Child and Family Law Journal

Volume 1 | Issue 1 Article 2

2013

Defining Parenthood: Evolution or Pendulum Swing?

DEFINING PARENTHOOD: EVOLUTION OR PENDULUM SWING?

BY: RUFINA D. BEEM[*]

> "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." Justice O'Connor[1]

INTRODUCTION

There are some things in life that everyone should have the freedom to do. Everyone should be able to create a family, experience the joy of being a parent, and raise children in a manner based upon personal choices and preferences. Indeed, this right of a parent has been recognized as fundamental.[2] The Fourteenth Amendment's Due Process Clause has a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests."[3] The liberty interest included in this component is a parent's fundamental right to make decisions concerning "the care, custody, and control of their children."[4] It has been soundly determined by the U.S. Supreme Court that the Constitution protects a parent's rights.[5] What the Constitution does not do, however, is define what constitutes a parent.

---

[*] Rufina D. Beem, Esq. graduated from Pace Law School, J.D., *cum laude*, in May 2012. She was admitted to the New York State Bar in February 2013 and is currently an Associate in the Matrimonial and Family Law Department at Miller, Zeiderman & Wiederkehr, LLP in White Plains, New York.

[1] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 851 (1992).

[2] *Id.* at 926–27.

[3] Troxel v. Granville, 530 U.S. 57, 65 (2000) (quoting Washington v. Glucksberg, 521 U.S. 702, 720 (1997).

[4] Id.

[5] Id.

Today's parents are a virtual kaleidoscope of combinations as a result of the cultural explosion of alternative methods of family formation such as surrogacy and assisted reproductive technologies (ART).[6] People who desire to be parents are no longer bound by the natural course of sexual reproduction, and instead have seized control of biology through science and are wielding its power by creating beautiful families every day. For example, 41,000 children were born through ART in 2006.[7] Many of these children were born to same sex couples.[8] In 2009, the number of infants born through ART rose to 60,190.[9] It is likely that this number is continuing to grow today.

As the use of alternative methods of family formation has become arguably "mainstream," novel issues regarding how to define a parent under the law have arisen and courts and legislatures have struggled to keep up.[10] The legal definition of a parent has experienced an unprecedented evolution in the last four decades, particularly in the context of how genetic ties and marriage are weighed as determining factors.[11] Parts I and II of this paper tell the story of the way the legal definition of a parent has evolved from its traditional roots, analyzes the way that courts have weighed the importance of the biological connection and marriage in defining parenthood, and argues that the evolution has inevitably resulted in a totality of the circumstances test. In light of the continuing evolution of societal views with respect to issues such as same sex marriage, polyamory, and polygamy, Part III attempts to predict the future legal definition of a parent. As such, this paper questions how far the liberty interests of parents will take us in terms of defining parentage, and argues that expanding views towards who can marry may actually be causing the legal definition of a parent to revert back to times past, much like a pendulum swing.

---

[6] See generally Linda D. Elrod, A Child's Perspective of Defining a Parent: The Case for Intended Parenthood, 25 BYU J. PUB. L. 245 (2011).

[7] Elrod, *supra* note 6, at 247 (citing Centers for Disease Control, Assisted Reproductive Technology (ART) Success Rates: National Summary and Fertility Clinic Reports: 2006 ART Report (indicating there were 138,198 ART cycles performed at 483 fertility clinics in 2006, resulting in 41,343 live births)).

[8] *Id.* (citing The Williams Institute, Census Snapshot: United States (Dec. 2007), available at http:// www.law.ucla.edu/williamsinstitute/publications/USCensusSnapshot.pdf.; See also Courtney G. Joslin, *Interstate Recognition of Parentage in a Time of Disharmony: Same-Sex Parent Families and Beyond*, 70 OHIO ST. L. J. 563, 591 n.153-55 (2009)).

[9] Centers for Disease Control and Prevention, 2009 Assisted Reproductive Technology Report (Mar. 7, 2012), http://www.cdc.gov/art/ART2009/index.htm.

[10] Elrod, *supra* note 6, at 252.

[11] *See* Elrod, *supra* note 6.

I. THE PARENTS OF YESTERDAY

In the past, there were three traditional ways to become a parent: (1) "giving birth (*mater sempe certe est*)";[12] (2) "being married to the mother of the child (*pater est quem nutpiea demonstrant*)";[13] or (3) "adopting a child."[14] Families were created through biological and contractual relationships and, accordingly, the cultural conception of family was comprised of the husband, wife, and children who lived together as a natural unit.[15] The definition of family was based upon the laws of nature, and it lived by rules that Americans regard as "self-evidently natural."[16] The concept of what comprised a family was defined according to age and gender.[17] The father had authority over the family.[18] The mother was expected to "bear children, nurse them, and care for them."[19]

The marital presumption that a man who is married to the mother is the father of her children has existed for centuries.[20] One of the policy reasons for the presumption was to assign responsibilities for the care of children.[21] Furthermore, "[t]he main end and design of marriage [is] to ascertain and fix upon some certain person, to whom the care, the protection, the maintenance, and the education of the children should belong."[22] This marital presumption was strong and only overcome if the man had "no access" to the wife.[23] There was a social stigma for illegitimate children, a cultural notion that U.S. Supreme Court decisions and the Uniform Parentage Act of 1973 (UPA) have since sought to diffuse.[24] One of the major purposes of the first version of the UPA was

---

[12] Elrod, *supra* note 6, at 246 (citing Nguyen v. I.N.S., 533 U.S. 53, 62 (2001)).
[13] *Id.* (citing 1 William Blackstone, Commentaries *455 (1765)).
[14] *Id.* (citing U.S. Bureau of the Census, Households by Type: 2000, Table 1, n.2)).
[15] *Id.* at 266.
[16] Janet L. Dolgin, *Biological Evaluations: Blood, Genes, and Family*, 41 AKRON L. REV. 347, 353 (2008) (citing DAVID M. SCHNEIDER, AMERICAN KINSHIP: A CULTURAL ACCOUNT 34 (2d ed. 1980)).
[17] *Id.* (citing David M. Schneider, American Kinship: A Cultural Account 35 (2d ed. 1980)).
[18] *Id.* (citing David M. Schneider, American Kinship: A Cultural Account 36 (2d ed. 1980)).
[19] *Id.* (citing David M. Schneider, American Kinship: A Cultural Account 35 (2d ed. 1980)).
[20] Elrod, *supra* note 6, at 246
[21] *Id.* at 247.
[22] Elrod, *supra* note 6, at 246 n.6 (citing 1 William Blackstone, Commentaries *455 (1765)).
[23] David D. Meyer, Parenthood in A Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood, 54 AM. J. COMP. L. 125, 127 (2006).
[24] Id. at 129 (citing Harry D. Krause, Equal Protection for the Illegitimate, 65 MICH. L. REV. 477 (1967); Harry D. Krause, Legitimate and Illegitimate Offspring of Levy v. Louisiana: First Decisions on Equal Protection and Paternity, 36 U. CHI. L. REV. 338 (1969); Laurence C. Nolan, "Unwed Children' and Their Parents Before the United

to ensure full equality for all children in their legal relationship with both parents, "whatever the parents' marital status."[25]

Another way to become a parent was through adoption.[26] Adoption is a method to become a parent through a legal process pursuant to state statutes.[27] It is characterized by the necessity of biological parents relinquishing and terminating their parental rights, and adoptive parents obtaining parental rights and responsibilities through the legal process.[28] Traditionally, adoption was viewed as a "substitute relation designed to replicate as closely as possible the biological original."[29] Infertile couples in the post World War II years turned to adoption to erase the "stigma of childlessness in an era of 'compulsory parenthood.'"[30] However, many people were barred from the adoption process because of age, marital status, or sexual orientation.[31]

These traditional methods of family formation formed the legal framework for determining parentage for at least a century before alternative methods of family formation entered the scene.[32] Sperm donation was legitimized as a cure for infertility in the 1950s and1960s.[33] England announced the first successful "test tube" birth in 1978.[34] Egg donation and gestational surrogacy, where the surrogate serves as a carrier for another's genetic child, were legalized in the early 1990s.[35] There was a thirty-seven percent increase in the number of in-vitro procedures performed in the United States between 1995 and 1998.[36]

As the use of ART and surrogacy was becoming widespread, the traditional idea of a "nuclear family" was also evolving in parallel. In 1970, the number of families comprised of a married couple raising children was forty percent of all households; however, this number

---

States Supreme Court From Levy to Michael H.: Unlikely Participants in Constitutional Jurisprudence," 28 CAP. U. L. REV. 1 (1999)).

[25] Id.

[26] Elrod, *supra* note 6, at 246.

[27] *Id.* at 259.

[28] Id.

[29] Meyer, *supra* note 23, at 126 (citing ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION, INFERTILITY, AND THE NEW WORLD OF CHILD PROTECTION (1999); Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 DUKE L.J. 1077 (2003).

[30] Susan Frelich Appleton, *Adoption in the Age of Reproductive Technology*, 2004 U. CHI. LEGAL F. 393, 403 (2004).

[31] J. Herbie Difonzo & Ruth C. Stern, *The Children of Baby M.*, 39 CAP. U. L. REV. 345 (2011) (citing Stephanie Saul, *Building a Baby, with Few Ground Rules*, N.Y. TIMES, Dec. 13, 2009, at 1.).

[32] Meyer, *supra* note 23, at 125.

[33] Noa Ben-Asher, *The Curing Law: On the Evolution of Baby-Making Markets*, 30 CARDOZO L. REV. 1885, 1888 (2009).

[34] *Id.* at 1900.

[35] *Id.* at 1888.

[36] *Id.* at 1900 (citing DEBORA L. SPAR, THE BABY BUSINESS 28 (2006)).

decreased to less than a quarter of a percent by 2000."[37] The number of gay and lesbian families with children more than tripled in the latter part of the 20th Century.[38] The birth rate increased for women aged fifteen to forty-four, doubled for women aged forty to forty-four, and tripled for women aged forty-four to forty-nine.[39] As family law scholar David Meyer observed, "[t]he domestic unit in early 21st century America [has become] a crazy quilt of one-parent households, blended families, singles, unmarried partnerships and same-sex unions."[40] By 2000, the landscape of what constituted a family in the United States had evolved so much that Justice Sandra Day O'Connor noted, "[t]he demographic changes of the past century make it difficult to speak of an average American family."[41]

As the concept of family evolved, the definitions of legal parentage presented unique challenges in U.S. courts. Apart from the UPA, which was revised in 2000 and again in 2002, there were few statutes for courts to leverage when deciding these new issues.[42] Therefore, courts were frequently fashioning equitable solutions in light of the best interest of the child standard, and often times coming down with opposing decisions.[43] The use of the best interest of the child standard did not provide clear direction for the courts. For example, in *Troxel v. Granville*, the Supreme Court overruled the best interest standard to strike down visitation proceedings by grandparents or any third party because it violated the constitutional rights of the parents to make decisions about raising their children.[44] Here, the Supreme Court declared that a parent's constitutional right to have autonomy in parenting decisions was to be protected over the interests of the child to have a relationship with grandparents or other third parties.[45] As David Meyer remarked, "[i]f the Court in *Troxel* was distressed over the breadth and novelty of a law that permitted 'best interests' over a parent's objections, how much more shocking would it find a scheme that allowed the reassignment of parenthood on the same basis?"[46] In

---

[37] Meyer, *supra* note 23, at 132 (citing JASON FIELDS, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2003, at 12–13 (U.S. Census Bureau 2003).
[38] Difonzo & Stern, *supra* note 31, at 347.
[39] Joyce A. Martin et al., *Births: Final Data for 2005*, 56 NAT'L VITAL STATISTICS REPORT 6 (2007), http://www.cdc.gov/nchs/data/nvsr/nvsr56/nvsr56_06.pdf.
[40] Meyer, supra note 23, at 133 (citing Siobhan Morrissey, The New Neighbors: Domestic Relations Law Struggles to Catch Up with Changes in Family Life, ABA J., Mar. 2002, at 37, 38.).
[41] Troxel v. Granville, 530 U.S. 57, 63–64 (2000).
[42] Elrod, *supra* note 6, at 257.
[43] *Id.* at 262.
[44] *Troxel*, 530 U.S. at 72–73.
[45] Id.
[46] David D. Meyer, *The Constitutionality of "Best Interests" Parentage*, 14 WM. & MARY BILL RTS. J. 857, 865 (2006).

other words, it would offend the fundamental rights of a parent if parenthood could be defined on the basis of a best interest of the child standard.[47] Therefore, as society pushed forward into the era of alternative family formation and technologies raced ahead of the legislatures, the law and the courts struggled, with no clear standards, to deal with the conflicts these new arrangements created.

II. THE PARENTS OF TODAY

A. Parenting and the Biological Tie

America celebrated the birth of its first baby conceived by in vitro fertilization (IVF) in 1981.[48] Twenty-five years later, at least 54,656 babies were born in the United States using IVF and IVF-related procedures.[49] In parallel with the growth of IVF, desiring parents also began entering into surrogacy arrangements.[50] Today, an estimated 1,000 surrogacy agreements are entered into each year.[51] There are two kinds of surrogacy arrangements-gestational surrogacy and full surrogacy.[52] In gestational surrogacy, an embryo is created *in vitro* in the surrogate by using the ova of another woman.[53] Ninety-five percent of surrogates today are fertilized with the genetic material of another.[54] However, in full surrogacy, the surrogate is impregnated with her own ova.[55]

The parenting issues that arose as a result of these arrangements challenged the courts, particularly in the context of determining parentage through biological ties.[56] Historically, defining parenthood through biological ties had been a clear method.[57] If a mother gave birth to a baby originating from her own ovum, it was easy to determine she

---

[47] *Id.* at 865–66.
[48] U.S. Dep't of Health and Human Services, 2006 Assisted Reproductive Technology Success Rates: National Summary and Fertility Clinic Reports 1 (2008).
[49] *Id.* at 11.
[50] *See* DiFonzo & Stern, *supra* note 31.
[51] *Id.* at 356 (citing Karen Busby & Delaney Vun, Revisiting the Handmaid's Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers 14 (2009) (unpublished manuscript), *available at* http://claradoc.gpa.free.fr/doc/329.pdf.).
[52] Ben-Asher, *supra* note 33, at 1887.
[53] Id.
[54] DiFonzo & Stern, *supra* note 31, at 355 (citing KAREN BUSBY & DELANEY VUN, REVISITING THE HANDMAID'S TALE: FEMINIST THEORY MEETS EMPIRICAL RESEARCH ON SURROGATE MOTHERS 8 (2009) (unpublished manuscript), *available at* http://claradoc.gpa.free.fr/doc/329.pdf.).
[55] Ben-Asher, *supra* note 33, at 1887.
[56] See Darra L. Hofman, "Mama's Baby, Daddy's Maybe:" A State-By-State Survey of Surrogacy Laws and Their Desparate Gender Impact, 35 WM. MITCHELL L. REV. 449 (2009).
[57] Christen Blackburn, Family Law – Who Is a Mother? Determining Legal Maternity in Surrogacy Arrangements in Tennessee, 39 U. MEM.L. REV. 349, 353 (2009).

was the mother.[58] Similarly, the man who contributed the sperm that fertilized the ovum of the mother was the father.[59] However, defining motherhood was not so clear when a gestational surrogate gave birth to child created by another woman's genetic materials or when a full surrogate gave birth to a child genetically related to her pursuant to a contractual relationship with another woman.[60]

Without a doubt, the case of *In re Baby M*, decided by the New Jersey Supreme Court in 1988, was one of the most notorious cases dealing with the determination of parentage in the context of surrogacy arrangements.[61] Here, William Stern contracted with a surrogate, Mary Beth Whitehead, to be artificially inseminated with his sperm and to carry a child for him and his wife Elizabeth.[62] The contract specified that Whitehead would surrender the child to the Sterns for adoption.[63] However, when the baby girl was born—named Melissa by the Sterns—Mary Beth suffered an emotional crisis and refused to relinquish the child.[64] A dramatic story unfolded, with Mary Beth actually fleeing to Florida with her husband and the baby and only returning the baby to the Sterns after arrest and a court order.[65] The New Jersey courts had to answer the question—"[w]ho are the parents of Baby M?"[66] Are the parents the genetically-related surrogate who also carried the baby and her husband, or the intended genetically-related father and wife who contracted with the surrogate to adopt the baby?[67] The genetic factor alone could not determine which parties would raise Baby M as their own child.[68] The trial court upheld the surrogacy contract under the best interest of the child analysis.[69] As a result, it ordered that Mary Beth Whitehead's parental rights be terminated, that sole custody of the child be granted to William Stern, and entered an order allowing the adoption of Melissa by Elizabeth Stern.[70] The New Jersey Supreme Court reversed on the basis that the surrogacy contract was not only invalid, but that it was evil:

> It guarantees the separation of a child from its mother; it looks to adoption, regardless of suitability; it totally ignores the child; it takes the child from the mother

[58] Id.
[59] *See* Hofman, *supra* note 56.
[60] Id.
[61] *In re* Baby M, 537 A.2d 1227 (N.J. 1988).
[62] *Id.* at 1235.
[63] *Id.*
[64] *Id.* at 1236–37.
[65] *In re* Baby M, 537 A.2d at 1237.
[66] Id.
[67] *In re* Baby M, 537 A.2d 1227, 1237 (N.J. 1988).
[68] *Id.* at 1237–38.
[69] Id.
[70] Id.

> regardless of her wishes and her maternal fitness; and it does all of this, it accomplishes all of its goals, through the use of money.[71]

The aftermath of the decision in *Baby M* was widespread. The news media covered the story extensively, and the frenzy resulted in a "moral panic" about selling babies that had the effect of demonizing commercial surrogacy arrangements.[72] The effects of this social mark are still being felt today, as many states still outlaw commercial surrogacy.[73] The case of *Baby M* could not be decided solely based upon who was genetically related to the child since both sides could claim a genetic relationship, and so the court relied on the "evil" nature of the contract to tip the scales in favor of the genetic-mother surrogate.[74]

The case of *Johnson v. Calvert* was also a monumental case in the evolution of the legal definition of a parent. This case also posed the question of who is the mother: the genetic mother or the gestational mother?[75] On January 15, 1990, Mark and Crispina Calvert, a married couple, signed a contract with Anna Johnson providing that an embryo created by the sperm of Mark and the egg of Crispina would be implanted in Anna and the child born would be the Calvert's child.[76] However, relations deteriorated between the parties and they resorted to litigation to resolve the dispute over parentage.[77] The trial court ruled that "Mark and Crispina were the child's 'genetic, biological and natural' parents, that Anna had no 'parental rights,' and that "the surrogacy contract was legal and enforceable against Anna's claims."[78] Although both the genetic mother—Crispina—and the birth mother—Anna—could potentially be considered mothers to the child under California law, which was modeled after the UPA, the court concluded that legal parentage should be assigned to Crispina and Mark based upon their *intention* to bring about the birth of the child.[79] The court wrote:

> We conclude that although the [Uniform Parentage] Act recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child-that is, she who intended to bring about the birth of

---

[71] *Id.* at 1250.
[72] Elizabeth Scott, *Surrogacy and the Politics of Commodification*, 72 LAW & CONTEMP. PROBS. 109, 110-11 (2009).
[73] Elrod, *supra* note 6, at 255.
[74] *In re* Baby M, 537 A.2d at 1250.
[75] Johnson v. Calvert, 851 P.2d 776, 777–78 (Cal. 1993).
[76] *Id.* at 778.
[77] Id.
[78] Id.
[79] *Id.* at 782 (emphasis added).

> the child that she intended to raise as her own-is the natural mother under California law.[80]

Thus, the traditional means of establishing parentage through biology, marriage, or adoption were expanded into the nebulous world of intent. Although the court was careful to limit the holding to the particular facts of the case, the precedent to consider intent in parenting disputes was born.

This intent-based decision was not accepted by every court, as seen in *Belsito v. Clark*, decided in Ohio one year after *Johnson*.[81] In *Belsito*, an embryo comprised of genetic material from a married couple was implanted into the wife's younger sister who had agreed to act as the surrogate.[82] When the Belsitos were told that only the birth mother—surrogate—could be listed on the child's birth certificate, and the child would be considered illegitimate under Ohio law because the surrogate and the biological father were not married, the Belsitos filed a complaint for a declaratory judgment that it was unnecessary for them to adopt the child.[83] The Belsitos contended that they were "the genetic and natural parents of that child and therefore entitled to be recognized as having the legal status of parents."[84]

Because both the wife and the sister could be considered the natural mother under Ohio law, the court was faced with a similar issue as in *Johnson*.[85] The court rejected the intent standard from *Johnson*, stating that it was difficult to prove and posed the question, "who is the natural parent if both a nongenetic-providing surrogate and the female genetic provider agree that they both intend to procreate and raise the child?"[86] Instead, the court relied on the traditional biological connection to determine parentage—separating birth from the equation—in its reasoning to pronounce the Belsitos as the natural parents of the child being carried by the surrogate sister.[87] The court stated, "[t]he test to identify who the natural parents should be, 'Who are the genetic parents?'"[88]

---

[80] Id.
[81] Belsito v. Clark, 644 N.E.2d 760 (Ohio 1994).
[82] *Id.* at 761.
[83] *Id.* at 762.
[84] Id.
[85] *Compare* Johnson v. Calvert, 851 P.2d 776, 777–78 (Cal. 1993) (stating "[w]ho is the 'natural mother' under California law?"), *with* Belsito, 644 N.E.2d at 762 (stating "[t]he central question before the court is, who is to assume the legal status of natural parents of the unborn child carried by Carol S. Clark?").
[86] Belsito, 644 N.E.2d at 764.
[87] Belsito v. Clark, 644 N.E.2d 760, 766–67 (Ohio 1994) (finding that adoption of the child by the Belsitos was unnecessary).
[88] *Id.* at 766.

The tension between intent tests and genetic tests to determine parental rights and responsibilities became apparent in *In re Marriage of Buzzanca*.[89] Here, Luanne and John Buzzanca, a husband and wife unable to conceive naturally, obtained egg and sperm donors and hired a surrogate to give birth to the child.[90] There was no genetic relationship between the intended parents and the resulting child.[91] When the Buzzancas decided to get divorced, John sought to disclaim any responsibility for the child, financial or otherwise.[92] Luanne filed a petition, seeking to establish herself as the mother of the child and John as the father, which would presumably obligate John to pay her child support.[93]

The trial court astonishingly reached the conclusion that the child had no lawful parents, relying on a stipulation by the surrogate and her husband that they were not the biological parents and the fact that Luanne neither contributed an egg nor gave birth to the child.[94] The appellate court found this result to be unacceptable, and extended the intent standard from *Johnson* to find that John and Luanne were the natural parents of the child.[95] Thus, John and Luanne were responsible for supporting the child notwithstanding the fact they were getting divorced.[96] The court also relied on the decision in *People v. Sorensen*, which held that when a husband consents to allowing his wife to be artificially inseminated, he is presumed to be the "lawful father" because he consented to the procreation of the child.[97] The court reasoned that because fatherhood can be established apart from giving birth or being genetically-related to a child—and "but-for" the Buzzancas intending on creating the child the child would not exist—the seemingly only "right" solution was that they were the natural parents of the child.[98] In this case, a genetic relationship could not establish parentage to the resulting child because neither John nor Luanne contributed genetic material.[99] Additionally, the court leaned partly on the marital presumption to establish John's fatherhood and corresponding responsibilities and obligations to support the child.[100] The intent of the Buzzancas to parent

---

[89] 72 Cal. Rptr. 2d 280 (Ct. App. 1998).
[90] *Id.* at 282.
[91] Id.
[92] Id.
[93] *Id.* at 282–83.
[94] *Id.* at 282.
[95] *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 293 (Ct. App. 1998).
[96] Id.
[97] *Id.* at 286 (discussing People v. Sorensen, 437 P.2d 495 (Cal. 1968)).
[98] *Id.* at 291.
[99] *Id.* at 293.
[100] *Id.* at 291–92.

the child also weighed heavily in the court's decision to declare the divorcing parties as parents.[101]

This string of early cases illustrates how the courts wrestled with the concept of genetic ties and what this meant for determining parentage when faced with the complicated facts of surrogacy cases. The results show that deference to the biological tie remains, but that it is often inadequate to be the only factor when determining parentage.[102] The novel issues that IVF and surrogacy arrangements brought out during this time began the dramatic evolution of the legal definition of a parent, and showed that other factors—such as intent and often marriage—should also be weighed.[103] These early cases exhibited the necessity of considering a variety of factors when determining parenthood, and so the evolution of determining parentage continued.

B. Parenting and the Marital Presumption

The other major factor besides the genetic tie that was historically held to be dispositive in determining parentage is marriage.[104] Decisions during the explosion of ART and surrogacy were consistent in showing deference to marriage as a determinative factor. For example, in *Culliton v. Beth Israel Deaconess Med. Ctr.*, an unmarried surrogate carried twins consisting of genetic materials from wife and husband Marla and Steven Culliton.[105] The Cullitons sought the following two things: (1) a declaration of paternity and maternity; and (2) a pre-birth order that would direct the hospital—where the gestational carrier was expected to deliver—to designate the [Cullitons] as the father and mother on the children's birth certificates.[106] The court found that the governing statutes for determining parentage for children born "out of wedlock" and for adoption were inapplicable.[107] Instead, the court ruled that the twins were the children of the Cullitons because they were married and had conceived the twins.[108] The court reasoned that "[w]hile the twins technically were born out of wedlock, because the gestational carrier was not married when she gave birth to them, it is undisputed that the twins were conceived by a married couple. In these circumstances the

---

[101] *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 291–92 (Ct. App. 1998).
[102] *Id.* at 293 (relying on Johnson v. Calvert, 851 P.2d 776 (Cal. 1993)).
[103] *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d at 293.
[104] *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110 1989); *In re* Jesusa V., 85 P.3d 2, 6 (Cal. 2004); *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (Cal Ct. App. 1998); Wade v. Wade, 536 So. 2d 1158 (Fla. Dist. Ct. App. 1988); Culliton v. Beth Israel Deaconess Med. Ctr., 756 N.E.2d 1133 (Mass. 2001); C.M. v. P.R., 649 N.E.2d 154 (Mass. 1995).
[105] Culliton, 756 N.E.2d at 1135.
[106] *Id.* at 1136.
[107] *Id.* at 1137.
[108] Id.

children should be presumed to be the children of marriage."[109] The court also acknowledged that if the surrogate had been married, it would have caused a problem in declaring the Cullitons as the parents because of the marital presumption under Massachusetts law.[110]

Another case where marriage played a determinative role is *In re Jesusa V.*[111] In this case, the husband of the child's mother and the biological father were both seeking to be declared the father of the child after the child was taken into protective custody because the biological father raped and beat the mother.[112] The husband, Paul, had been married to the mother at the time the child was born and held the child out to be his own child.[113] Here, the marital presumption and the biological presumption were in direct competition with each other in determining parentage.[114] The court weighed the competing interests of the biological father and of the husband and ruled that it was in the best interest of the child that the husband be declared the father of the child.[115] This decision was supported by the strength of the marital presumption and the conduct the husband displayed in caring for the child and treating her as his own:

> [T]he court must look to the state interests in rendering its decision. The state interests rest on the policy to preserve and protect developing parent/child relationships which give young children social and emotional strength and stability. This is more important than establishing biological ties. In other words, there is so much more to being a father than merely planting the biological seed. The man who provides the stability, nurturance, family ties, permanence, is more important to a child than the man who has mere biological ties. By finding [Paul] is the presumed father, this court is protecting and preserving a family unit, the integrity of the family unit.[116]

This case weighed the conduct of the husband in holding the child out to be his own as a major factor in his favor.[117] The court also considered the state interest in promoting stability in the family unit in rendering its decision, and favored the marriage over the biological

---

[109] Culliton v. Beth Israel Deaconess Med. Ctr., 756 N.E.2d 1133, 1137 (Mass. 2001).
[110] Id.
[111] 85 P.3d 2 (Cal. 2004).
[112] *Id.* at 6.
[113] *Id.* at 7.
[114] *Id.* at 14.
[115] *Id.* at 15.
[116] *In re* Jesusa V., 85 P.3d at 15.
[117] Id.

father.[118] However, without the marital presumption to bolster this decision, it is likely the biological father would have been declared the father of the child.

In *C.M. v. P.R.*, a man not married to the mother tried to assert conduct as a basis to be declared the father of a child.[119] The mother was living with the plaintiff when she gave birth to the child, but the two were never married and plaintiff was not the biological father of the child.[120] The plaintiff attended birthing classes with the mother, was with her in the delivery room when the child was born, and his name appeared on the birth certificate.[121] The parties decided that the child would have the plaintiff's last name.[122] They lived as a family for three years, and the plaintiff was often the primary caretaker of the child while the mother worked.[123] Although the couple split up, the mother allowed a continued relationship between the plaintiff and the child and the plaintiff even voluntarily paid child support.[124] When the mother ended the visits with the plaintiff, he filed a complaint to establish paternity and sought visitation rights.[125]

The court denied both claims on the basis that the plaintiff was neither the biological nor adoptive father nor married to the mother and, therefore, there was a lack of support for his right to visitation or custody.[126] Here, the plaintiff sought to persuade the court to extend the "equitable parent" doctrine to the facts of his case.[127] The "equitable parent" doctrine provides that:

> [T]he husband of the biological mother of a child born or conceived during marriage, who is not the biological father of the child, may be treated as the father if a parental relationship is acknowledged by the father and child or is developed in cooperation with the mother.[128]

However, the court rejected plaintiff's argument and determined that a man not biologically-related to the child, who acted like a father, should not have the rights of parenthood because the plaintiff was never

---

[118] Id.
[119] C.M. v. P.R., 649 N.E.2d 154, 155–56 (Mass. 1995).
[120] *Id.* at 154.
[121] Id.
[122] Id.
[123] *Id.* at 154–55.
[124] *Id.* at 155.
[125] C.M. v. P.R., 649 N.E.2d 154, 155 (Mass. 1995).
[126] C.M., 649 N.E.2d at 156.
[127] Id.
[128] Id.

married to the mother.[129] This case showed the unwillingness of the court to grant parental rights to a man who acted like a father but did not have a biological relationship with the child and did not have the benefit of the marital presumption.[130]

An opposite result with similar facts occurred in *Wade v. Wade*, where the distinguishing factor was marriage.[131] Here, the court looked to a former husband's behavior—holding himself out as the father, claiming the child as a dependent, signing the birth certificate, as well as "the benefits of his representation as the child's father, including the child's love and affection, his status as father . . . and the community's recognition of him as the father"—to preclude him from denying parental responsibilities of child support upon dissolution of the marriage.[132] Because he was formerly married to the mother and acted like a father, he could not escape paying child support notwithstanding the fact he was not the child's biological father.[133]

Perhaps the most illustrative case that exhibits the strong deference to marriage when determining parental rights is *Michael H. v. Gerald D.*[134] A child, Victoria D. was born to Carole D. who was married to Gerald D.[135] However, blood tests showed with a 98.07% probability that Michael H., with whom Carole had an adulterous affair, was the biological father of Victoria D.[136] To make matters even more complicated, Carole D. and Victoria D. at times resided with Gerald D. and at times with Michael H., and both men held Victoria D. out to be their daughter.[137] Under California law, a child born to a married woman living with her husband is presumed to be a child of the marriage.[138] Michael H., as a putative father, brought an action to establish paternity and visitation.[139] The Supreme Court ruled, *inter alia*, that Michael did not have a constitutionally-protected liberty interest in a relationship with Victoria, notwithstanding his biological relationship and conduct in holding her out as his daughter.[140] The majority opinion written by Justice Scalia spoke about the "unitary family," which was defined by traditional notions of husband, wife, and children living together as a family, and the need to protect the it.[141]

---

[129] Id.
[130] Id.
[131] Wade v. Wade, 536 So. 2d 1158 (Fla. Dist. Ct. App. 1988).
[132] *Id.* at 1160.
[133] Wade v. Wade, 536 So. 2d at 1160.
[134] Michael H. v. Gerald D., 491 U.S. 110 (1989).
[135] *Id.* at 113.
[136] *Id.* at 114.
[137] *Id.* at 113–14.
[138] *Id.* at 113.
[139] *Id.* at 115.
[140] Michael H. v. Gerald D., 491 U.S. 110, 123–24 (1989).
[141] *Id.*

The dissent, written by Justice Brennan, discussed the fact that Carole D. and Gerald D. were married was a dispositive factor in the decision:

> The evidence is undisputed that Michael, Victoria, and Carole did live together as a family; that is, they shared the same household, Victoria called Michael "Daddy," Michael contributed to Victoria's support, and he is eager to continue his relationship with her. Yet they are not, in the plurality's view, a "unitary family," whereas Gerald, Carole, and Victoria do compose such a family. The only difference between these two sets of relationships, however, is the fact of marriage. The plurality, indeed, expressly recognizes that marriage is the critical fact in denying Michael a constitutionally protected stake in his relationship with Victoria[.][142]

The result in *Michael H.* is even more significant, and perhaps surprising, when one considers the history of recognition of putative fathers' rights by the Supreme Court in a string of cases dating back to 1972.[143] In *Michael H.*, the court weighed biology, marriage, and conduct, and seemingly declared the most important factor was the marriage of the non-biological father to the mother.[144] With this holding, the court strongly affirmed the state interest in promoting marriage, which is viewed as leading to a stable and nurturing "unitary family."[145]

The evolution of the legal definition of a parent was one of expansion in terms of what factors courts leveraged when deciding parentage disputes. The traditional factors of determining parentage through a genetic connection and through marriage remained, but necessarily included the factors of intent to parent and conduct of acting like a parent in order to achieve a just result in many of these cases.[146]

---

[142] Michael H., 491 U.S. at 123–24.

[143] *See, e.g.*, Lehr v. Robinson, 463 U.S. 248, 267–268 (1983) (holding that an unmarried father who had failed to establish "any significant custodial, personal, or financial relationship" with his child was not entitled to constitutional protection); Caban v. Mohammed, 441 U.S. 380, 382 (1979) (finding a statute that distinguished between the rights of unwed mothers and unwed fathers to be constitutional); Quilloin v. Walcott, 434 U.S. 246, 255 (1978) (recognizing that the Due Process Clause is violated when the relationship between a child and parent is broken up without proof of unfitness, but that proof of only disruption of the parental relationship serves "the best interests of the child" and is constitutional); Stanley v. Illinois, 405 U.S. 645, 648–49 (1972) (holding that a statute that presumed putative fathers to be unfit parents violated the Fourteenth Amendment).

[144] Michael H., 491 U.S. at 123–24.

[145] Id.

[146] *See* cases cited *supra* notes 75, 89, 105, 111, 119, 131, 134 and accompanying text.

C. Parenting and "ART Mixups"

As discussed, traditional legal frameworks of determining parentage through biology, marriage, or adoption were ill-equipped to address the myriad of issues that ART produced.[147] The UPA addressed many of the issues and has been adopted by several states, but gaps still remain.[148] For instance, it is well established that a sperm or egg donor is not a parent—whether the gamete is donated to a single or married woman who conceives through ART—with the intent to parent alone or parent with a man.[149] If the woman that conceived through ART was married, her husband will be presumed to be the father if he gave consent to the insemination, unless he revoked his consent before the insemination or he proves his lack of consent within two years of learning of the birth.[150] The intended parents in a gestational surrogacy agreement become the parents of the resulting child, and the gestational surrogate and husband, if any, are not the parents.[151] However, the UPA fails to address the legal disposition of embryos that are frozen and stored for later use by a couple.[152] Current law is also not able to definitively solve issues that arise in the context of what has been termed "ART mix-ups."[153]

An ART mix-up is what occurs when mistakes are made in the process of insemination, usually "where ova are mixed with sperm from the wrong man/donor, the wrong donated ova are mixed with the right sperm, or where one couple's embryos are transferred or implanted into a wrong woman's womb."[154] It should be noted that very few of these mistakes happen, but are obviously devastating and perplexing in terms of who becomes the legal parent.[155] As Leslie Bender wrote:

> ART-related mix-ups or mistakes ultimately ask us to consider what the relevant prerequisite(s) for assigning legally recognized parenthood are and what they should be--genetic contribution of gametes, gestational contribution, consent and contract, intent to create a child, intent to rear a child as its parent, existing or pre-existing relationships with the

---

[147] *See supra* Part I.
[148] Nat'l Conference of Comm'rs on Unif. State Laws, Uniform Parentage Act 1 (2002) (explaining that as of 2000, nineteen states had adopted the full text of the UPA and many others had adopted significant portions of the Act.).
[149] *Id.* at 63.
[150] Id.
[151] *Id.* at 70–71.
[152] Molly Miller, Embryo Adoption: The Solution to an Ambiguous Intent Standard, 94 MINN. L. REV. 869, 878–79 (2010).
[153] See Leslie Bender, "To Err Is Human" Art Mix-Ups: A Labor-Based, Relational Proposal, 9 J. GENDER RACE & JUST. 443, 445 (2006).
[154] Bender, *supra* note 153, at 444.
[155] *Id.* at 444–45.

> baby/child, the labor of rearing, the parents' needs, the child's best interests, social and emotional parenting, economic support, legal adoption, or something else. They require us to examine this question from a justice, equality, relational, and humanist perspective. They also ask us to examine the roles race and sex biases (and even economic privilege) play in distorting our legal conclusions about who is a parent.[156]

Interestingly, many of the ART mix-up cases involve instances of Caucasian women giving birth unexpectedly to mixed-race babies, usually of African-American descent.[157] Practically speaking, it can be presumed these mistakes resulting from ART mix-ups become immediately apparent at birth and, perhaps, this contributes to more of these cases being reported or even discovered. Leslie Bender, writing in 2005, observed that ironically all the ART mix-up cases were presented in black and white.[158] She remarked, "I wish it would be that the answers were as legally and ethically 'black and white,' but instead we find ourselves enveloped in shades of gray, or more appropriately, pinks and browns."[159]

The first known case of an ART mix-up was the 1987 case of Lisa Skolnick. a white woman, who wanted to conceive a child with her deceased white husband's sperm.[160] When she gave birth to a "dark skinned" child, it was clearly the result of a sperm mix-up.[161] In April 1998, Deborah Perry–Rogers and Robert Rogers started the process to conceive through IVF.[162] Unfortunately, the Rogers' embryos were erroneously implanted in another woman's uterus. The woman's name was Donna Fasano, and she was also implanted with her own ova fertilized by her husband's genetic material in addition to the Rogers' embryos.[163] When Ms. Fasano gave birth to two male babies of two different races, it became obvious something went wrong.[164] One, a white child, was the Fasanos' biological child named Vincent Fasano.[165] However, subsequent tests confirmed that the other child, who was

---

[156] *Id.* at 445.
[157] *Id.* at 446–47.
[158] *Id.* at 446.
[159] *Id.* at 447.
[160] Bender, supra note 153, at 447 (citing Cynthia R. Mabry, "Who Is My Real Father?"-The Delicate Task of Identifying a Father and Parenting Children Created From an In Vitro Mix-Up, 18 NAT'L BLACK L.J. 1, 60 (2004-05).
[161] Id.
[162] Perry–Rogers v. Rogers, 715 N.Y.S.2d 19, 21 (App. Div. 2000).
[163] Id.
[164] *Id.* at 22.
[165] Id.

black, was the biological son of the Rogers.[166] When the Rogers discovered that Ms. Fasano had given birth to a child that could be theirs, they commenced an action against the Fasanos.[167] The court analyzed the situation in the context of Ms. Fasano as the gestational mother and Ms. Rogers as the genetic and intended mother.[168] Ultimately, the court held that the Rogers were the parents of the black baby because they were the biological parents and also the intended parents.[169] The Fasanos were the parents of the white baby by the same reasoning.[170] Therefore, the genetic tie was a major determining factor in the court's decision. Because the Fasanos were "legal and biological strangers" to the black child, the Rogers were pronounced the parents, notwithstanding that there was no gestational agreement wherein Ms. Fasano agreed to relinquish her paternal rights.[171]

The resolution of an ART mix-up was not as simple in *Prato–Morrison v. Doe*, decided in California in 2002.[172] In this case, a married couple, Donna Prato-Morrison and Robert Morrison, attempted unsuccessfully to bear a child through IVF and eventually gave up, assuming their embryos were destroyed by the clinic.[173] When the clinic was later sued for medical improprieties, the couple learned through the discovery process that their genetic materials may not have been destroyed and that another woman, Judith Doe, may have been implanted with their embryos and conceived twin girls.[174] The Morrisons brought an action to be declared parents of the twins because they believed that they were the twins' biological parents.[175] The court denied genetic testing of the twins, who were fourteen years old at that time, on the basis that it was not in the twins' best interest to disrupt their lives in this manner.[176] The court wrote, "[s]imply put, the social relationship established by the Does and their daughters is more important to the children than a genetic relationship with a stranger."[177] The possibility of

---

[166] Id.
[167] Perry–Rogers v. Rogers, 715 N.Y.S.2d 19, 22 (App. Div. 2000).
[168] *Id.* at 23.
[169] Perry–Rogers, 715 N.Y.S.2d at 24.
[170] *Id.* at 24–25.
[171] *Id.* at 24–25 (finding that had the Fasanos contested custody, the intent standard as seen in Johnson [*See* case cited *supra* note 75 and accompanying text] and McDonald v. McDonald, 608 N.Y.S.2d 477 (App. Div. 1994) would likely have produced the same result.). It should be noted that the resolution of this case may have been easier in part because the parties' stipulated that the Rogers were the legal and genetic parents of the black child.
[172] Prato–Morrison v. Doe, 126 Cal. Rptr. 2d 509 (Ct. App. 2002).
[173] *Id.* at 511.
[174] Id.
[175] Id.
[176] *Id.* at 515–16.
[177] Prato–Morrison, 126 Cal. Rptr. 2d at 516 (citing Dawn D. v. Superior Court (Jerry K.), 952 P.2d 1139, 1144 (1998).

the genetic relationship between the Morrisons and the twins was not enough to threaten the stability of the Doe family, and the Morrisons were left with no children and the belief that the Does were raising the twins that were genetically their children.[178] In this case, the best interest of the children and public policies for protecting the sanctity of the family trumped the alleged biological connection.[179]

An opposite result occurred just a year later in *Robert B. v. Susan B.*[180] Robert and Denise B., a married couple, had obtained an egg from an anonymous donor to be fertilized with Robert's sperm.[181] Meanwhile, Susan B., a single woman, went to the same fertility clinic with the intent to purchase genetic material from "two strangers who would contractually sign away their rights" so "there would be no paternity case against her, ever."[182] Three of the embryos from the donor and Robert's sperm were accidentally implanted in Susan and she gave birth to Daniel.[183] However, Denise gave birth to Madeline, Daniel's genetic sister.[184] When the fertility doctor informed Robert and Denise about the mistake, Robert and Denise brought a parentage action against Susan.[185] The court ruled that the husband, Robert B., was the child's father, the single woman, Susan, was the child's mother, and dismissed Denise B. from the parentage action with prejudice for lack of standing.[186] Robert could not be considered a "mere" donor because his intent for his sperm was only to fertilize an egg to be implanted into his wife.[187] The single woman was the gestational mother and the wife had no genetic connection with the child and, therefore, had no standing to claim maternity.[188] The court also noted that the intent test could only be applied as a tie-breaker when two women had equal claims of genetic consanguinity and birth, but that regardless it would not be helpful here:

> Moreover, even if we were to invoke the concept of intended mother here, which party would qualify? Both-and neither. Susan intended to be the mother of the child created from an embryo implanted in her uterus that day at the clinic-but not *that* embryo, not one belonging to someone else. Indeed, her intent was to obtain an embryo created entirely from the egg and

---

[178] Id.
[179] Id.
[180] Robert B. v. Susan B., 135 Cal. Rptr. 2d 785 (Ct. App. 2003).
[181] *Id.* at 786.
[182] Id.
[183] Id.
[184] Id.
[185] Id.
[186] Robert B. v. Susan B., 135 Cal. Rptr. 2d 785, 785 (Ct. App. 2003).
[187] Robert B., 135 Cal. Rptr. 2d at 787.
[188] *Id.* at 788–89.

> sperm of anonymous donors. Denise intended to be the mother of the child created from this very embryo-but not at that time, and she did not intend for another woman to bear the child.[189]

As these ART mix-up cases illustrate, the law determining parentage that was evolving often resulted in unsatisfactory and conflicting results. The biological tie was weighed heavily in some cases, and dismissed in others.[190] The marital presumption, as seen in *Robert B.*, is gender-specific to males and does not work in the reverse; that is, a woman married to the father is not presumed to be the mother.[191] These inconsistencies illuminate the murky state of the legal definition of a parent. Courts were still struggling to leverage the well-settled law of determining parentage through biology and marriage, but were looking to factors of intent and conduct when faced with the complicated facts of parenting disputes caused by ART and surrogacy arrangements.[192] These new parenting disputes were the proverbial square peg in the round hole of the traditional legal definition of a parent. Faced with the inadequacy of the traditional legal definition, the rigid historical standard of determining parentage through biology and marriage was morphing by necessity into a totality of the circumstances test.

D. Parenting and Same Sex Relationships

The necessity of the emerging totality of the circumstances test in deciding parenting disputes became even more apparent when considering the complex interplay between genetic ties and marriage in same sex couple families. Same sex couples are disadvantaged in determining parentage by the inherent design of their relationship. Procreation through sexual reproduction was never an option for same sex couples, and external assistance was needed in order for two same sex partners to build a family.[193] Therefore, at least one partner would not be able to achieve parenthood through the genetic relationship.

---

[189] *Id.* at 789, 789 n.7. It is important to note that while the result here seems practically impossible, the families were at least theoretically able to remain intact. Robert ended up only seeking visitation with Daniel, which Denise was amenable to.

[190] *See* case cited *supra* note 162 and accompanying text for biological tie weighed heavily; *See* cases cited *supra* notes 173, 181 and accompanying text for biological tie not weighed heavily.

[191] Robert B. 135 Cal. Rptr. 2d at 787.

[192] *See* cases cited *supra* note 162, 173, 181 and accompanying text for ART cases; *See* cases cited *supra* notes 75, 89, 105, 111, 119, 131, 134 and accompanying text for surrogacy contract cases.

[193] *See generally* Sarah Abramowicz, *The Legal Regulation of Gay and Lesbian Families As Interstate Immigration Law*, 65 VAND. L. REV. EN BANC 11, 17 (2012) (explaining that "[g]ay and lesbian parents often employ assisted reproductive technology ("ART"), including surrogacy, egg donation, and sperm donation, to create their families.").

Marriage was simply not an option for same sex couples, particularly during the latter part of the twentieth century.[194] Thus, same sex couples could not benefit from the marital presumption.[195]

In the early 1990's, courts in California were dealing with more cases involving such same sex parents.[196] The early case of *Curiale v. Reagan* held that a "nonparent in a same sex bilateral relationship, [does not have] any right of custody or visitation upon the termination of the relationship [with the biological parent]."[197] Here, the court found that de facto parent status did not give custody rights to a non-parent over the objections of the biological parent.[198] As a result, a non-biological mother who had raised and developed a relationship with the child did not have any parental rights.[199] The same year, a California Court of Appeal addressed the same issue in *Nancy S. v. Michelle G.*[200] Although the court acknowledged that both partners in a lesbian relationship intended to raise their children together, it explicitly declined to expand the definition of presumed parent to the non-biological mother.[201]

As the years progressed, however, and as more courts were faced with same sex parenting issues, the decisions began to evolve. In 1995, a case out of Wisconsin, *In re Custody of H.S.H. K.*, produced a standard for determining when a non-biological mother should have continued access to a child born to a lesbian couple.[202] The court stated:

> To demonstrate the existence of the petitioner's parent-like relationship with the child, the petitioner must prove four elements: (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of

---

[194] *See infra* Part III and accompanying text (discussing the few states that legally recognize same-sex marriage).
[195] *See* Dolgin, *supra* note 16, at 348, 353 (observing that in the middle twentieth century, families were assumed to consists of a husband and wife and the traditional presumption was that the husband was the father of the children).
[196] Paula Roach, Parent-Child Relationship Trumps Biology: California's Definition of Parent in the Context of Same-Sex Relationships, 43 CAL. W. L. REV. 235, 243 (2006).
[197] Curiale v. Reagan, 272 Cal. Rptr. 520, 522 (Ct. App. 1990) (citing White v. Jacobs, 243 Cal. Rptr. 597, 597 (Ct. App. 1988)).
[198] *Id.* at 522.
[199] Id.
[200] 279 Cal. Rptr. 212, 214 (Ct. App. 1991).
[201] *Id.* at 219.
[202] *In re* Custody of H.S.H. K, 533 N.W.2d 419, 421 (Wis. 1995).

> financial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.[203]

In this decision, the conduct and parental relationship between the non-biological parent and child were grounds for granting parental status.[204]

Along the same reasoning as *In re Custody of H.S.H. K.*, in 2005 the California Supreme Court handed down three decisions that changed the landscape of same sex parenting rights.[205] The lead case was *Elisa B. v. Superior Court*.[206] Here, a same sex couple became inseminated together using sperm from the same donor so that the children would be biological siblings.[207] Elisa gave birth to Chance, and Emily gave birth to Kaia and Ry, who had Down's Syndrome and other medical problems.[208] Emily took on the role of "stay at home mother" and Elisa was the "primary breadwinner" because she earned more than twice as much money as Emily.[209] The couple consulted an attorney to discuss adopting each other's children, but never completed the process.[210] When the two separated, Elisa sought to escape paying child support for the children born to Emily on the grounds that she was not genetically related to them.[211] The court disagreed and held that a child could have two parents who were women under the UPA, and that Elisa was the parent of Emily's children because she participated in causing the children to be born and held the twins out to be her own children.[212] Therefore, Elisa was obligated to pay child support.[213]

The two other companion cases similarly established parentage in the context of same sex relationships. *Kristine H. v. Lisa R.* held that a biological mother in a lesbian relationship could not challenge the validity of a stipulation she made with her former partner declaring that both the biological mother and partner were parents of the child.[214]

---

[203] *In re* Custody of H.S.H. K, 533 N.W.2d at 421.
[204] *Id.* at 437.
[205] Elisa B. v. Super. Ct., 117 P.3d 660 (Cal. 2005); Kristine H. v. Lisa R., 117 P.3d 690 (Cal. 2005); K.M. v. E.G., 117 P.3d 673 (Cal. 2005).
[206] 117 P.3d 660 (2005).
[207] *Id.* at 663.
[208] Id.
[209] Id.
[210] Id.
[211] *Id.* at 663–64.
[212] Elisa B. v. Super. Ct., 117 P.3d 660, 666–67 (Cal. 2005).
[213] Id. at 670.
[214] Kristine H. v. Lisa R., 117 P.3d 690, 692 (Cal. 2005).

K.M. v. E.G. held that when lesbian partners decide to have a child, where one partner provides her ova and the other partner bears the child, both are the child's parents.[215]

Courts are still faced with issues with regard to same sex couples. A case decided in the District Court of Appeal in Florida in December 2011, *T.M.H. v. D.M.T.*, held, as a matter of first impression, that the statute that required egg donors "to relinquish all maternal rights to a resulting child violated the biological mother's constitutionally protected parental rights to the child."[216] Consequently, the form that the biological mother signed was not a waiver of her parental rights.[217]

Accordingly, the legal definition of a parent evolved from solely traditional factors of biology and marriage to essentially a totality of the circumstances test. ART, surrogacy arrangements, and same sex couple families challenged and expanded the way that courts determine parental status and this trend is likely to continue as our society continues to grow and change. Shifting views towards who can marry will undoubtedly influence the next step in the evolution of the legal definition of a parent. For example, views toward same sex marriage are in flux. *Elisa B.* is cited for the proposition that for partners in same sex marriages, domestic partnerships or civil unions, spouses can avail themselves of the presumption of parentage based upon the traditional marital presumption.[218] Giving same sex couples who are married, or in a civil union, the benefit of the marital presumption when determining parentage signals another significant change in the evolution of the legal definition of a parent.

III. THE PARENTS OF TOMORROW

A. Parenting and Same Sex Marriage

Currently, married same sex couples in states that permit same sex marriage—Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, Vermont, Washington, and the District of Columbia—should be entitled to the same marital presumption as heterosexual couples.[219] States that permit same sex couples to enter into civil unions or comprehensive domestic

---

[215] K.M. v. E.G., 117 P.3d 673, 675 (Cal. 2005).
[216] T.M.H. v. D.M.T, 79 So. 3d 787, 787 (Fla. Dist. Ct. App. 2011).
[217] *Id.*
[218] Meyer, *supra* note 23, at 135.
[219] *Id.*; FREEDOM TO MARRY, http://www.freedomtomarry.org/states/ (last visited Mar, 14, 2013); *See also* Caleb K. Bell, *Gay Marriage Seen As Inevitable by Americans: Poll*, THE HUFFINGTON POST (May 7, 2013, 12:29 PM), http://www.huffingtonpost.com/2013/03/14/gay-marriage-inevitable-americans_n_2876601.html (stating that the Illinois Senate recently passed a bill to legalize same-sex marriage).

partnerships—and essentially grant these couples the same rights to parentage as married couples—include California, Hawaii, Illinois, New Jersey, Nevada, and Oregon.[220]

However, the picture is not so clear when same sex couples travel to states where same sex marriage is not yet legalized and/or civil unions are not granted the same rights as married couples. These couples are getting caught in somewhat of a legal paradox. For instance, on one side of the border in New York, a married same sex couple receives the benefits and obligations of the marital presumption, and both partners are considered parents.[221] Yet, if the couple were to move to a nearby state, for instance, Pennsylvania, probably only the biological parent would be considered a legal parent.[222]

The federal Defense of Marriage Act (DOMA) was enacted in 1996 and purports to allow states to deny recognition to marriages between same sex couples in other states.[223] Forty-two states, as of 2011, have also enacted "mini-DOMA's," which proclaim that the state will not recognize a marriage or equivalent relationship between same sex couples from other states.[224] The DOMA analysis results in Pennsylvania being able to deny parental rights to the non-biological parent who was a legal parent in New York. From a practical perspective, how can someone be a parent in one state but not another? The idea is rather ludicrous. DOMA was enacted in part as a response to Hawaii's high court's decision in 1993 that suggested that same sex unions may be protected under Hawaii's Equal Protection Clause.[225] There was concern at the time that same sex couples would only need visit Hawaii, get married, and then return to their home states and receive the benefits of marriage.[226] In other words, some of the reasoning behind the enactment

---

[220] FREEDOM TO MARRY, http://www.freedomtomarry.org/states/ (last visited May 7, 2013); Karen Moulding & Nat'l Lawyers Guild, Lesbian, Gay, Bisexual and Transgender Comm., 1 Sexual Orientation and the Law § 2:30 (2012) (stating that the Defense of Marriage Act references civil unions as "a relationship between persons of the same sex that is treated as a marriage under the laws of such other State[.]").

[221] Meyer, *supra* note 23, at 135; FREEDOM TO MARRY, http://www.freedomtomarry.org/states/ (last visited Mar, 14, 2013).

[222] 23 Pa. Cons. Stat. § 1102 (1996) (defining marriage as "a civil conract by which one man and one woman take each other for husband and wife."); 23 Pa. Cons. Stat. § 1704 (1996) (explaining that the public policy is to define marriage as between one man and one woman and that "[a] marriage between persons of the same sex which was entered into in another state or foreign jurisdiction, even if valid where entered into, shall be void in this Commonwealth.").

[223] Defense of Marriage Act, 28 U.S.C. § 1738C (1996).

[224] Moulding & Nat'l Lawyers Guild, Lesbian, Gay, Bisexual and Transgender Comm., *supra* note 221.

[225] Abramowicz, *supra* note 194, at 16 (citing Baehr v. Lewin, 852 P.2d 44, 63–67 (Haw. 1993) (finding that Hawaii's limitation of marriage to a man and a woman created a sex-based classification, and as such was subject to strict scrutiny under article I, section 5 of the Hawaii Constitution)).

[226] Id.

of DOMA was to avoid forum shopping. It is obvious to a practical mind that this restrictive view of marriage—presumably intending to respect family and promote values of stability and security—actually results in forum shopping.

Same sex couples who want to be married may move to states that recognize same sex marriage. Once there, however, any potential decisions to move out of that state may be effectively blocked because of a desire to have both partners recognized as parents to any children. In this regard, it can be argued that the effects of DOMA may limit same sex couples' right to move freely from state to state in violation of the Privileges and Immunities Clause of the Fourteenth Amendment.[227] Bans on same sex marriage also affect the children of these families, essentially creating a "second-class citizenship" for them.[228] To disallow two partners from being married and forming the "unitary family" is contrary to the public policy of promoting stable and nurturing families.[229] As more states legalize same sex marriage, it is clear that DOMA and its progeny of mini-DOMA's will become obsolete.

Moreover, trends in society seem to be moving away from prohibitions on same sex marriage. President Barack Obama's Administration issued a brief in July 2011, which condemned DOMA as being unconstitutional by stating that "[t]he official legislative record makes plain that DOMA Section 3 was motivated in large part by animus toward gay and lesbian individuals and their intimate relationships, and Congress identified no other interest that is materially advanced by Section 3[.]"[230]

President Obama also became the first sitting U.S. President to publicly support same sex marriage on May 9, 2012, stating:

> I've been going through an evolution on this issue. I've always been adamant that gay and lesbian Americans should be treated fairly and equally[.] At a certain point I've just concluded that, for me personally, it is important for me to go ahead and

---

[227] *See* U.S. Const. art. IV, § 2, cl. 1.

[228] Abramowicz, *supra* note 194, at 15 (citing *In re* Marriage Cases, 183 P.3d 384, 452 (2008).

[229] *See Id.* at 17–18.

[230] Sudhin Thanawala, *Obama Administration Says Defense of Marriage Act is Unconstitutional*, THE HUFFINGTON POST (July 2, 2011, 7:26 PM), http://www.huffingtonpost.com/2011/07/03/obama-administration-says-defense-of-marriage-act-unconstitutional_n_889374.html (referring to the section of DOMA that defines marriage as being between a man and a woman).

> affirm that I think same-sex couples should be able to get married.[231]

This announcement is particularly revolutionary because it was made merely six months before the 2012 presidential election, during President Obama's campaign for re-election. At least as of now, however, the President reportedly has no plans "to pursue new U.S. policy on gay marriage . . . because he believes states should decide the issue."[232] Polls and surveys currently show that roughly fifty percent of Americans support same sex marriage.[233]

Furthermore, the Supreme Court granted certiorari to two cases regarding same sex marriage on December 7, 2012—the notorious case of *Hollingsworth v. Perry*,[234] originating out of California, and *United States v. Windsor*, originating out of New York.[235] In *Perry*, the court will determine whether the Ninth Circuit was correct in its decision that the California law known as Proposition 8, which prohibits same sex marriage, is unconstitutional on equal protection and due process grounds.[236] In *Windsor*, the Justices agreed to review certain provisions of DOMA with regard to "whether Congress can deprive legally married gay couples of federal benefits otherwise available to married people."[237]

During the oral arguments in the *Perry* case before the Supreme Court on March 26, 2013, one of the main issues discussed concerned the individual's constitutional right to get married as it relates to the state's interest in promoting procreation and the unitary family.[238] Proponents of Proposition 8 took the position in their brief that, as quoted by Justice Kagan, "[o]pposite-sex couples are not similarly situated because opposite-sex couples can procreate, same-sex couples cannot, and the State's principal interest in marriage is regulating procreation."[239] Justice Breyer challenged this viewpoint by asking, "[w]hat precisely is the way in which allowing gay couples to marry would interfere with the vision of marriage as procreation of children that allowing sterile couples of

---

[231] Carol E. Lee, *Obama Backs Gay Marriage*, WALL ST. J. (May 10, 2012, 8:05 AM), http://online.wsj.com/article/SB10001424052702304070304577394332545729926.html.
[232] Id.
[233] Id.
[234] Hollingsworth v. Perry, 133 S. Ct. 786 (2012).
[235] United States v. Windsor, 133 S. Ct. 786 (2012).
[236] Perry v. Brown, 671 F.3d 1052, 1063 (9th Cir. 2012).
[237] Bill Chappell & Dana Farrington, *Supreme Court Will Review Two Gay Marriage Cases In 2013*, NPR (Dec. 7, 2012, 3:34 PM), http://www.npr.org/blogs/thetwo-way/2012/12/07/166751369/supreme-court-to-review-gay-marriage-laws (last visited May 7, 2013).
[238] *See* Transcript of Oral Argument, Hollingsworth v. Perry, 133 S. Ct. 786 (2012) (No. 12–144) [hereinafter Transcript].
[239] *Id.* at 16.

different sexes to marry would not?"[240] The discussion continued by comparing same-sex couples to opposite-sex couples over the age of fifty-five and persons incarcerated, both of whom have a constitutional right to marry.[241] Here, the Justices were debating whether the ability to procreate should be a factor that is weighed in the decision of the *Perry* case.[242] Proponents of Proposition 8 asserted that regulating procreation is an appropriate factor in deciding who can marry because it is consistent with promoting a stable, unitary family.[243] Conversely, Perry, the party challenging Proposition 8, essentially argued that regulating procreation should not be a factor that is weighed in deciding who can marry because there are already those who have the constitutional right to marry who do not have the ability to procreate.[244]

Another point discussed during the *Perry* oral argument further weakened the proponents of Proposition 8's position on regulating procreation—the fact that California already gives same sex couples the right to adopt and that, currently, there are approximately 40,000 children in California that live with same sex parents.[245] As Justice Kennedy pointed out, "[t]hey [children in California] want their parents to have full recognition and full status. The voice of those children is important in this case, don't you think?"[246] General Verrilli, as amicus curiae for *Perry*, stated that

> [T]here are 37,000 children in same-sex families in California now. Their parents cannot marry and that has effects on them in the here and now. A stabilizing effect is not there. When they go to school….they don't have parents like everybody else's parents. That a real effect, a real cost in the here and now.[247]

Here, the discussion focuses on the fact that California has already declared that same-sex couples can become parents through adoption, and that there are a substantial number of children living in such families today. This fact nullifies the proponents' of Proposition 8's argument that same-sex couples should not be allowed to marry because of the state interest in regulating procreation to promote stable families. In other words, denying same-sex couples the right to marry actually contradicts the state interest in promoting stable families because many

---

[240] Id.
[241] Transcript, *supra* note 238, at 24–27.
[242] *Id.* at 16, 24–27.
[243] *See generally Id.* at 3–27 (arguing the Petitioners' position).
[244] *See generally Id.* at 28–81 (arguing the Respondents' position).
[245] *Id.* at 21, 43.
[246] *Id.* at 21.
[247] *Id.* at 61.

same-sex couples are already parents. Quite simply, to act in the best interest of such children would be to allow their same-sex parents to marry.

During the oral arguments heard on *Windsor*, it was reported that at least four of the Supreme Court Justices implied that DOMA improperly discriminates against same-sex couples because the federal government is blocked from recognizing same-sex marriages in states that permit such marriages.[248] Justice Kagan reiterated a House report that stated "Congress passed DOMA to express its 'moral disapproval of homosexuality.'"[249] Justice Ginsberg added that "the 1,100 federal benefits denied to same-sex couples water down their relationships to 'skim-milk marriages.'"[250]

Indications from the media reports on the oral argument predict that at least parts of DOMA will be struck down when the Supreme Court renders a decision in the *Windsor* case.[251] What is interesting to ponder is that if DOMA is struck down as unconstitutional, the result is that same-sex marriage effectively becomes a *de facto* constitutional right, regardless of the outcome in the *Perry* case. The inevitable result of a "no-DOMA" legal landscape with some states granting same sex couples the right to marry is wide scale forum shopping. Same sex couples desiring to get married will only need to travel to a legally-friendly state to get married and their home state will no longer have a legal basis by which to deny recognition of the marriage.

If the Supreme Court were to rule that prohibitions on same sex marriage are unconstitutional at the federal level in *Perry*, or if DOMA is struck down in *Windsor*, then same-sex couples throughout the United States could marry and enjoy parental status under the marital presumption. If, and when that occurs, the law of determining parentage will revert back, at least in part, to a more traditional state. In other words, the added factors of conduct and intent would no longer be necessary tools for married same-sex couples when fighting for parental rights because each parent would benefit from the marital presumption. Thus, each parent would be considered legal parents simply because the couple was married.

---

[248] Pete Williams, *Supreme Court likely to advance gay marriage but stop short of broad ruling*, NBC Politics (Mar. 29, 2013, 4:08 AM), http://nbcpolitics.nbcnews.com/_news/2013/03/29/17505931-supreme-court-likely-to-advance-gay-marriage-but-stop-short-of-broad-ruling?lite (last visited May 7, 2013).
[249] Id.
[250] Id.
[251] See Id.

B. Parenting and the Number Two

Another possibility for parentage law in the future is that the law's obsession with having two parents could be a thing of the past. The debate over same sex marriage overlaps in many respects with the debate over polygamy or even polyamory.[252] Since the Supreme Court decision in *Lawrence v. Texas*[253]—which declared a state law banning sodomy as unconstitutional—both proponents and opponents of polygamy have utilized the "slippery slope" argument when advocating for their cause.[254] The logic goes something like this: if homosexuals have a constitutionally protected right to engage in "alternative" intimate relationships, then on what grounds may we ban polygamists' alternative intimate relationships? One law professor observed:

> Gay activists champion autonomy in intimate relationships and charge that traditionalists simply fear what is different and mindlessly mouth religious prejudice. On these grounds polygamy is even easier to support because, unlike gay marriage, it has been and still is condoned by many religions and societies. The Equal Protection argument for same sex marriage also applies to polygamy.[255]

Interestingly, even fundamentalist polygamists—those who base their belief on religious grounds—are "'coming out of the closet' to join the fight for rights recognition for 'sexual minorities.'"[256] If same sex marriage is legalized at the federal level, or even if a majority of the states eventually recognize same sex marriage, how long will the slope stick and not slip? Hypothetically speaking, if everyone could marry regardless of sexual orientation or numbers arrangement, the marital presumption would cover everyone who was married. The law of determining parentage as applied would essentially become what it used to be; that is, through birth, marriage or adoption. Intent and conduct

---

[252] *See* POLYGAMY, http://www.polygamy.com (last visited on Mar. 14, 2013) (explaining that polygamy is a social practice that occurs when an individual has more than one spouse."); *See* THE POLYAMORY SOCIETY, http://www.polyamorysociety.org/page6.html (last visited on Mar. 14, 2013) (defining polyamory as "the practice of loving people simultaneously.").

[253] 539 U.S. 558, 578–79 (2003) (overruling Bowers v. Hardwick, 478 U.S. 186 (1986), which found that there is no constitutional right to engage in consensual homosexual sodomy)).

[254] *See generally* Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUMBIA L. REV. 1955, 1959 n.8 (2010) (highlighting arguments that focus on the "slippery slope invocation" and the gay analogy in by both "left" and "right" in the legal challenges of polygamy).

[255] Davis, *supra* note 242, at 1983 (citing George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & POL. 581, 628 (1999) (footnotes omitted)).

[256] *Id.* at 1983.

would still be available to determine appropriate parentage for those who were not married, but would likely be invoked to a much lesser degree. Marriage would essentially become the dominant legal means of defining parenthood and would be available to everyone regardless of lifestyle choices.

There is also an argument to be made that the families we have today are already "polygamous" or "polyamorous" to a certain extent. Scholar Adrienne Davis points out that in 2006, thirty-eight and a half percent of children were born to unmarried women, some of whom will eventually marry.[257] The unmarried fathers of these children born to unmarried women may also eventually marry and have offspring, resulting in multiple non-marital families, or de facto polygamy.[258] Also, a significant percentage of married couples divorce, remarry, and start new families, which adds to the multiplicity of parents in a family.[259]

This notion of de facto polygamy or de facto polyamory is easily expanded into the context of families formed by surrogacy and ART arrangements, as multiple players in a variety of scenarios may agree to declare themselves "parents" and form their families in non-traditional ways. There are already glimpses of this in courtrooms today. For example, certain trial courts in California have granted “third parent adoptions.”[260] A example of a “third parent adoption” is when a sperm donor wishes to act as a father to a child born to a lesbian couple.[261] These courts have allowed all three desiring parties to be legally declared as parents, “on the condition that the child is at least five years of age and the parties can show full bonding of the child with all three parents plus a good co-parenting arrangement among the adults.”[262] Similarly, in Pennsylvania, a trial court awarded de facto parent status—and the accompanying rights to visitation and shared custody—to the ex-partner of a woman who married after ending the same-sex relationship.”[263] Because the woman’s husband had legally adopted the child and the child and the ex-partner had a well-established relationship, the court’s decision created a legally protected relationship between the child and

---

[257] *Id.* at 2028.

[258] Davis, *supra* note 242, at 1964, 2028. (defining “de facto” polygamy as a situation that involves “intimate multiplicity.”).

[259] Id.

[260] Deborah H. Wald, *The Parentage Puzzle: The Interplay Between Genetics, Procreative Intent, and Parental Conduct in Determining Legal Parentage*, 15 AM. U. J. GENDER SOC. POL'Y & L. 379, 406 (2007) (citing K.M. v. E.G., 117 P.3d 673, 680–81 (Cal. 2005) (reversing a California appellate court decision to deny a lesbian woman legal parent status because the lesbian woman supplied the ova that resulted in the birth of the twins, and, under the Model Uniform Parentage Act, consanguity constitutes evidence of a mother-and-child relationship.).

[261] Id.

[262] Id.

[263] *Id.* It is important to note that the woman’s husband adopted the child.

the child's biological mother, biological mother's husband, and the biological mother's ex partner."[264] Thus, the legitimacy of multiple parents in modern families could be positioning to be the next evolutionary step in defining parenthood.

CONCLUSION

We have seen the traditional ways of becoming a legal parent through birth, marriage, and adoption evolve into a combination of factors based also upon intent and conduct.[265] The test for parental status has essentially become a totality of the circumstances test, and appropriately so. There is no other test that could adequately encompass all the possible combinations of players vying for parental status in today's modern families formed through divorces, remarriages, ART, and surrogacy arrangements.

With an eye toward the future, the question arises whether the evolution of the legal definition of a parent is becoming more modern or more traditional. As anthropologist Marilyn Strathern opined over a decade ago, "[i]t would seem we cannot be at both ends of the continuum at the same time. I want to suggest that is exactly where we might be . . . [w]ould it also follow that one might have both more tradition and more modernity at the same time?"[266] With the possibility of same sex marriage becoming legalized on a federal level, or through a majority of the states, it appears that a significantly greater section of the population will be recognized as a parent through the traditional marital presumption. The fledgling movement towards the recognition of multiple parents may end up providing support for polyamorous or polygamous family arrangements. If more "alternative intimate relationships" are given the freedom to marry, then they, too, will benefit from the marital presumption. If this occurs, the traditional way of defining parenthood through marriage will benefit a substantial portion of the population, and will signal a pendulum swing back to our past. In essence, the legal definition of a parent will be both modern and traditional at the same time.

---

[264] Wald, *supra* note 248, at 406–07 (citing KDP v. TPW, Court of Common Pleas of Montour County, Pennsylvania, No. 192 of 2004, Opinion of June 25, 2004 (finding that lesbian ex-partner of a child's biological mother - who had not been given notice or an opportunity to be heard at the proceeding where the mother's new husband adopted the child - had standing to proceed with a custody action for the child with whom she had resided in a parent-child relationship for over four years based on her in loco parentis relationship with the child.)).

[265] *See infra* Part I.

[266] Dolgin, *supra* note 16, at 364 (2008) (citing Marilyn Strathern, Enabling Identity? Biology, Choice and the New Reproductive Technologies, in Questions of Cultural Identity, 37, 45 (Stuart Hall & Paul Du Gay eds., 1996).