

ASSISTED REPRODUCTION AND THE DIVERSITY OF THE MODERN FAMILY

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§ 1.1 ASSISTED REPRODUCTION TECHNOLOGY TODAY

Advances in the science of reproductive technology in recent decades have made the potential for procreation of children a reality for thousands of people who in prior times would be childless. This has created nontraditional methods of conceiving and giving birth to children, which in turn has created a new dimension of life-giving for people who either cannot or do not choose to have children through sexual intercourse. Now, couples of varying genders (and ages) and singles of either gender can procreate with third-party assistance for the various biological components of procreation, including sperm, eggs, embryos, and gestation. Further, interventions such as intrauterine insemination, in vitro fertilization, and pre-implantation genetic screening can help improve the chances of a successful pregnancy and a healthy child.

In 2013, 160,521 assisted reproduction technology (ART) procedures resulting in 53,252 live-birth deliveries were reported to the Centers for Disease Control and Prevention (CDC).¹ This accounted

1. Saswati Sunderam et al., *Assisted Reproductive Technology Surveillance—United States, 2013*, 64(11) MMWR SURVEILL SUMM, 1-25 (2015), <http://www.cdc.gov/mmwr/pdf/ss/ss6411.pdf>.

for 1.6 percent of all live births in the United States.² However, based on the CDC definition of ART, this report only counts procedures where eggs or embryos are handled in a laboratory. From a legal perspective, we consider intrauterine insemination (particularly when a donor is involved), to be ART. Therefore, the number of ART procedures performed in the United States is likely far higher than as reported by the CDC. With rising rates of infertility and increased legal recognition of families headed by same-sex couples,³ the use of ART is only expected to increase. The reality of a child conceived by collaborative reproduction has created a number of difficult legal issues for lawyers and judges in the context of varied family relationships, which is the reason for this book.

ART has many legal implications, first of which is the establishment of parentage of the child who is born through ART. In this book, we examine the analysis of parentage under a number of procreative scenarios, including children born with the assistance of third parties such as gamete donors and gestational surrogates. ART itself raises questions about regulation, ethics, standards of care, informed consent, and access to medical treatment. We also consider disputes over the by-products of ART, namely cryopreserved genetic material, which should be of particular interest to the family law practitioner as these disputes typically happen in the context of a divorce.

In 2008, the American Bar Association (ABA) House of Delegates approved The Model Act Governing Assisted Reproductive Technology (ABA Model Act on ART).⁴ This promises to be only a first step toward greater legal recognition and regulation of what has been largely ignored by the legal community—that is, the rapid advances in medical technology affecting the family by means of methods “of causing pregnancy through means other than sexual intercourse.”⁵

While society historically saw reproduction and child rearing as a function of the family, however defined, ART has introduced entirely new concepts of human reproduction beyond that historical idea of the family function. This includes collaborative reproduction, that is, “any assisted reproduction in which an individual other than the intended parent(s) provides genetic material or agrees to act as a gestational carrier.”⁶ Thus, traditional

2. *Id.*

3. *See, e.g., Obergefell v. Hodges*, 576 U.S. ____ (2015), Docket No. 14-556.

4. *See* Charles P. Kindregan, Jr. & Steven H. Snyder, *Clarifying the Law of ART: The New American Bar Association Model Act Governing Assisted Reproductive Technology*, 42 *FAM. L.Q.* 203 (2008).

5. ABA MODEL ACT ON ART § 102-1 (2008) (defining assisted reproduction).

6. ABA MODEL ACT ON ART § 102-5 (2008) (defining collaborative reproduction).

notions of the family are qualified by the introduction of entirely new legal parental concepts, such as “intended parent,”⁷ “gestational carrier,”⁸ and “gamete provider.”⁹ The traditional concept of family as based on genetics is directly challenged by assisted reproduction’s emphasis on *choice* of offspring whether or not genetically related, a fact tolerated by increasing legal reluctance to interfere with private family choice.¹⁰ The growing recognition of “nontraditional” families, including same-sex unions, has also been impacted by advances in reproductive technology since children may be conceived and born as a result of such unions.¹¹ The use of surrogacy even provides single men with an opportunity to procreate children.¹²

These are just some examples of various ways in which noncoital reproduction can be achieved. When combined with the ability of medical science to cryopreserve gametes or embryos, the availability of prebirth orders in some jurisdictions and postbirth adoption proceedings to cement a legal parent-child relationship, and use of co-parenting agreements, lawyers and judges must be prepared to deal with a growing number of human reproduction scenarios in which legal issues of parentage will arise.

Popular media have in recent years reported on ART issues in ways that trumpet extraordinary but troublesome events that do not reflect common events in the field. One frequently noted example was an unmarried woman who was already the mother of six children who asked her physician to implant multiple cryopreserved embryos remaining from prior in

7. An intended parent is an “individual, married or unmarried, who manifests the intent as provided in this Act to be legally bound as the parent of a child resulting from assisted or collaborative reproduction.” *Id.* § 102-19.

8. A gestational carrier means “an adult woman, not an intended parent, who enters into a gestational agreement to bear a child, whether or not she has any genetic relationship to the resulting child.” *Id.* § 102-17.

9. A gamete provider “means an individual who provides sperm or eggs for use in assisted reproduction.” *Id.* § 102-14.

10. Janet L. Dolgin, *Biological Evaluations: Blood, Genes, and Family*, 41 AKRON L. REV. 347, 363 (2008) (unorthodox family relationships today are grounded on increased judicial deference to adults’ autonomous choices about family matters).

11. AMY AGIGIAN, *BABY STEPS: HOW LESBIAN ALTERNATIVE INSEMINATION IS CHANGING THE WORLD* (2004) (noting increasing use of assisted reproduction in same-sex female relationships).

12. In *J.B. v. D.F.*, 879 N.E.2d 740 (Ohio 2007), an unmarried man contracted with a surrogate to carry a child for him using his sperm and an egg donated by a woman who had no personal or marital connection to him. In *Magdalin v. Commissioner of Internal Revenue Services*, 2008 WL 5535409 (U.S. Tax Ct., 2008) an unmarried man had children carried by two different surrogate carriers, although the tax court denied his claim as medical deductions for payments to the various persons and entities involved in the collaborative reproduction. In a case reported by the *New York Times*, two men employed a gestational carrier to carry a child for them; see *Judge Calls Surrogate Legal Mother of Twins*, N.Y. TIMES, Dec. 31, 2009, at A15.

vitro fertilization treatment. This resulted in her giving birth to octuplets.¹³ In another case, a married man and woman from Australia conceived twins with an egg donor and a gestational surrogate in Thailand. One of the twins had Down's syndrome, and the couple returned to Australia with the infant that did not have Down's, leaving the other infant with the surrogate in Thailand. To make matters worse, it turned out that the father in this case had a prior history of inappropriate behavior with minors. In the end, the Family Court of Western Australia allowed the one child to remain in Australia.¹⁴

We have seen celebrities involved in disputes over cryopreserved embryos¹⁵ and fights over parentage of children born through surrogacy.¹⁶ Other events that have received news coverage included women offshoring their pregnancies to India, women becoming pregnant in their late 60s, and reports of excessive compensation being paid to young women willing to "donate" their eggs to be used by others. These events trouble those who support the idea of the need to maintain legal and ethical support for "traditional" family values. Yet the reality is that ART is and will continue to be a reality as long as people need and want to use assisted reproduction to have children. As family lawyers, we have an obligation to advise and help our clients within the context of both the law governing the family and the mandates of our professional obligations.

The potential for misuse of reproductive technology may seem obvious, especially in the absence of legal regulation or well-defined medical and ethical standards. The ambiguity left by this lack of legal regulation poses pitfalls for lawyers. For example, one ethical danger arises in the conflict of interest that exists when a lawyer represents various individuals in the collaborative enterprise whose interests are potentially or actually in conflict, such as when the lawyer serves as the agent for bringing gamete donors or gestational carriers together with the potential intended parents. Another example of a problem area for lawyers who work in the ART field exists when the lawyer, the intended parents, donors, surrogate carriers, medical

13. Bonnie Rochman, *The Ethics of Octuplets*, TIME, Feb. 16, 2009, at 43. See also Stephanie Saul, *Birth of Octuplets Puts Focus on Fertility Industry and Risks*, N.Y. TIMES, Feb. 12, 2009, at A1.

14. *Farnell & Anor and Chanbua* (2016) FLC 93-700, colloquially known as the "Baby Gammy Case."

15. Hilary Hanson, *Judge Allows Sofia Vergara's Ex to Sue for Custody of Frozen Embryos*, HUFFINGTON POST (May 24, 2015), http://www.huffingtonpost.com/2015/05/24/sofia-vergara-embryo-lawsuit-nick-loeb-custody_n_7432114.html.

16. *In Re: Baby S.*, 2015 PA Super 244; Nicole Sodoma, *Surrogacy & Sherri Shepherd: A Troubling Case*, HUFFINGTON POST (Feb. 4, 2016), http://www.huffingtonpost.com/nicole-h-sodoma/surrogacy-sherri-shepherd_b_9152642.html.

providers, or other interested parties are residents of various states or countries and the lawyers serving as counsel or intermediaries are not licensed in all the relevant jurisdictions or even knowledgeable about the laws of each of them. The risk to the ART law practitioner is that different jurisdictions may have divergent approaches to ART, and some or all of the various parties may not be properly advised of their rights and legal risks in their own jurisdiction. This is not to say that lawyers may not provide representation in these situations, but that care must be taken in order to provide such representation adequately. These issues will be explored further in this book.

§ 1.2 ART AND MARRIAGE

The authors believe that the modern acceptance of “assisting” human reproduction is related in different ways to the evolution of the modern family and the liberal meaning of marriage that has marked that evolution. After all, ART can affect how a family is defined, and parentage laws often look to marriage to determine who may be presumed to be the parents of a child.

Human beings form family units for many reasons. Among the many motivations that cause individuals to merge their identities with others in a family unit are desires for companionship, financial security, sexual intimacy, and a hope to contribute to the well-being of a loved one. Others see family life as being part of the larger community and having social acceptance. Religious beliefs also contribute greatly to the motivation for family life for many people. And for many, the quest to find meaning in life by procreating and raising children contributes to the desire for family.

Historically, Anglo-American law had placed a strong emphasis on promoting and protecting the traditional family through statutes governing marriage and children. In this context, marriage means civil marriage. It is true that for many people, marriage has religious significance, but from the establishment of purely civil marriage in the Plymouth Colony in the 17th century, American law has continually evolved away from entanglement with the doctrines of its religious origins. The law respects the right of individuals to consummate the consent to their union in an ecclesiastical ceremony, but marriage as a civilly recognized union is governed by state legislation, not religious law. However, an historical residue of some religious ideas about the marital family persisted in law, including a commitment to a permanent union that can be ended only by divorce. The “traditional” definition of marriage as a union of one man and one woman, and the role of the marital

family as the proper and appropriate basis of procreating and raising children, persisted in American law until very recently. This has been called the “traditional family,” but in recent years, the understanding of “family” is undergoing change.¹⁷ This may explain in part why some religions currently seem hostile to the use of assisted reproduction as a means of procreation in the context of family relationship, since that technology is not based on religious doctrine.

One of the most contentious public debates in the 19th century involved the issue of polygamous families, which given the high rate of reproduction of children in such families, contributed substantially to the growth of the Mormon Church.¹⁸ For most of the 20th century, family law issues focused on the legal regulation of heterosexual marriage. These included liberalization of married women’s rights by passage of various married women’s property acts, gradual liberalization of divorce laws, development of standards for resolving custody disputes, legislative efforts to define the rights and responsibilities of married persons, and the development of property division laws to be applied in divorce.

While the legal system focused on issues relating to the marital family, a quiet revolution was taking place in American society independent of marriage. The US Supreme Court has acknowledged this social change in stating that “[t]he demographic changes of the past century make it difficult to speak of an average American family.”¹⁹ There has been substantial growth of and acceptance of the “nontraditional” family in American society. Gradual legal recognition of “nontraditional” families has included recognition of contracts regarding support and property between nonmarital cohabitants,²⁰

17. A “traditional family” in the context of American family law means two heterosexual adults who are married to each other and who may have their own biological children as a product of sexual intercourse or who have legally adopted children. See generally Katherine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879 (1984); Martha Minow, *All in the Family and in All Families: Membership, Loving and Owning*, 95 W. VA. L. REV. 275 (1992–93); Note, *Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family*, 104 HARV. L. REV. 1640 (1991); Charles P. Kindregan, Jr., *Religion, Polygamy, and Nontraditional Families: Disparate Views on the Evolution of Marriage in History in the Debate over Same-sex Unions*, 41 SUFFOLK U. L. REV. 19 (2007).

18. For the best account of the 19th-century conflict over law and polygamy, see SARAH B. GORDON, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN 19TH CENTURY AMERICA* (2002).

19. *Troxel v. Granville*, 530 U.S. 57, 63 (2000) (ruling unconstitutional a state statute that authorized any person to seek a court order of visitation with a child even over the fit parent’s objection to such visitation).

20. See, for example, the much-cited decision of the Supreme Court of California in *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976) (couple entering unmarried cohabitation could contract

equality of treatment of children born out of wedlock with marital children,²¹ adoption of children by unmarried co-parents,²² and recognition of de facto parental interests.²³ Marriage equality was extended to same-sex couples first in Massachusetts,²⁴ and finally to the entire country in the US Supreme Court's 2015 decision in *Obergefell v. Hodges*.²⁵

In the private, (nongovernment) sphere, American society has been even more accepting of “nontraditional” family unions. For example, many major corporations provided domestic partner benefits for employees years before the *Obergefell* decision.²⁶ Notably, post-*Obergefell*, many companies continue to offer these benefits for employees who do not choose to marry. Such benefits may include medical and hospital insurance coverage, life insurance, maternity and paternity leave, childcare services, and other benefits that in the past have been reserved exclusively for marital families. Affording such benefits has resulted in the broadening of the concept of family in American society to include an evolving acceptance of alternate family structures, which in turn has found greater acceptance in law.²⁷

It was in the context of these remarkable changes in American family law that the development of ART flowered, and by the early 21st century had produced the kind of legal issues discussed in this book. These developments have recently included the drafting of such model laws as the 2008 ABA Model Act on ART and the sections of the 2017 Uniform Parentage Act

for economic support and property in the event the relationship ends). *But see* Hewitt v. Hewitt, 394 N.E.2d 1204 (Ill. 1979) (criticizing the *Marvin* analysis).

21. Gomez v. Perez, 409 U.S. 535 (1973) (state may not invidiously discriminate against children born out of wedlock as distinguished from marital children).

22. *See, e.g., In re Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993) (two unmarried women permitted to adopt the child of one of them). *See also In re Adoption of B.L.V.B.*, 628 A.2d 1271 (Vt. 1993) (not necessary to terminate the natural mother's parental rights when her female companion petitions to adopt her child).

23. J. Shoshanna Ehrlich, *Co-parent Visitation*, 9 LAW & SEXUALITY 151 (2000); Gregory A. Loken, *The New Extended Family—De Facto Parenthood*, 2001 BYU L. REV. 1045; Charles P. Kindregan, Jr., *The Nontraditional Family: Visitation and the New Concept of the De Facto Parent*, 17 MASS. FAM. L.J. 112 (2000).

24. *Goodridge*, 798 N.E.2d 941 (same-sex couples entitled to issuance of marriage licenses; court rejected state's argument that same-sex marriage not entitled to recognition because of the traditional procreation argument, noting that same-sex couples can now reproduce by assisted reproduction).

25. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (recognizing that the fundamental right to marry applied to same-sex couples as well as opposite-sex couples).

26. Lotus (now a division of IBM) was the first publicly traded company to offer domestic partner benefits in 1992. By 2015, nearly all Fortune 500 companies did so.

27. SANFORD KATZ, *FAMILY LAW IN AMERICA*, Ch. 1 (2003) (describing development of marriage-like relationships and informal marriage in the United States).

(UPA) and the Uniform Probate Code (U.P.C.). All of these proposed laws will be cited throughout this book.

The Model Act Governing Assisted Reproductive Technology was developed by the Family Law Section of the ABA. It could have been developed by other groups whose primary interest was in technology, bioethics, legal-medicine, or health law, but it is significant that family lawyers developed the Act. This is explained by the fact that the members of the Family Law Section were very much aware of the growing influence of assisted reproduction on the modern family, and the issues that these forms of reproduction pose for the family structure.

§ 1.3 EVOLUTION OF THE FAMILY

Resistance to legal recognition of nonmarital family units was often justified in terms of the state's interest in the procreation of children. For example, the Court of Appeals of Washington denied a marriage license to a same-sex couple in the 1970s by this analysis:

Although, as appellants hasten to point out, married persons are not required to have children or even to engage in sexual relations, marriage is so closely related to the public interest in affording a favorable environment for the growth of children that we are unable to say that there is not a rational basis upon which the state may limit the protection of its marriage laws to the legal union of one man and one woman.²⁸

This argument is based on two propositions. One is that “the institution of marriage provides the important legal and normative link between heterosexual intercourse and procreation on the one hand and family responsibilities on the other;”²⁹ which is a now-discredited argument for not providing the protections of marriage for same-sex unions. The other proposition is that children are best conceived and raised in a “traditional” marital family rather than some other family type, such as a nonmarital opposite-sex partnership or a same-sex partnership of any kind, not to mention single individuals pursuing parenthood. This argument is based in part on the lack of applicable law governing such family structures, as

28. *Singer v. Hara*, 522 P.2d 1187, 1197 (Wash. Ct. App. 1974).

29. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 995 (Mass. 2003) (Cordy, J., dissenting).

expressed in the question: “What of the children of such relationships? What are their support and inheritance rights, and by what standards are custody questions resolved?”³⁰

The resolution of these concerns is directly related to the subject matter of this book. These dual concerns imply that the state has a preference that children should be conceived only by male-female sexual intercourse, and children should be raised in a marital family. This was the essence of the state’s position in the landmark same-sex marriage case in Massachusetts. The state in *Goodridge v. Department of Public Health*³¹ argued that only heterosexual marriage provides a favorable setting for procreation and that only such marriages provide the optimal setting for child rearing.³² The majority opinion of the Massachusetts Supreme Judicial Court rejected this dual argument:

Our laws of civil marriage do not privilege procreative heterosexual intercourse between married people above every other form of adult intimacy and every other means of creating a family. . . . Fertility is not a condition of marriage, nor is it grounds for divorce. . . . While it is certainly true that many, perhaps most, married couples have children together (assisted or unassisted), it is the exclusive and permanent commitment of the marriage partners to each other, not the begetting of children, that is the sine qua non of civil marriage. Moreover, the Commonwealth affirmatively facilitates bringing children into a family regardless of whether the intended parent is married or unmarried, whether the child is adopted or born into a family, whether assistive technology was used to conceive the child, and whether the parent or her partner is heterosexual, homosexual, or bisexual. If procreation were a necessary component of civil marriage, our statutes would draw a tighter circle around the permissible bounds of nonmarital child bearing and the creation of families by noncoital means.³³

While *Goodridge* focused on a particular form of “nontraditional” family, that is, same-sex parenthood, it also reflects the impact that ART has

30. *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1207–08 (Ill. 1979).

31. *Goodridge*, 798 N.E.2d 941.

32. *Id.* at 961. The third argument advanced by the state was that limiting marriage to the marital union of a man and woman assisted the state in preserving scarce public and private resources.

33. *Id.* at 961–62 (Marshall, C.J.).

had on legal analysis of the reality of modern American family life. Parents, whether they are in a married or unmarried union with another, whether they are divorced, whether they are a single parent, whether they procreate by sexual intercourse or by ART, are entitled to the respect the law gives to family choice. Obviously, there are and will be many in society who disagree with this type of analysis about issues that same-sex marriage raises, but it would be hard to deny that the availability of assisted reproduction (as distinguished from sexual intercourse) to procreate has produced new realities that the law must confront.

The Supreme Court of New Jersey stated a simple reality in a case involving a custody dispute between two women over a child conceived by one of them by intrauterine insemination³⁴ when it commented:

[W]e should not be misled into thinking that any particular model of family life is the only one that embodies “family values.” . . . Those attributes may be found in biological families, step-families, blended families, single parent families, foster families, families created by modern reproductive technology, and in families made up of unmarried persons. . . . Moreover, our judicial system has long acknowledged that “courts are capable of dealing with the realities, not simply the legalities, of relationships, and have adjusted the rights and duties of parties in relation to that reality. . . . [T]he nuclear family of husband and wife and their offspring is not the only method by which a parent-child relationship can be created.”³⁵

An academic argument has been ongoing for some years as to the potential impact that ART holds for the future of the construct of family. As the technology began to evolve, arguments began to appear suggesting that radical changes in the way people conceive, bear, and give birth to children would likely cause rethinking of the social structure of families as a way of assigning responsibility.³⁶ There are some who believe that ART poses a

34. See Chapter 2 for analysis of intrauterine insemination.

35. *V.C. v. M.J.B.*, 748 A.2d 539, 556–57 (N.J. 2000) (Long, J., concurring).

36. See, for example, the comments of Kingsley Davis in *Constants: The Underlying Principles of the Family* in 1 REPORT OF THE COMMISSION ON POPULATION GROWTH AND THE AMERICAN FUTURE, RESEARCH REPORTS 241 (1972), giving examples such as test-tube babies and surrogate birth mothers and other developments as likely to impact on the emphasis on bloodline, inheritance, and social organization of the nuclear family. See also Charles P. Kingsdregan, *The Challenge of Bioethics: Family Law Meets the Biological Revolution*, 13 ADVOCATE, Spring 1982, at 3 (commenting on the Commission Report). See also HENRY T. GREELY,

substantial threat to the traditional family,³⁷ while others take a more benign stance about the technology.³⁸ But as this book will illustrate, while the technology is bound to affect thinking about the family, judges and legislatures continue to address specific issues by reference to concepts of family law that are evolving, but which are nevertheless grounded in traditional presumptions of family relationships.

§ 1.4 THE RIGHT OF PRIVACY, FAMILY CHOICE, AND ART

Although not universally accepted by all countries, the choice to reproduce is perceived as a fundamental human right in some countries,³⁹ including the United States. While this right is generally seen as a right to reproduce through sexual means, it is possible that this right includes the use of ART when people cannot or choose not to procreate through sexual means. ART, particularly when third parties participate in the procreative process, poses many questions about the status of the parties involved. Who are the parents of the child born? What rights have all the parties involved in the procreative process? These are just two basic questions, but there are many more. ART challenges the legal relationships between individuals, and raises novel questions as the component parts of reproduction are deconstructed. When human reproduction is slowed down and even paused in the midst of the process, more space is given for legal questions and issues.

THE END OF SEX AND THE FUTURE OF HUMAN REPRODUCTION (Harvard Univ. Press 2016) (positing a future where children are conceived using gametes derived from skin cells).

37. Several commentators have raised questions about the impact ART may have on our thinking about family values. See AGIGIAN, *supra* note 11; Judith Areen, *Baby M. Reconsidered*, 76 GEO. L.J. 1741 (1988); Radhika Rao, *Assisted Reproductive Technology and the Threat to the Traditional Family*, 47 HASTINGS L. J. 951 (1996); Walter Wadlington, *Artificial Conception*, 69 VA. L. REV. 465 (1983). An example of a court using the framework of traditional marital family analysis to address a custody dispute between two females is found in *In re Marriage of Simmons*, 825 N.E.2d 303 (Ill. App. Ct. 2005), rejecting the nonparent's claim based on the fact that their record "marriage" was invalid; the interests of the child are ignored by this type of analysis.

38. See, e.g., John A. Robertson, *Assisted Reproductive Technology and the Family*, 47 HASTINGS L.J. 911 (1996).

39. DECLARATION ON SOCIAL PROGRESS AND DEVELOPMENT, G.A. RES. 2542 (XXIV), ¶ 4, (11 Dec., 1969), <http://www2.ohchr.org/english/law/pdf/progress.pdf>; Meyer v. Nebraska, 262 U.S. 390 (1923) (finding the 14th Amendment includes right to "bring up children"); Skinner v. Oklahoma, 316 U.S. 535 (1942) (declaring compulsory sterilization a violation of fundamental right to procreate).

The Supreme Court of the United States has noted that “[t]he decision whether or not to beget or bear a child is at the very heart of . . . constitutionally protected choices.”⁴⁰ The Court struck down state-imposed restrictions on the use of contraceptives by married couples⁴¹ and by unmarried persons⁴² as well as prohibitions on the termination of pregnancy by abortion.⁴³ These decisions are based on an individual’s right to make private choices regarding procreation free from state interference unless that interference is justified by a compelling state interest.

Even before the landmark privacy decisions in the contraceptive and abortion cases, the Supreme Court in dictum had described the right to procreate as “one of the basic civil rights of man.”⁴⁴ In light of the recognition of a right of personal autonomy in reproductive choices, “the rights of personal intimacy, of marriage, of sex, of family, of procreation . . . are fundamental rights protected by both the federal and the state Constitutions.”⁴⁵ Although we have this analysis as a foundation, we do not have, as of this writing, a definitive, positive right for individuals and couples to access ART in order to procreate.

In the context of this legal background, a state or the federal government cannot prohibit the use of most forms of ART when doing so would intrude into the private choice of a person or couple. (An exception may be reproductive human cloning, which some states do prohibit; see Chapter 8 in this book.) Governments in the United States have been reluctant to enact comprehensive laws, such as the ABA Model Act on ART, even when the law would not restrict private choice. The absence of comprehensive legislation on ART is due in part to the fact that some people continue to have moral, social, or religious objections to nonsexual reproduction. Many people also object on moral grounds to the validation

40. *Carey v. Population Servs. Int’l*, 431 U.S. 678, 685 (1977) (state may not improperly restrict advertising, display, or sale of nonprescription contraceptives).

41. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (state may not prohibit access to contraceptives by married couple).

42. *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (state may not prohibit access to nonprescriptive contraceptive by unmarried persons). A statute prohibiting the sale of contraceptives to minors younger than 16 was declared unconstitutional in *Carey v. Population Services International*, 431 U.S. 678 (1977).

43. *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973); *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992) (right of pregnant women to abortion prior to viability free from state prohibition).

44. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (statute authorizing compulsory sterilization of habitual criminals is unconstitutional as applied in a racially discriminatory manner).

45. *In re Baby M.*, 537 A.2d 1227, 1253 (N.J. 1988) (ruling that a traditional surrogacy agreement in which the birth mother is also the genetic mother is unenforceable against her).

by the state of some “nontraditional” families, such as same-sex unions, nonmarital partnerships, or unions elsewhere on the spectrum of gender and sexual identity. The absence of legislation is also partly due to a lack of a natural constituency for such legislation.⁴⁶ However, the use of certain assisted reproductive technologies such as intrauterine insemination or in vitro fertilization in both “traditional” (i.e., husband and wife) and “nontraditional” families to procreate seems safely within the protection of the law.

While some commentators have raised concerns about the ethics and long-range implications of medical advances in reproductive technology,⁴⁷ the development and applications of some have existed for several decades without serious legal regulation in the United States.⁴⁸ Efforts have been made to limit some of the more controversial technologies.⁴⁹ However, the legal regulation that does exist is concerned, for the most part, with issues of informed consent or the legal status of the children conceived by these procedures. In the following chapters of this book, examples of such legislation will be cited in the context of particular reproductive technologies.

§ 1.5 ASSISTED PROCREATION AND THE MODERN FAMILY

As long as reproduction required a male and female to have sexual intercourse, society made traditional husband-wife marriage (whether monogamous as in Western society or polygamous as in other cultures) the preferred status for procreation. Based on the procreative function, the marital family became legally favored as best for parents and children as well as society. However, once procreation became separated from sex with the advent of alternative methods of human reproduction, nonmarital unions were also seen as an appropriate means of childbearing and ultimately

46. People undergoing infertility treatment do not necessarily form a visible “class” that motivates legislators. However, there are advocacy organizations, such as Resolve, that do work for legislative change.

47. Vincent Brannigan, *Biotechnology: A First Order Technico-Legal Revolution*, 16 *HOFSTRA L. REV.* 545 (1988).

48. Elizabeth Olson, *Bioethics Panel Recommends Limits on Assisted Fertility*, *N.Y. TIMES*, Apr. 2, 2004, at A-12 (noting that reproductive technology is less regulated in the United States than in Europe).

49. *Id.* at A-12 (noting report of President’s Council on Bioethics and that panel was divided on need for regulation of ART). For analysis of government regulation of assisted reproduction, see Chapter 6.

child-rearing. Indeed, the Supreme Court of Iowa noted in ruling that the state's former prohibition of same-sex marriage could not be justified based on the procreation argument because today "[g]ay and lesbian persons are capable of procreation."⁵⁰

The growing diversity of family structures, including nonmarital couples and same-sex unions, were bound to affect thinking about the place of family in human reproduction. Other factors were clearly at work, including changes in society and the business world, which redefined the "traditional" roles of men and women, greater acceptance of non-marital cohabitation, and the decline of the stigma formerly associated with illegitimacy. The role of ART has also caused some societal reflection on the legal status of other family structures in relation to procreation and child rearing.

One area where the use of reproductive technology in "nontraditional" families has caused a transformation of black-letter family law is in the decline in emphasis on biological or birth connections in determining parental interests. For example, the Supreme Court of Wisconsin has recognized this new reality in allowing the nonbiological parent of a child conceived by one lesbian partner through intrauterine insemination with donor sperm to seek visitation with the child after the adult relationship ended. Such a claim by a nonbiological parent would have been almost always denied until the last decade of the 20th century.⁵¹ As early as 1995, the Wisconsin court was able to recognize that a child growing up in a household headed by a same-sex couple could create a parent-child relationship that was not based on biology but rather on a *de facto* family relationship.⁵²

Such *de facto* parent-child relationships are in many cases formed in a "nontraditional" family,⁵³ and the child is often the product of ART.

50. *Vanum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (rejecting state's argument that heterosexual marriage promotes procreation while same-sex marriage does not do so).

51. The majority decision in *Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991) ruling that the same-sex partner of a woman who conceived a child by intrauterine insemination had no parental rights was a typical decision in a parent versus nonparent custody dispute in the 20th century and still is the law in some states.

52. *In re Custody of H.S.H.-K.*, 533 N.W.2d 419 (Wis. 1995). *But see* *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005) (a woman who encouraged her former domestic partner to have a child by intrauterine insemination could be held liable for support of the child) and *Kristine H. v. Lisa R.*, 117 P.3d 690 (Cal. 2005) (biological birth mother by assisted reproduction estopped from denying maternity of former domestic partner whom she had consented to being named as a parent in a prebirth order).

53. Sometimes such a *de facto* relationship grows out of a traditional marital family, such as the relationship between a child and a stepparent. *See, e.g.*, *Karner v. McMahan*, 640 A.2d 926 (Pa. Super. Ct. 1994) (stepparent's standing to litigate custody issues).

One year after the Wisconsin decision, a Pennsylvania court explicitly recognized that when same-sex partners decide to have a child by ART, “the child was to be a member of their nontraditional family, the child of both of them and not merely the offspring of [the birth mother] as a single parent.”⁵⁴

By the end of the 20th century, the American Law Institute had recognized the reality of de facto parent-child relationships notwithstanding that one adult parent is not a biological or legal parent. The family connection is not based on biology, blood relation, or adoption but on the fact that the adult has participated in the life of the child in a substantial parental role. The legal parent’s allowance and encouragement of the de facto parent’s involvement and residence with the child⁵⁵ is an important consideration in these cases. Perhaps even a support obligation could be imposed on an agreement between the obligor and child’s parent that they would “share responsibility for raising the child and each would be a parent to that child.”⁵⁶ This had a most intense application in the families in which ART was used to conceive a child in the body of one party, but both parties intended to parent the child so conceived.⁵⁷

The connection between the child of ART and the growing recognition of new family structures was recognized by the Supreme Judicial Court of Massachusetts in the case of *E.N.O. v. L.M.M.*⁵⁸ The court in *E.N.O.*

54. *J.A.L. v. E.P.H.*, 682 A.2d 1314, 1321 (Pa. Super. Ct. 1996).

55. ALI, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.03(1)(b) (2002).

56. *Id.* § 3.03(1), cmt. (c) (2000). This is based on the concept of equitable estoppel and the welfare of children. See *Elisa B.*, 117 P.3d 660 (woman ordered to support child of former female companion when she encouraged the plaintiff to have the child by assisted conception). But see *T.F. v. B.L.*, 813 N.E.2d 1244 (Mass. 2004), in which a divided court refused to order a lesbian former domestic partner who had entered into a co-parenting agreement if her partner had a child by assisted reproduction to pay child support; the three dissenting judges cited the quoted ALI section to argue for support based on equity concepts. It may be important to distinguish this case from de facto parent cases, since in *T.F.* the defendant never exercised any parenting activity after the birth of the child. In *A.H. v. M.P.*, 857 N.E.2d 1061 (Mass. 2006), rejecting a claim of parenthood by estoppels, a former same-sex partner of the birth mother who conceived by intrauterine insemination by donor sperm was held not to be a parent when the partner’s contribution to the upbringing of the child was mostly financial.

57. *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005) (woman who provided her egg to her registered domestic partner so she could have a child was also a parent of the resulting child they co-parented and not a mere gamete donor). See also, Courtney G. Joslin, *Protecting Children: Marriage, Gender and Assisted Reproductive Technology*, 83 S. Cal. L. Rev. 1177 (2010) (status of ART children should not depend on marital status, gender or sexual orientation of the intended parents).

58. *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999) (birth mother in same-sex relationship became pregnant by intrauterine insemination using donor sperm).

recognized a nonparent's standing to seek visitation when her same-sex relationship with the mother ended. Justice Abrams commented:

Here, the judge emphasized the plaintiff's role as a parent of the child. It is our opinion that he was correct to consider the child's nontraditional family. A child may be a member of a nontraditional family in which he is parented by a legal parent and a de facto parent. A de facto parent is one who has no biological relation to the child, but has participated in the child's life as a member of the child's family. The de facto parent resides with the child and, with the consent and encouragement of the legal parent, performs a share of caretaking functions at least as great as the legal parent. . . . The recognition of de facto parents is in accord with notions of the modern family. An increasing number of same gender couples, like the plaintiff and defendant, are deciding to have children. It is to be expected that children of nontraditional families, like other children, form parent relationships with both parents, whether those parents are legal or de facto.⁵⁹

A decision of the Court of Appeals of Indiana encouraged the legislature to help "address this current social reality by enacting laws to protect children who, through no choice of their own, find themselves born into unconventional familial settings."⁶⁰ However, many state legislatures have not been responsive to this challenge, leaving it to the courts "to fashion the common law to define, declare, and protect the rights of these children"⁶¹ who were conceived by ART where traditional presumptions of parentage do not apply.

59. *Id.* at 891.

60. *In re Parentage of A.B.*, 818 N.E.2d 126, 131 (Ind. Ct. App. 2004) (holding that both the birth mother and her former female domestic partner are co-parents of child conceived by intrauterine insemination with mutual consent of the women). However, while recognizing that "the law related to parentage in the context of assisted reproduction and gay-lesbian relationships is in the early stages of development" the Indiana Supreme Court vacated judgment in the A.B. case in *King v. S.B.*, 837 N.E.2d 965 (Ind. 2005) (ruling that the former partner could proceed with her claims of parenthood, but rejecting the Appeals Court analysis of co-parenthood based on assisted reproduction). See also *Elisa B. v. Superior Court*, 117 P.3d (Cal. 2005), in which the Supreme Court of California upheld a co-parenting claim in a same-sex union growing out of assisted reproduction.

61. *Parentage of A.B.*, 818 N.E.2d at 126. While the Supreme Court of Indiana subsequently vacated the opinion of the appeals court in *King v. S.B.*, 837 N.E.2d 965, the authors believe that the appeals court opinion reflects the law of the future that is likely to evolve in the United States. See, for example, *Clifford K. v. Paul S.*, 916 S.E.2d 138 (W.Va. 2005) and cases cited therein (female partner of deceased mother of child conceived during relationship and raised as their child was awarded custody of child). In one much noted case involving multistate disputes over custody of triplets born to a gestational surrogate on behalf of an unmarried man

One fundamental aspect of the use of assisted reproduction is that persons who employ reproductive technology are making a conscious decision to procreate a child, whereas “natural” reproduction often occurs simply as the result of sexual intercourse without a specific reproductive intent. This was discussed in an Indiana appellate decision in relation to the state’s clear interest in seeing that children are raised in stable environments. Those persons who have invested significant time, effort, and expense associated with assisted reproduction or adoption may be seen as very likely to be able to provide such an environment, with or without the “protections” of marriage, because of the high level of financial and emotional commitment exerted in conceiving or adopting a child or children in the first place. By contrast, procreation by “natural” reproduction may occur without any thought for the future.⁶²

In a nation where family law issues are mostly resolved by state law rather than federal law, there are bound to be conflicting results regarding parentage issues arising from the use of assisted reproduction. While clients often resist the advice to do so once they have a child, consideration must be given to seeking an adoption to secure parental rights. A New York decision illustrates the desirability of adoption when local law recognizes the marriage of same-sex partners and their parentage of a child conceived by assisted reproduction but it is possible that other jurisdictions will not recognize these legal standings. In that case, two women who were married under the law of the Netherlands had a child gestated by one of them using the egg provided by the other woman with donor sperm. While they were the legal parents of the child under New York law, they were concerned about that recognition in other states and nations, and the New York court believed that concern was legitimate and allowed a decree of adoption.⁶³

While these are usually matters of state law, the US Supreme Court has recently weighed in on parentage issues involving ART twice in as many

who wished to have children, the Ohio court enforced the surrogacy agreement and thereby recognized parental rights growing out of the agreement; *J.F. v. D.B.*, 879 N.E.2d 740 (Ohio 2007). See Robert E. Rains, *What the Erie Surrogate Triplets Can Teach State Legislatures About the Need to Enact Article 8 of the Uniform Parentage Act (2000)*, 56 CLEV. ST. L. REV. 1 (2008).

62. *Morrison v. Sadler*, 821 N.E.2d 15, 24 (Ind. Ct. App. 2005) (ruling that same-sex couples have no right under the state constitution to have marriage licenses issued and that the ability or inability to reproduce by natural means is a basis for the state to distinguish between homosexual and heterosexual couples in regard to marriage).

63. *In re Adoption of Sebastian*, 879 N.Y.S.2d 677 (Sur. Ct. 2009) 2009 WL 1141728 (N.Y. Sur. Ct. 2009) (based on the best interests of the child, the legal relationship to both its gestating and its genetic mother should be protected by allowing adoption).

years. First, in a unanimous⁶⁴ decision in 2016, the Supreme Court reversed the refusal of the Supreme Court of Alabama to grant full faith and credit to an adoption of children born through ART to a same-sex female couple.⁶⁵ The Supreme Court of Alabama had, in its decision,⁶⁶ determined that the state of Georgia had not applied its own law correctly when granting the adoptions. In 2017, the US Supreme Court decided another case that has potentially more far-reaching implications for ART. In *Pavan v. Smith*, the Supreme Court ordered that Arkansas may not refuse to put the names of two married women on the birth certificate of the child born to one of them.⁶⁷ The decision in *Pavan* was based on the interpretation of an Arkansas statute, but it has nevertheless opened the door to the application of marital presumptions of parentage to same-sex couples across the nation.

In the post-*Obergefell* world, the necessity of an adoption when the individuals in a married same-sex couple have already been determined to be the parents of a child born through ART is a matter of debate. While the decision in *V.L. v. E.L.*⁶⁸ solidifies the notion that adoptions are to be given full faith and credit, we do not yet have judicial validation that prebirth orders of parentage enjoy the same treatment. Nor do we have definitive precedent in *Pavan* that parentage granted based on a presumption found in one state's law cannot be challenged by another state. This is an area where we can expect to see further litigation before we have clarity.

§ 1.6 PARENTAGE AND ART UNDER THE UPA

The increased use of ART has forced rethinking of the law governing parentage. As will be noted in various places in this book, some states have enacted parentage statutes defining parentage rights growing out of assisted reproduction and other states have at least a patchwork of court decisions dealing with particular factual settings. While no nationwide, consistent legal solution currently exists, two legal proposals in particular have potential to have substantial impact on thinking about this matter. These are the UPA, discussed in this section, and the ABA Model Act on ART. *Infra*, in section 1.7 and Chapter 11.

64. The decision was 8-0; it occurred after the death of Justice Scalia and before the appointment of Justice Gorsuch. Further, the decision was rendered per curiam without a hearing.

65. *V.L. v. E.L.*, 577 U.S. ____ (2016).

66. *Ex parte E.L.*, No. 1140595 (Ala. Sep. 18, 2015).

67. *Pavan v. Smith*, 582 U.S. ____ (2017).

68. Note, however, that the parties in this case were not married.

The Uniform Parentage Act was originally developed in 1973 by the National Conference of Commissioners of Uniform State Laws (NCCUSL). The Act serves to provide a uniform legal framework for states as they consider enacting parentage laws. States may selectively enact some or all UPA provisions. The most recent version of the UPA, adopted in 2017, has significantly updated its approach to parentage of children born through ART. However, many states laws in this regard are based on earlier versions of the UPA from 1973, 2000, and 2002. As of the publication of this book, Washington State and Vermont have adopted law based on the 2017 UPA, and it is being considered by other state legislatures.

The issue of parentage arising from assisted reproduction has to date been resolved largely on a case-by-case basis. However, the revisions to the UPA in 2000 by the NCCUSL created a potential means to develop an optional uniform system for determining parentage in ART cases. The 2000 UPA caused the NCCUSL to withdraw its prior approval of the 1988 Uniform Status of Children of Assisted Conception Act (U.S.C.A.C.A.).

The use of ART other than by marital families has caused NCCUSL to include references to unmarried couples who attempt to have children by assisted reproduction. After the promulgation of the 2000 version of the UPA, several sections of the ABA objected that the Act did not “adequately treat a child of unmarried parents equally with a child of married parents.”⁶⁹ The amendments to the UPA inserted in 2002 thus took account of the needs of children conceived by married parents as well as those conceived for unmarried family. The 2017 revision of the UPA further updates the Act to address the realities of today’s families.

Any analysis of the UPA must note that it does not deal with many of the complex legal issues arising from the use of ART that are discussed in this book. Instead, it focuses exclusively on issues of parentage, which, while important, leaves many other family law, probate, tort, contract, and public policy issues raised by assisted reproduction untouched.

The UPA takes the position that a donor of either eggs or sperm who does not intend to become a parent is not a legal parent and has no legal rights or obligations of parenthood.⁷⁰ When an individual consents to the use of ART by a woman with the intent to be the parent of the child, then that individual will be a parent of the child so conceived.⁷¹ When a woman and

69. UNIF. PARENTAGE ACT (2017) (UPA).

70. UPA § 702 (2017).

71. UPA § 703 (2017).

another individual use ART with intent to become parents, they both must consent in a written record,⁷² but the failure to have a written record does not preclude a later finding that the other individual is a parent of the child so conceived if there is “clear and convincing evidence” of consent, or if they cohabit during the first two years of the child’s life and the adults openly treat the child as their own.⁷³

Under the UPA, when a married woman gives birth as a result of ART, her nongestating spouse may not challenge his or her parentage unless a suit to adjudicate parentage is commenced within two years of the child’s birth and the court makes a finding that the nongestating spouse did not consent to ART before or after the birth of the child.⁷⁴ However, the court may adjudicate a parentage at any time if it is found that the nongestating spouse did not provide a gamete or consent at any time to the use of ART, the spouses have not cohabited since the probable time of the ART, and the nongestating spouse never attempted to project a parental relationship with the child.⁷⁵

When a child is conceived by ART, but the eggs, sperm, or embryo are implanted after a divorce, the former spouse is not a parent of the child under the UPA unless there was consent in writing to be a parent of a child conceived by use of ART after a divorce.⁷⁶ A man or woman, whether married or not, who consents to ART may withdraw that consent in a written record before the placement of egg, sperm, or embryo, and if he or she does so, that person will not be considered the legal parent of a child under the UPA.⁷⁷ A person who consented to ART but dies before the placement of eggs, sperm, or embryo may be a legal parent of the resulting child if the person would otherwise be a parent of the child if he or she remained alive.⁷⁸

The UPA creates a mechanism for recognition of surrogacy agreements. The UPA provides for written agreements among the proposed surrogate, her spouse if she is married, the gamete donor or donors, and the intended parents.⁷⁹ In these agreements, the surrogate, her spouse if she is married, and the gamete donor or donors relinquish all rights and duties regarding the child to be produced by ART.⁸⁰ The agreement also provides for the intended

72. UPA § 704(a) (2017).

73. UPA § 704(b) (2017).

74. UPA § 705(a) (2017).

75. UPA § 705(b) (2017).

76. UPA § 706 (2017).

77. UPA § 707(a) (2017).

78. UPA § 708 (2017).

79. UPA § 801 (2017).

80. UPA § 804(a)(2) (2017).

parents to be the legal parents of the child so produced.⁸¹ The UPA provides that jurisdiction may attach if any of the parties to the agreement are residents of the state, or if any of the medical procedures occur in the state.⁸² The agreement can include a provision for reasonable compensation to the prospective gestational mother.⁸³

For genetic surrogacy,⁸⁴ the UPA provides that the agreement must be validated by a court before the surrogate becomes pregnant.⁸⁵ The agreement shall be validated if it complies with the eligibility, process, and content requirements described for surrogacy agreements,⁸⁶ and if the court finds that the parties entered into the agreement voluntarily.⁸⁷

Under the UPA, termination of the surrogacy agreement depends on the type of surrogacy involved. An agreement for gestational surrogacy⁸⁸ may be terminated at any time prior to an embryo transfer by any party by giving notice in a record to the other parties.⁸⁹ Upon such termination, all parties are released from their respective obligations; however, the intended parents remain responsible for any outstanding financial obligations to the surrogate.⁹⁰ Neither the surrogate nor her spouse is liable for any damages or penalties for terminating the agreement under this provision, except in the event of fraud.⁹¹ For genetic surrogacy, an intended parent who is a party to the agreement may terminate the agreement at any time prior to gamete or embryo transfer,⁹² but the genetic surrogate herself may terminate the agreement at any time up to 72 hours *after* the birth of the child.⁹³ In either case, the notice of termination must be in a record and either attested to by a notarial officer or witnessed.⁹⁴ As with the case of termination of a gestational surrogacy agreement, the termination of a genetic surrogacy agreement releases the parties from all obligations, with the provision that the intended parents remain responsible for outstanding financial obligations to the surrogate. However, the termination of a genetic surrogacy agreement

81. UPA § 804(a)(4) (2017).

82. UPA § 803(1) (2017).

83. UPA § 804(b) (2017).

84. Genetic surrogacy is where the surrogate is also a gamete provider for the child.

85. UPA § 813(a) (2017).

86. UPA §§ 802–804 (2017).

87. UPA § 803(b) (2017).

88. Gestational surrogacy is where the surrogate does not provide a gamete for the child.

89. UPA § 808(a) (2017).

90. UPA § 808(b) (2017).

91. UPA § 808(c) (2017).

92. UPA § 814(a)(1) (2017).

93. UPA § 814(a)(2) (2017).

94. UPA § 814(a) (2017).

specifically releases the intended parents from their obligation to pay the genetic surrogate nonexpense-related compensation, unless the surrogacy agreement states otherwise.⁹⁵ The genetic surrogate, like the gestational surrogate, is also not liable for any damages or penalties for terminating the agreement, except in the event of fraud.⁹⁶

Under the UPA, parentage for the child born pursuant to a gestational surrogacy agreement may be adjudicated prior to the birth of the child, at the time of the birth, or after the birth of the child.⁹⁷ Any party to the agreement may petition the proper court for an order of parentage.⁹⁸ If the court grants the petition, it will stay enforcement of the order until the child is born.⁹⁹ For a child born pursuant to a genetic surrogacy arrangement, however, the parentage adjudication may occur no sooner than 72 hours after the birth of the child.¹⁰⁰ If the genetic surrogacy agreement was validated by the court and no party has terminated the agreement, the court shall order that the intended parents are the parents of the child.¹⁰¹ If, however, the genetic surrogacy agreement was not previously validated by the court and no party has terminated the agreement, the court will determine parentage based on the best interests of the child, taking into account the intent of the parties.¹⁰²

§ 1.7 PARENTAGE AND THE ABA MODEL ACT GOVERNING ASSISTED REPRODUCTIVE TECHNOLOGY (2008)

The ABA approved the current version of the ABA Model Act on ART to “provide a flexible framework that will serve as a mechanism to resolve contemporary controversies, to adapt to the need for resolution of controversies that are envisioned but that may not have occurred, and to guide the expansion of ways by which families are formed.”¹⁰³ The 2008 ABA Model Act on ART provisions dealing with parentage are intended “as much as possible to be consistent with and to track the corresponding provisions of

95. UPA § 814(b) (2017).

96. UPA § 814(c) (2017).

97. UPA § 811(a) (2017).

98. *Id.*

99. UPA § 811(c) (2017).

100. UPA § 815(a) (2017).

101. UPA § 815(b) (2017).

102. UPA § 816(d) (2017).

103. ABA MODEL ACT ON ART. At the time that this edition goes to publication, the Model Act is undergoing significant revisions, and the reader is advised to check for an updated version of the one cited in this book.

the Uniform Parentage Act of 2000, as amended in 2002.”¹⁰⁴ (Note that there are many provisions in the ABA Model Act on ART that do not deal with parentage and that deal with other matters affecting assisted reproduction, and that will be noted in context throughout this book.) However, there are some provisions in the 2008 ABA Model Act on ART affecting parentage that differ from the UPA.

The ABA Model Act is intended to be a model for states considering ART laws, and includes optional ways for dealing with surrogacy arrangements.¹⁰⁵ Specifically, the ABA Model Act on ART provides for either a legally recognized self-enforcing gestational agreement¹⁰⁶ or a judicially validated gestational agreement.¹⁰⁷ In recognizing the right of intended parents and potential gestational carriers to enter a binding contract, subject to compliance with certain requirements,¹⁰⁸ the ABA Model Act on ART provisions could reduce the costs and inconvenience of a judicial hearing. Some of these requirements may appear to be onerous, but may make the enactment of such a right in contract less subject to legislative obstacles to enactment.

The ABA Model Act on ART provisions dealing with the status of children of assisted conception are closer to, but not completely identical to, the UPA provisions discussed in section 1.6, *supra*.¹⁰⁹ Other provisions in the ABA Model Act on ART are written in gender-neutral language, which, given the increased use of assisted reproduction by same-sex couples, is appropriate. The ABA Model Act on ART, developed before *Obergefell*, specifically defines spousal interests in assisted reproduction broadly by enacting a definition of a “legal spouse” to include “an individual married to another, or who has a legal relationship to another that this state accords rights and responsibilities equal to, or substantially equivalent to, those of marriage.”¹¹⁰

104. *Id.*

105. In the pending revisions to the ABA Model Act on ART, the approach to surrogacy law has been streamlined. See Chapter 11 for additional detail.

106. ABA MODEL ACT ON ART, Alternative B art. 7. This provision is similar to, although not identical to, 750 ILL. COMP. STAT. 47/5-47-50 *et seq.* As to the Illinois law, see Nancy Ford, *The New Illinois Gestational Surrogacy Act*, 93 ILL. B.J. 240 (2005).

107. ABA MODEL ACT ON ART, Alternative A art. 7 (2008).

108. The gestational carrier must be at least 21 years old, have previously given birth to a child, have undergone legal consultation and medical and mental health evaluation, and be covered under a health insurance policy, and the embryo to be transplanted must contain the gametes of at least one of the intended parents. *Id.*, Alternative B § 702.

109. *Id.* art. 6; UPA art. 7.

110. ABA MODEL ACT ON ART § 102(21) (2008). An example of a court giving a broad definition of the word “spouse” is *In re Donna S.*, 871 N.Y.S.2d 883 (Fam. Ct. 2009) in which the court ruled that a same-sex partner of a woman who was bearing a child by intrauterine

To deal with the troublesome issue of children conceived after a parent's death by use of preserved gametes (discussed in Chapter 7), the ABA Model Act on ART would defer to any contrary provision of the U.P.C. enacted by a state.¹¹¹

§ 1.8 THE U.P.C. AND ART

After consideration and debate, the NCCUSL approved amendments to the U.P.C. that would govern the family relationships arising out of assisted reproduction.¹¹² Since the law of inheritance depends on legally defined family relationships, these amendments to the U.P.C. help to clarify both the law of descent and distribution and the law of the family.

The 2008 amendments to the U.P.C. added new sections 2-120 and 2-121 to deal with “various parent-child relationships resulting from assisted reproductive technologies in forming families.”¹¹³ U.P.C. section 2-120(b) provides that a parent-child relationship does not exist between a child of assisted reproduction and a third-party donor.¹¹⁴ U.P.C. section 2-120(i) provides that if a married couple is divorced before placement of eggs, sperm, or embryos, any resulting child of assisted reproduction is not a child of the birth mother's former spouse unless the former spouse consented in a written record that the child would be that former spouse's child in these

insemination after the two women married in Canada was a “spouse” under the New York adoption law even though New York did not then recognize same-sex marriage.

111. ABA MODEL ACT ON ART arts. 6 & 7 legislative notes (2008). As to the U.P.C., *see* Chapter 11, *infra*.

112. Amendments to the Uniform Probate Code, approved and recommended for enactment in the states by the National Conference of Commissioners on Uniform State Laws, Annual Conference, July 18–25, 2008.

113. *Id.*, explanatory note for the 2008 amendments.

114. A third-party donor is an “individual who produces eggs or sperm used for assisted reproduction, whether or not for consideration.” U.P.C. § 2-120(a)(3) 8 U.L.A. 58-59 (West Supp. 2010). It does not include a husband or wife who produces gametes for use of a spouse, a birth mother of a child of assisted reproduction, a person other than a birth mother identified as the parent of a child of assisted reproduction on a birth certificate, or a person who consented to assisted reproduction by the birth mother with the intent to be the parent. U.P.C. § 2-120 (f) 8 U.L.A. 59 (West Supp. 2010) provides for establishment of consent in a written record or in the absence of a written record by functioning as a parent no later than two years after birth, or intention of so functioning but being prevented from doing so by death, incapacity, or other circumstances or if intent to so function is established by clear and convincing evidence as to a posthumously conceived child. Other refinements dealing with such matters as a record of consent executed more than two years after birth and presumptions as to a birth mother or surviving spouse deal with particular issues and should be carefully reviewed when relevant if the U.P.C. is enacted in your state.

circumstances.¹¹⁵ If a person withdraws consent to assisted reproduction before placement of eggs, sperm, or embryos in a record, that person is not a parent of any resulting child except as to a posthumous child as that is defined under the U.P.C.¹¹⁶ A posthumously conceived child is treated as being in gestation at a parent's death if in utero not later than 36 months after that person's death and is not born later than 45 months after the person's death.¹¹⁷

The U.P.C. also makes provisions as to children born to a surrogate carrier in section 2-121. A gestational agreement is defined as "an enforceable or unenforceable agreement for assisted reproduction in which a woman agrees to carry a child to birth for an intended parent, intended parents"¹¹⁸ or a deceased or incapacitated parent.¹¹⁹ As to the death or incapacity of a spouse, the U.P.C. creates a presumption that the spouse intended to be treated as the parent of a gestational spouse (unless there is clear and convincing evidence of a contrary intent) if his or her gametes were deposited before death or incapacity, he or she was married at the time of the deposit, no divorce proceeding was pending, and the spouse or surviving spouse functioned as a parent of the gestational child no later than two years after the child's birth.¹²⁰

Since the adoption of a child changes legal relationships with biological families, an important amendment to the U.P.C. deals with the status of a child of assisted reproduction or a gestational child who is adopted or is in the process of being adopted by the parent's spouse when that spouse dies.¹²¹ However, the U.P.C. provisions regarding children of assisted reproduction

115. "Divorce" includes annulment, dissolution, and declaration of invalidity of a marriage. U.P.C. § 2-115, 8 U.L.A. 52 (West Supp. 2010).

116. U.P.C. § 2-120(j) (defining effect of withdrawal of consent before placement of gametes or embryos) 8 U.L.A. 60 (West Supp. 2010).

117. U.P.C. § 2-120(k) (defining posthumous parenthood) 8 U.L.A. 60 (West Supp. 2010).

118. U.P.C. § 2-121(a)(1) (defining gestational agreement) 8 U.L.A. 63 (West Supp. 2010).

119. *Id.*, cross-referencing U.P.C. § 2-121(e), 8 U.L.A. 64 (West Supp. 2010) (in absence of a court order designating a parent-child relationship as to a gestational child, a parent-child relationship exists as to a deceased or incapacitated person whose gametes were used when he or she had consented in a record or other evidence that established the individual's intent to allow the use of the gametes by clear and convincing evidence).

120. U.P.C. § 2-121(f), 8 U.L.A. 64 (West Supp. 2010) (defining parenthood of gestational child after parent's death or incapacity).

121. U.P.C. § 2-118, 8 U.L.A. 55 (West Supp. 2010) (defining adoptee and adoptive parent, including children of ART and gestational arrangements). Since U.P.C. § 2-120, 8 U.L.A. 58-60 (West Supp. 2010) does not apply to same-sex couples using gestational surrogacy, or state law may place some restrictions on recognition of surrogacy by same-sex couples who are the intended parents, adoption may be the appropriate method to create a legally recognized parent-child relationship.

and gestational children does not affect the doctrine of equitable adoption in jurisdictions that recognize that doctrine.¹²²

§ 1.9 THE DIFFICULTY FACED BY SOME FAMILIES IN OBTAINING ART SERVICES

The availability of ART services has generally expanded in recent years. However, there are some problems that particular families face in obtaining ART services so they can begin to have children. The most obvious of these is the high cost of these services,¹²³ which excludes some families from having a child by ART. In some jurisdictions where law mandates at least some insurance coverage for ART services, families with health care insurance can access such services when they fall within the parameters of the coverage. However, as will be explained in greater detail in Chapter 6, insurance coverage for ART is often highly limited. Of course, more wealthy families can and often do pay for ART services on their own.

Since ART services operate in a largely unregulated free market system, the services may be difficult to obtain for gays, lesbians, older, and unmarried persons even if the money is available to pay for them.¹²⁴ A 2001 study found that only 79 percent of ART clinics would provide services to unmarried women and 74 percent to lesbian couples.¹²⁵ Given the advances in civil rights for gays and lesbians since this study was conducted, it is likely that a larger percentage of ART clinics would provide services to this population, although presumably still not 100 percent. It is probable that single males or gay couples are likely to encounter even more exclusionary policies in a

122. U.P.C. § 2-122, 8 U.L.A. 67 (West Supp. 2010).

123. Discussing various aspects of the unregulated ART market and cost issues are Sunni Yuin, *An Information Privacy Approach to Regulating the Middlemen in the Lucrative Gametes Market*, 29 U. PA. J. INT'L L. 527 (2007); Michelle Bercovici, *Biotechnology Beyond the Embryo: Science, Ethics and Responsible Regulation of Egg Donations to Protect Women's Rights*, 29 WOMEN'S RTS. L. REP. 193 (2008); Radhika Rao, *Coercion, Commercialization and Commodification: The Ethics of Compensation for Egg Donors in Stem Cell Research*, 21 BERKELEY TECH. L.J. 1055 (2006); Lisa Hird Chung, *Free Trade in Human Reproduction Cells: A Solution to Procreative Tourism and the Unregulated Internet*, 15 MINN. J. INT'L L. 263 (2006).

124. John A. Robertson, *Gay and Lesbian Access to Assisted Reproduction*, 55 CASE W. RES. L. REV. 323 (2004) (discussing use of assisted reproduction by gays and lesbians and arguing that concerns about the effect on children are not justified and do not justify barring gays and lesbians from assisted reproduction services).

125. Judy E. Stern et al., *Access to Services at Assisted Reproductive Technology Clinics*, 184 AM. J. OBSTETRICS & GYNECOLOGY 591 (2001).

search for ART services. Except in states where state law or insurance regulations may expressly prohibit health care providers from refusing services to a person or couple based on sexual orientation or marital status, it is probably legal for an ART provider to choose not to help an unmarried person or a lesbian or gay couple to have a child.¹²⁶ Since such a refusal is based sometimes on a religious belief, state religious exemptions may also support such a refusal; it is generally recognized that a hospital operated by a religious entity may not be compelled to provide ART services that contravene its theological teachings.

A study by the Ethics Committee of the American Society for Reproductive Medicine (ASRM) has taken the position that populations such as single men, single women, and lesbian and gays seeking to have children should not be denied ART services: “Programs should treat all requests for services for assisted reproduction equally without regard to marital status or sexual orientation.”¹²⁷ This recommendation is based on the conclusion that unmarried persons, gays, and lesbians have a legitimate interest in becoming parents and there is no persuasive evidence that children raised by single parents or by gays or lesbians are harmed or disadvantaged by that fact alone.¹²⁸ However, this ethical obligation is not, for the most part, mandated by law, and even if state statutes might preclude denial of ART services based on a patient’s sexual orientation, a defense of religious belief by the health care provider *might* effectively bar a remedy.¹²⁹

The Hill-Burton Act¹³⁰ has been law in the United States since 1946 and was intended to ensure that communities were furnished with facility and health services by federal funding. While the law has not received great attention in recent years, federal regulations under the law prohibit discrimination in provision of medical services. Although little has been written as to how Hill-Burton might apply to provision of ART services, an outstanding

126. Many ART providers do not receive federal funds (through, for example, Medicaid) and therefore do not need to comply with federal antidiscrimination laws that apply to other medical providers.

127. American Society of Reproductive Medicine, Ethics Committee, *Access to Fertility Treatment by Gays, Lesbians, and Unmarried Persons*, 100 FERTILITY & STERILITY 1524-7 (2013).

128. *Id.* at 1526.

129. See, for example, *North Coast Women’s Care Medical Group, Inc. v. San Diego County Superior Court*, 189 P.3d 959 (Cal. 2008) (suit by lesbian domestic partner claiming clinic’s denial of intrauterine insemination services was based on her sexual orientation; defendant physicians had no defense based on their religious belief against allegation that they violated state’s civil rights law prohibition on discrimination based on sexual orientation).

130. PUB. L. No. 79-725, 60 STAT. 1041 (1946), amended by PUB. L. No. 93-461, 88 STAT. 2268 (1975).

study of the issue has been written by Professor Susan B. Apel and should be consulted by anyone interested in the topic.¹³¹

Same-sex couples who seek to have children by surrogacy arrangements in a foreign nation should have their counsel carefully explore the attitude of the foreign law on same-sex unions. Not all nations, including some of those that recognize gestational surrogacy, may be friendly to the use of such technology by same-sex partners. An unmarried intended parent may also find the enforcement or recognition of a gestational surrogacy agreement difficult under the law of some countries. The same may be true of heterosexual couples who were married when the arrangements were made but have since been divorced or separated. It is recommended that an American attorney employed by such persons try to ascertain the applicable law before sending clients off to a foreign country, or even another state within the United States, without first investigating this matter. We will explore this topic further in Chapter 5.

§ 1.10 THE NEED FOR LEGISLATION

Some of the issues that arise at law involving ART are covered by legislation. However, most of the issues that have arisen in the courts involving ART find little solution in statutory law. Although some issues can be addressed by reference to other statutory law, the questions that exist usually come to the courts with no statutory framework for developing a solution. This is particularly true when the parties engaging in ART do not conform to specific presumptions that may be in the statutes, such as gender or marital status. Clearly, legislatures can contribute to the development of this area of law by drafting a statutory framework of rights and liabilities affecting all parties involved in ART.

It is obvious that “the legislature is the most appropriate forum to address issues raised by assistive reproductive technology in a comprehensive fashion.”¹³² Courts have joined the chorus of voices pleading for legislative attention to the increasing number of complex legal issues spawned by recent

131. Susan B. Apel, *Access Denied: Assisted Reproductive Technology Services and the Resurrection of Hill-Burton*, 35 WM. MITCHELL L. REV. 412 (2009) (noting that the vestiges of the Hill-Burton Act may still be relevant and perhaps a basis for challenging discrimination in the provision of assisted reproduction services).

132. *Hodas v. Morin*, 814 N.E.2d 320, 327 n.16 (Mass. 2004) (in absence of statute dealing with the issue, court employed general equity power to authorize a prebirth order as to parentage of child being carried by a gestational surrogate).

advances in the field of artificial reproduction. Whatever merit there may be to a fact-driven case-by-case resolution of each new issue, some overall legislative guidelines would allow the participants to make informed choices, and the courts to strive for uniformity in their decisions.¹³³

A California appellate court best expressed the need for legislation in the *Buzzanca v. Buzzanca*¹³⁴ case:

Again we must call on the Legislature to sort out the parental rights and responsibilities of those involved in artificial reproduction. No matter what one thinks of artificial insemination, traditional and gestational surrogacy (in all its permutations), and—as now appears in the not-too-distant future, cloning and even gene splicing—courts are still going to be faced with the problem of determining lawful parentage. A child cannot be ignored. Even if all means of artificial reproduction were outlawed with draconian criminal penalties visited on the doctors and parties involved, courts will still be called upon to decide who the lawful parents really are and who—other than the taxpayers—is obligated to provide maintenance and support for the child. These cases will not go away.¹³⁵

As was mentioned previously, widespread uniform legislation dealing with the many complexities of ART is desirable. With changes such as those in the UPA and the U.P.C., as well as the approval of the ABA Model Act on ART that have taken place since the publication of the first edition of this book, there are now various models for state legislatures to consider. While it is unlikely that widespread enactment of uniform or model laws will be forthcoming in the foreseeable future, except possibly in regard to the status of children conceived by ART, these are useful tools in litigation when there are no other statutes, and for lawyers and other activists who seek to bring about legislative change.

133. *Prato-Morrison v. Doe*, 103 Cal. App. 4th 222, 232 n.10 (2002) (couple who sought to determine if their gametes were used by a clinic to produce a pregnancy for another couple without the knowledge of either couple were denied right to seek determination of whether there was a genetic link to the children born to the other couple). See also Naomi R. Cahn, TEST TUBE FAMILIES: WHY THE FERTILITY MARKET NEEDS REGULATION (2009) (arguing that the application of laws piecemeal to address questions arising from ART is not providing protections for all involved and that state and federal legislation is needed to regulate the matter).

134. *Buzzanca v. Buzzanca*, 61 Cal. App. 4th 1410 (1998) (ruling that a now-divorced man and woman who entered a gestational surrogacy arrangement that involved implanting the gametes provided by other donors in the surrogate were the legal parents of the child so conceived).

135. *Id.* (Sills, P.J.).

The issues involved are politically controversial and often mixed with religious, moral, medical, political, social, and legal disagreement. Further, these issues strike directly at the heart of the question “What makes a family?” that many lawmakers tread with caution. This makes it difficult for the political branches of government to develop a consensus as to how to regulate assisted reproduction. The increasing use of the technology to produce children outside of marital union further complicates the political picture. Thus, it is likely that in many jurisdictions lawyers and judges will continue to struggle with these issues on a common-law or equitable basis and evolve solutions on a case-by-case basis. This book does not provide firm answers to all of these issues, but the authors hope that by examining the various uses of ART and the response of the courts to date, attorneys and judges may find some much-needed guidance.