald v. McDonald, 608 N.Y.S.2d 477 (App. Div. 1994); *see also In re* C.K.G., No. M2003-01320-COA-R3-JV, 2004 Tenn. App. LEXIS 394 (Tenn. Feb. 19, 2004), *appeal docketed*, No. M2003-01320-SC-R11-CV, 2004 Tenn. LEXIS 1122 (Tenn. Dec. 20, 2004).

[86] *McDonald*, 608 N.Y.S.2d at 479–80.

[87] R.R. v. M.H., 689 N.E.2d 790 (Mass. 1998). The court said, however, that it recognized that that arrangement would not be unlawful "by which an informed woman agrees to attempt to conceive artificially and give birth to a child whose father would be the husband of an infertile wife." *Id.* at 797.

[88] Culliton v. Beth Israel Deaconess Med. Center, 756 N.E.2d 1133, 1137 (Mass. 2001).

[89] *Id.* at 1141.

The lack of harmonization of the law among states is clearly revealed in a case in which a Connecticut couple and a New York surrogate chose Massachusetts law to govern their gestational surrogacy contract.[90] In that case, the surrogate was impregnated with the couple's embryo in Connecticut. The parties' agreement included a provision that the surrogate would "take all reasonable steps to give birth . . . at a hospital located in the State of Massachusetts."[91] The parties also agreed to take steps necessary for Massachusetts law to apply so that the couple would be named as the child's parents on the birth certificate and would immediately take physical custody of the child, obviating the need for them to adopt.[92] The parties chose Massachusetts law because New York law declares surrogate contracts void and unenforceable as against public policy,[93] while Connecticut has no surrogacy statute.[94]

The Massachusetts Supreme Court held that the parties' choice of Massachusetts law applied and the names of the contracting couple would be entered as the child's legal parents. To reach that conclusion, the court analyzed its choice of law principles and the *Restatement (Second) of Conflict of Laws*. Applying that analysis, the court held that Massachusetts had a "substantial relationship to the parties or the transaction"[95] because the birth and some prenatal care would take place at a Massachusetts hospital and Massachusetts officials would issue the birth certificate. The court distinguished its prior decision, *R.R. v. M.H.*, in which the court applied Massachusetts law even though the parties' contract specified that it would be interpreted under Rhode Island law.[96] In *R.R.*, the surrogate was a Massachusetts resident and the child was born in Massachusetts, but the contracting husband and wife were Rhode Island residents. Because the arrangement involved a traditional surrogacy and, in violation of Massachusetts adoption laws, provided payment to the surrogate and omitted a waiting period after the birth of the child, the court held that the contract violated Massachusetts public policy,[97] and it would not apply the parties' choice of law.

In *Hodas v. Morin*, by contrast, the court held that application of Massachusetts law would not "be contrary to a fundamental policy of a state which has a materially greater interest than Massachusetts," and opined that Massachusetts law would have applied even if the parties had not specified

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[90] Hodas v. Morin, 814 N.E.2d 320 (Mass. 2004).

[91] *Id.* at 322.

[92] *Id.*

[93] N.Y. DOM. REL. LAW § 122 (McKinney 1999).

[94] Connecticut does have a statute requiring that birth certificates list the child's birth mother, unless a court orders otherwise. CONN. GEN. STAT. § 7-48a (1999).

[95] *Hodas*, 814 N.E.2d at 325.

[96] R.R. v. M.H., 689 N.E.2d 790, 792 (Mass. 1998).

[97] *Hodas*, 814 N.E.2d at 325 n.10.

their own choice of law.[98] The court regarded New York and Connecticut law as at cross-purposes and concluded that it could not determine a fundamental policy that applied to both those states.[99] The court concluded that the parties' choice of law would be honored,[100] and the contracting couple would be listed on the child's birth certificate.

IV. CONCLUSION

Thus, many years after the first child born by artificial insemination and seventeen years after the celebrated *Baby M* case, a small number of decisions present polar positions on issues raised by assisted reproduction. Judicial disagreements on the status of various types of parents in AID and surrogacy arrangements reflect far-reaching social issues. The divisions among the courts manifest complex cross-currents in societal opinions about the technology of reproduction, about gender and marriage, and about what it means to be a parent. Indeed, "issues of bioethics increasingly underlie controversies that dominate public and political discussion. They have become flashpoints for front-page news day after day."[101] Almost certainly the reported decisions and jurisdictional conflicts will grow significantly in number, accompanying a likely increase in the number of private arrangements of heterosexual and homosexual couples who desire children, donors, and surrogates. New issues are sure to arise—for example, whether a female partner who consents to her partner's ART is to be treated in law as the child's second parent, on par with a male who consents to his female partner's ART, and who the law treats as the legal father. It does not require a seer to predict that as the cases mount over the coming decades, the best chance of national harmonization among courts is that social dissonance on these issues will cease.

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[98] *Id.* at 325.

[99] *Id.* at 325–26.

[100] *Id.* at 326.

[101] Martha Montello, *Novel Perspectives on Bioethics*, CHRON. OF HIGHER EDUC., May 13, 2005, at B6.