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Articles

The Intended Parent: The Power and Problems Inherent in Designating and Determining Intent in the Context of Parental Rights

Heather Kolinsky*

ABSTRACT

This Article seeks to consider and discuss the intent to parent and, particularly, the use of the words intent and intentional in the context of assigning legal parental rights. Problems and preferences have arisen from the use of this paradigm and the notion that intent can be fixed at any one point in time. This Article discusses how this historical use of intent and intentional parenthood may impact the evolving field of parental form, considering whether we will carry forward some of the same problems and preferences into newer forms of the assignment of legal parental rights.

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The Article first frames the concept of who is a parent, and how that decision is made from a legal standpoint under a traditional analysis. Next, the Article discusses some of the problems that have arisen both in the traditional assignment of parental rights, by and among heterosexual married and unmarried parents, assisted reproductive technology, and open adoption. The Article then moves into an assessment of more modern issues of assignment of legal parental rights by examining four distinct cases involving known donors in assisted reproductive technology. After highlighting some of the pitfalls of the application of the intended/intentional parent paradigm in more modern conceptions of both childbirth and marital status, the Article considers how new legislation seeks to address these problems by highlighting a new family law enacted in British Columbia and a new statute in California. The Article also points out how newer known donor assignments of rights already have a predecessor in the form of open adoption.

Finally, the Article argues that if we do not pause and consider the impact of how we have assigned legal parenthood in the past through intent, we may be destined to repeat many of the same mistakes, and we risk carrying forward prejudices and preferences that are inappropriate given the realities of both modern reproductive technology and modern family status.

Table of Contents

INTRODUCTION	802
I. BECOMING A PARENT	805
A. If I Had To Explain It	805
1. Simple Biology Is Not Enough	806
2. The Intended/Intentional Parent Model.....	808
B. Thinking Outside the Spock Box: Open Adoption	812
II. WHEN INTENDED PARENT BECOMES A LEGAL CATEGORY	814
A. The Easy Case.....	815
B. A Slightly Harder Case	818
C. A Not So Simple Case	820
D. The Hardest Kind of Case: Surrogacy, Intent, and Biology	825
III. RECONSIDERING DELIVERY OF PARENTAL RIGHTS.....	828
A. Fixing Identities and Expanding the Parental Pool	829
B. Repurposing Intent and Returning to Biology First	830
CONCLUSION	834

INTRODUCTION

Generally, a “parent” is a mother or father who is raising, nurturing, and caring for a child and has some legally recognized relationship with that child. The default presumption is that the child is the biological

offspring of that parent. The “traditional” assumption is also that the child has only two parents, a mother and a father, and that they are married.¹ This definition is parentage in its simplest form, and the foundation of the “invisible rules of legal parentage.”² The traditional family unit has been constructed based upon a presumption of a biological connection and conformity with what is socially desirable.³ However, that initial family form can shift for any number of reasons—adoption, death, remarriage, assisted reproductive technology (“ART”), or termination of parental rights. The law’s need to assign legal recognition to two people who are responsible for the care and nurture of a child in this social construct causes the assignment to be artificially rendered in such a way that often makes determining who is a parent exceedingly complex. This complexity is driven by three things: (1) societal expectations of how, and by whom, children should be raised; (2) the determination that only two people can hold exclusive legal rights to raise a child at any given time; and (3) the fluid interaction between identity and intent within and among potential parents.

To navigate this complexity, the law often directly or indirectly ascribes “intent” to a party in order to assign parentage. “Intent has a powerful normative benefit” that can be useful in assigning parentage.⁴ Historically, the reliance on intent appears to have manifested itself in two ways: “intended” parenthood and “intentional” parenthood. First, the law has identified the gestational mother of a child as the “intended” parent of that child, based on a presumption of biology and nurture through pregnancy.⁵ Second, the law has identified a woman’s husband, if she has one, as the “intended” father of that child based upon a legal presumption of paternity through marriage.⁶ Thus, “intended”

1. See generally Martha Fineman, *Why Marriage?*, 9 VA. J. SOC. POL’Y & L. 239, 247 n.21 (2001) (quoting Martha Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2182 (1995)); Mary Kay Kisthardt, *Of Fatherhood, Families and Fantasy: The Legacy of Michael H. v. Gerald D.*, 65 TUL. L. REV. 585, 589 nn.29–30 (1991) (citing H. KRAUSE, *ILLEGITIMACY: LAW AND SOCIAL POLICY* 15–16 (1971)).

2. Dara E. Purvis, *Intended Parents and the Problems of Perspective*, 24 YALE J.L. & FEMINISM 210, 211 (2012); see also David Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125, 127 (2006).

3. See Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 248 (2006) (discussing some of the underlying social and economic reasons for deferring to the “model” family as the normative model).

4. Purvis, *supra* note 2, at 212.

5. *Lehr v. Robertson*, 463 U.S. 248, 260 n.16 (1983) (quoting *Caban v. Mohammed*, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting)) (“The mother carries and bears the child, and in this sense her parental relationship is clear.”).

6. See generally Kisthardt, *supra* note 1, at 589 nn.29–30.

parenthood was traditionally limited to presumed maternity and paternity as conceived within a legal marriage.⁷ Marriage acted as a marker of intent and a proxy for biology.

“Intentional” parenthood, on the other hand, fills the gaps intended parenthood leaves behind. In this circumstance, a person desires to parent a child but lacks the intended presumption provided by marriage or gestation.⁸ For instance, where a biological father is not married to the child’s biological mother, he loses the full force of his intended parent protection and must demonstrate that he intends to parent a specific child—thus justifying parentage based upon his intention to parent rather than his biological connection to the child.⁹ Additionally, in some cases, intentional parenthood bolsters a weaker claim to intended parenthood.¹⁰

As issues of parentage become more complex, this socially constructed model of parentage has been strained to the breaking point. Intended and intentional notions of parentage presume many social norms that simply no longer exist as the only model—particularly heteronormative marriage and two-party conception (meaning one man, one woman, his sperm, and her egg).¹¹ Thus, the landscape of modern parentage resembles a broken trail of twists and turns where once a direct line could be drawn.

In an attempt to expand this model to fit our new reality, the concept of intended parent has changed from merely a marital proxy to a designation for parents who commission ART conceptions and births.¹²

7. This conception was a necessity at a time when biological parentage could not be determined with certainty. But, as Meyer notes, it was also a time when social and biological parentage tended not to be in conflict. See Meyer, *supra* note 2, at 128.

8. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Stanley v. Illinois*, 405 U.S. 645, 654 (1972).

9. *Troxel*, 530 U.S. at 65; *Quilloin v. Walcott*, 434 U.S. 246, 246 (1978); *Stanley*, 405 U.S. at 654. Moreover, even the stated intention to parent is itself insufficient and must instead be exercised in a way society deems satisfactory. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

10. See, e.g., *Lehr*, 463 U.S. at 248; *Caban*, 441 U.S. at 380; *Quilloin*, 434 U.S. at 255–56. With respect to unmarried fathers, the U.S. Supreme Court conceived the “biology plus” test. It often serves as the basis for recognizing paternity and legal parental rights in the face of competing custody claims. See Heather M. Kolinsky, *The Ties that Bind: Reevaluating Legal Presumptions of Paternity*, 48 LOY. L.A. L. REV. 221, 229 (2014) (discussing how the “biology plus” test arose from the Supreme Court’s opinions in *Quilloin*, *Caban*, *Lehr*).

11. See Alana Semeuls, *Sperm Donor, Life Partner*, ATLANTIC MONTHLY (Dec. 8, 2014, 7:30 AM), <http://www.theatlantic.com/business/archive/2014/12/sperm-donor-life-partner/383421/4/>.

12. *In re Paternity of F.T.R.*, 833 N.W.2d 634, 643 (Wisc. 2013) (quoting ABA MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 102(19) (2008)) (“An ‘intended parent’ is ‘an individual, married or unmarried, who manifests the intent . . . to be legally bound as the parent of a child resulting from assisted or collaborative reproduction.’”); see also *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 286–88 (Cal. Ct. App. 1998).

Further, an argument has been made to extend the legal presumption of paternity, situated in marriage based on intent, to same-sex couples, thereby removing the gender preference that only permits men to be granted presumptive paternity based on relational marital rights.¹³ Continuing to perpetuate a system that favors maintaining the traditional hetero-normative marital unit as the model family, or to make everything else look like it, causes every person involved in the procreative process to become more vulnerable to competing interpretations of the law and different biases. The heart of this process, as perpetuated, is the assumption that parentage can be linked to intent which is measured at different times in the procreative process for different purposes.¹⁴ Intent is often conceived of as a fixed point despite the reality that the only thing that is ever fixed is the parties' biological relationship to the child.

This Article seeks to contemplate the connections made between biology and legal status, to analyze the concept of intention in the law, and to discuss both the benefits and the burdens of the system as currently conceived. Part I will discuss the nature of becoming a parent, focusing particularly on how legal rights are fashioned in and among different types of intended and intentional parents. Then, Part II will examine recent cases with respect to the problem of known donors in ART to highlight the vulnerabilities inherent in the lack of clear state guidance on these issues. Finally, Part III will discuss proposed solutions to this problem and consider how to move forward in a way that better protects parenthood and childhood from ambiguity and uncertainty.

I. BECOMING A PARENT

A. *If I Had To Explain It . . .*

Trying to encapsulate the complexities of legal recognition of parentage is not a simple process. Rather, it often resembles a mad game

13. See Appleton, *supra* note 3.

14. See *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993) (finding that intent is fixed prior to conception where the intended egg donor and the gestational carrier had equal claims to maternity under California law and holding that "she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law"); Laura Oren, *The Paradox of Unmarried Fathers and the Constitution: Biology 'Plus' Defines Relationships; Biology Alone Safeguards the Public Fisc*, 11 WM. & MARY J. WOMEN & L. 47, 101 (2004) (discussing a biological father's right to seek paternity based on biology plus pursuant to *Lehr*); see also *Jason P. v. Danielle S.*, 171 Cal. Rptr. 3d 789, 795–96 (Cal. Ct. App.) (allowing known sperm donor to seek parental rights upon establishing a relationship with his child after regulated ART donation), *review denied*, (Cal. Ct. App. 2014).

of “rock, paper, scissors, lizard, Spock,”¹⁵ where one person’s claim to parentage often trumps another’s, only to be reordered based upon changing status and relationships in and among adults, and always complicated by the fact that, for the most part, only two “parents” can win any game. Against the backdrop of assigning and recognizing parentage are three shifting truths: the relationship between and among the adults involved has a profound impact; intent is a moving target highly dependent upon the point in time that a party asserts intent and legal parentage;¹⁶ and the assignment of legal parentage remains highly gendered, hetero-normative, and limited.¹⁷

1. Simple Biology Is Not Enough

In order to be a biological parent to a child, an individual must contribute genetic material to the creation of an embryo.¹⁸ Thus, a man contributes the sperm that fertilizes the woman’s ova, an embryo forms, and after a proper period of gestation, a child is born.¹⁹ The right to parent that child has been recognized as a fundamental right;²⁰ however, conferring this right to the child’s biological parents was not historically determined by biology alone. Instead, a biological connection was presumed when a woman was pregnant and gave birth to a child.²¹ A

15. The game, popularized by *The Big Bang Theory*, has 15 variables that behave as follows: scissors cut paper; paper covers rock; rock crushes lizard; lizard poisons Spock; Spock smashes scissors; scissors decapitate lizard; lizard eats paper; paper disproves Spock; Spock vaporizes rock; and rock crushes scissors. See *The Big Bang Theory: The Lizard-Spock Expansion* (CBS television broadcast Nov. 17, 2008); see also *Rock-Paper-Scissors: Additional Weapons*, WIKIPEDIA (Jan. 2014), <http://en.wikipedia.org/wiki/Rock-paper-scissors-lizard-Spock>.

16. See Purvis, *supra* note 2, at 229-30.

17. See generally Martha Fineman, *Women, Marriage and Motherhood in the United States: Allocating Responsibility in a Changing World*, 2011 SING. J. LEGAL STUD. 1, 3 (2011) (observing that the ideal family is marital, heterosexual, gendered, and hierarchically ordered with a wage earner and a domestic laborer).

18. *Topics: Biological Mother*, AM. SOC’Y FOR REPROD. MED., <http://www.asrm.org/topics/detail.aspx?id=3634> (last visited Apr. 9, 2015); *Topics: Biological Father*, AM. SOC’Y FOR REPROD. MED., <http://www.asrm.org/topics/detail.aspx?id=3633> (last visited Apr. 9, 2015).

19. See *Topics: Biological Mother*, *supra* note 18; *Topics: Biological Father*, *supra* note 18.

20. See *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (holding that parents have a fundamental liberty interest in the care, custody, and control of their children); *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925) (holding that parents have a fundamental liberty interest to direct the upbringing and education of children); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (holding that a parent’s liberty interest in the upbringing of his or her children extends to the type of education children receive); see also *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (holding that individuals have a fundamental right to procreate).

21. THOMAS COVENTRY, A READABLE EDITION OF COKE UPON LITTLETON 243b § 399 (Saunders & Benning eds., 1830).

father's right to parent his child was conferred via his legal relationship with the child's mother—through a legal presumption of paternity based on marriage.²² “[F]atherhood remains, in significant part, a ‘secondary’ or derivative relationship that requires an initial determination of the child's first or ‘primary’ parent, the mother.”²³ Important reasons for these presumptions existed at the time they were created because there was no simple way to determine biological parentage and there was a need to fix parentage at birth for a number of social reasons.²⁴

Where a father was not married to the child's mother, he was presumptively not the intended parent or even an intentional parent, and in the most extreme cases, he was excluded from his parental rights entirely if the child's mother was married to another man.²⁵ The further removed a biological father was from the traditional marital unit, the less likely he would be conferred the status of intended parent.²⁶ He was forced to demonstrate his intentional parenthood by taking affirmative actions to assert his rights to visitation, custody, and care, and even that may not have been enough in certain circumstances.

This “basic” model of parenthood has created a multitude of problems as both society and science have evolved. Marriage is no longer the familiar social anchor it once was, and science allows more than two people to be involved in the creation of life.²⁷ Interestingly, as the ability to determine biological paternity has become significantly easier, lessening the need for a visible marker of paternity such as marriage or the reliance on the concept of intent, the ability to determine biological maternity based on gestation alone has become more complicated due to the development of ART and gestational surrogacy in particular.²⁸

22. *Id.*

23. Appleton, *supra* note 3, at 282.

24. See Goodright *ex dim* Stevens v. Moss, (1777) 98 Eng. Rep. 1257 (K.B.) 1258 (adopting “Lord Mansfield’s Rule,” an evidentiary rule that prevented husband and wife from testifying regarding their access to each other); Serafin v. Serafin, 258 N.W.2d 461, 464 n.1 (Mich. 1977) (Coleman, J., concurring); Appleton, *supra* note 3.

25. See D.F.H. v. J.D.G., 125 So. 3d 146, 148 (Ala. Civ. App. 2013); see, e.g., Stanley v. Illinois, 405 U.S. 645, 645 (1972); see also Appleton, *supra* note 3, at 294 (citing Robert B. v. Susan B., 135 Cal. Rptr. 2d 785, 789 (Cal. Ct. App. 2003)). See generally Kolinsky, *supra* note 10.

26. See Kolinsky, *supra* note 10; Lehr v. Robertson, 463 U.S. 248, 261 (1983); Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Stanley, 405 U.S. at 645.

27. See Semeuls, *supra* note 11; Ariana Eunjung Cha & Sandhya Somashekhar, *FDA Panel Debates Technique that Would Create Embryos with Three Genetic Parents*, WASH. POST (Feb. 25, 2014), http://www.washingtonpost.com/national/health-science/fda-panel-debates-technique-that-would-create-embryos-with-three-genetic-parents/2014/02/25/60371c58-9e4d-11e3-b8d8-94577ff66b28_story.html.

28. Gestational surrogacy involves three distinct parties: the mother who donates the egg, the father who donates the sperm, and the carrier who provides the womb.

2. The Intended/Intentional Parent Model

In American law, the intended parent is the parent that initially receives all of the legal rights to parent a child, unless that parent affirmatively relinquishes those rights. Thus, in the simplest model, a biological, gestational mother is the penultimate intended parent; she is “parent zero.”²⁹ The presumption that she will want to parent, to be an intentional parent, is so strong that she cannot affirmatively relinquish those rights until after her child is born.³⁰ Thus, she is not only an intended parent, but she is deemed to be an intentional parent until she demonstrates otherwise. This view of women as mothers fits our traditional patriarchal model of woman as caregiver and, in essence, places the burden of care squarely on a mother’s shoulders.

If a biological mother chooses affirmatively to relinquish her status as both intended and intentional parent, then she may allow the child to be adopted by another person or persons.³¹ The adoptive parents are not the intended parents of the child, but they are the intentional parents because they have expressed the desire to parent the child. In order for these intentional parents to receive their legal rights, the biological mother must affirmatively relinquish her rights, and the court must approve the transfer of rights.³² Thus, in the case of adoption, the state must be involved in the process to create these legal rights for the intentional parents, and, while this process may begin prior to birth, it does not culminate until after birth.³³ Adoption is also significantly more complicated, expensive, and time-consuming than traditional conception and birth.³⁴

Magdalena Gugucheva, *Surrogacy in America*, COUNCIL FOR RESPONSIBLE GENETICS 12 (2010), <http://www.councilforresponsiblegenetics.org/pagedocuments/kaevej0a1m.pdf>. The surrogate is not a biological donor of the ova in gestational surrogacy. *Id.*

29. Martha Fineman has even suggested that the rights framework should shift to recognize the mother/child dyad as the caretaking unit instead. See MARTHA ALBERTSTON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 233 (1995).

30. See generally Elizabeth J. Samuels, *Time To Decide? The Laws Governing Mothers' Consents to the Adoption of Their Newborn Infants*, 72 TENN. L. REV. 509 (2005). This is also the presumption that in large part drove the *Baby M* case involving a traditional surrogate’s attempt to retain custody of a child she bore for another couple. See *In re Baby M*, 537 A.2d 1227, 1248 (N.J. 1988). It is also one reason why many people have a problem with surrogacy, particularly traditional surrogacy.

31. Samuels, *supra* note 30, at 527–29.

32. *Id.* at 572.

33. *Id.*

34. *Id.* at 522–23; *How Much Does Adoption Cost?*, INDEP. ADOPTION CTR., <http://www.adoptionhelp.org/qa/how-much-does-adoption-cost> (last visited Apr. 9, 2015) (“A voluntary adoption of a newborn through a non-profit agency will generally cost between \$10,000 and \$25,000. Attorney adoptions of newborns generally run from \$20,000 to \$30,000.”).

A biological father, on the other hand, is deemed an intended parent if he has the appropriate relationship—marriage—with the biological mother at the time of the child's birth.³⁵ In that case, the biological father has the same rights that the biological mother possesses at birth by virtue of his legal relationship with the biological mother; he is parent zero once removed. If the biological father is not married to the mother, however, then the law requires that the biological father affirmatively demonstrate his intention to parent that child through positive behaviors and actions, such as taking the child into his home, acknowledging the child as his own, and seeking an affirmative declaration of paternity.³⁶ Thus, like an adoptive parent, he must prove his intention to parent and may often be required to seek the assistance of the state to enforce that right. But, even if an unmarried father intends to parent his child and makes efforts to do so, the socially constructed assumption of intent that attaches to a mother's husband may prevent him from having any rights to his child, even though the mother's husband is not the child's biological father.³⁷ Further, the presumption of intent and marital proxy for biology only functions in one direction; a married man's biological child who is born to a woman outside of his marriage does not become the legal child of his wife.³⁸

The further removed the biological father is from the preferred marital-model relationship, the harder it will be for him to demonstrate his intention to parent his child.³⁹ Thus, in a very real way, his relationship with the biological mother will have a significant impact on his ability to exercise his rights. But, at the same time, as an intended parent, an unmarried biological father cannot forego his obligation to financially support his child, nor can a father unilaterally seek to put his child up for adoption.⁴⁰ While a married biological father would have to consent to an adoption of his child by another, an unmarried biological

35. See Kisthardt, *supra* note 1, at 589.

36. *Lehr v. Robertson*, 463 U.S. 248 (1983). But in some cases, even these efforts are not enough. See *Michael H. v. Gerald D.*, 491 U.S. 110, 129–30 (1989).

37. See *Michael H.*, 491 U.S. at 110; *Lehr*, 463 U.S. at 248; Kisthardt, *supra* note 1, at 606–07.

38. Appleton, *supra* note 3, at 237. Appleton explains:

Even the . . . rule that presumes a man to be the father of a child born outside of wedlock when he takes the child into his home and holds out the child as his own operates asymmetrically: His legal relationship with the child becomes established by such conduct, but the child does not become the legal child of his wife.

Id. (citation omitted).

39. *Michael H.*, 491 U.S. at 110.

40. Oren, *supra* note 14, at 97–100; see also *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2556–57 (2013).

father may not always be afforded that right.⁴¹ In a parallel twist, an identified legal father who is married to the biological mother may seek to remove the intended parent presumption by seeking to terminate his parental rights and obligations if another man is determined to be the child's biological father.⁴²

Even with its gender and marriage biases, the intended parent model, based on a mix of biology and marriage, lends itself easily to application in heteronormative issues of adoption and ART. Traditional adoption allows for intended parent(s) to convey their exclusive legal rights to raise their child to a person or persons who have demonstrated to the state's satisfaction that they are suitable intentional parents.⁴³ Further, with respect to anonymous egg and sperm donation used to assist reproductively challenged heterosexual couples, the intended/intentional parent model works because the donors are able to affirmatively relinquish their rights and are protected from liability. Anonymous donors are not intended parents, nor are they intentional parents as they have displayed none of the characteristics of an intended or intentional parent.⁴⁴ Perhaps most critically, the donors have no connection or relationship with the recipient family.⁴⁵ The law and the social construct, as conceived, permits the intended/intentional parent

41. *See Adoptive Couple*, 133 S. Ct. at 2556–57.

42. *See, e.g., Langston v. Riffe*, 754 A.2d 389, 417 (Md. 2000) (permitting disestablishment of paternity in accordance with statute). *See generally* Melanie Jacobs, *When Daddy Doesn't Want To Be Daddy Anymore: An Argument Against Paternity Fraud Claims*, 16 YALE J. L. & FEM. 193 (2004).

43. *See Meyer*, *supra* note 2, at 130 (noting that adoption law still retained an implicit preference for biological parenthood). Historically, “[a]lthough adoptive parents were accorded full parental status and rights under the law, identical to those enjoyed by biological parents, traditional adoption law and practice nevertheless implied that the legitimacy of the adoptive relationship turned in some sense on its ability to mimic a biological one.” *Id.* at 131 (citing ELIZABETH BARTHOLET, *FAMILY BONDS: ADOPTION, INFERTILITY, AND THE NEW WORLD OF CHILD PROTECTION* (1999); KATARINA WEGAR, *ADOPTION, IDENTITY, AND KINSHIP* (1997); Elizabeth Bartholet, *Beyond Biology: The Politics of Adoption and Reproduction*, 2 DUKE J. GENDER L. & POL’Y 5 (1995)); *see also* Barbara L. Atwell, *Nature and Nurture: Revisiting the Infant Adoption Process*, 18 WM. & MARY J. WOMEN & L. 201, 220–21 (2012).

44. *See, e.g., N.J. STAT. ANN. § 9:17-44* (West 2014). If a married couple uses artificial insemination with donor sperm with the assistance of a licensed physician, then the husband is deemed the natural father of the child born of the marriage. *Id.* at § 9:17-44a. The statute further provides:

Unless the donor of semen and the woman have entered into a written contract to the contrary, the donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the father of a child thereby conceived and shall have no rights or duties stemming from the conception of a child.

Id. at § 9:17-44b.

45. Not everyone thinks this is a good idea. *See generally* Naomi Cahn, *Do Tell! The Rights of Donor-Conceived Offspring*, 42 HOFSTRA L. REV. 1077, 1079–87 (2014).

framework to stretch in this manner to easily accommodate couples who seek to become parents but require assistance to do so, because the result is still the biological offspring of one parent, or one parent is the gestational carrier for a couple who will undertake to act as the two required intended parents. Even if the gestational commissioning mother uses a donated egg, she still receives the intended parent recognition as the donated ova are deemed hers by virtue of the donation itself.⁴⁶ Thus, the affirmative rights to procreate vested in the donor subsequently transfer to the gestational mother upon donation for these purposes. But, unlike adoption, or awarding parental rights in paternity actions, this transfer of rights more or less occurs privately and requires no intervention by the state beyond the legislative approval of an affirmative waiver of rights by a donor upon anonymous donation.⁴⁷

Moving further away from the traditional biological binary of mom and dad, but often still within the concept of “traditional” monogamous relationships, is the use of the intended/intentional parent model by same-sex couples. These relationships arguably lend themselves to the intended parent model; however, because the model is highly gendered and heteronormative, such application has proved problematic.⁴⁸ The issue, as experienced by same-sex female couples, is that if one mother is the biological mother of the child and thus, easily recognizable as the intended parent, the second mother lacks the protection the legal presumption provided to a married father, even if she is married to the biological mother.⁴⁹ If the non-biological mother does not have the protection of the marriage presumption, she must demonstrate to the state that she is entitled to recognition as an intentional parent just as an unmarried biological father would be required to do.⁵⁰ This requires the biological mother’s consent and public intervention in a private marriage, which the state generally avoids.⁵¹ The issues become even thornier when discussing same-sex male parents because the all-important “parent zero” is not part of the marital relationship. In such cases, the biological commissioning father is afforded few rights because he is not married to

46. See, e.g., FLA. STAT. § 742.14 (2014) (“The donor of any egg . . . shall relinquish all maternal . . . rights and obligations with respect to the donation.”).

47. See, e.g., CAL. FAM. CODE § 7611 (West, Westlaw through Ch. 2 of 2015 Reg. Sess.).

48. Stu Marvel et al., *Listening to LGBTQ People on Assisted Human Reproduction: Access to Reproductive Materials, Services, and Facilities*, in ASSISTED HUMAN REPRODUCTION ON TRIAL: CHALLENGES OF REGULATING SURROGACY, GAMETE DONATION AND REPRODUCTIVE SERVICES 1 n.2 (Trudo Lemmens ed., 2014).

49. See, e.g., D.M.T. v. T.M.H., 129 So. 3d 320, 328 (Fla. 2013).

50. *Id.*

51. This is the reason why the Court in *Michael H.* was willing to terminate biology plus type parental rights in favor of the relational rights in the marriage itself. See *Michael H. v. Gerald D.*, 491 U.S. 110, 113 (1989).

the surrogate, and the non-biological father is afforded no rights, even if donated ova are used. Despite some of the complexities of same-sex parenting, the law has slowly, some would say glacially, moved to recognize the rights of same-sex partners as parents, particularly those same-sex parents within a legal marriage.⁵²

B. *Thinking Outside the Spock Box: Open Adoption*

In thinking through the application of the intended/intentional parent model, open adoption adds another dimension to the conversation. Open adoption contemplates reallocating the bundle of rights given to parents in such a way that both the birth parents and the adoptive parents have a relationship with the child.⁵³ In a traditional closed adoption, the birth parents cede all of their parental rights to the adoptive parents, transferring care, custody, and control of their biological child to the new legal parents.⁵⁴ It is much like an anonymous gamete donation in the sense that further contact with the adoptive family and the child is not contemplated. Although a child who is adopted in this manner may be able to know the identity of and perhaps even meet her birth parents if she wishes at some point in the future, the understanding is that her biological parents will not be part of her life.⁵⁵ Essentially, the biological parents wholly cede their intended and intentional parent status to the adoptive parents.

Open adoption provides a slightly different model. In an open adoption, the birth parents and adoptive parents have some sort of relationship, and an expectation exists that the birth parents will remain in the child's life and be known to the child.⁵⁶ Open adoption

52. See *Baskin v. Bogan*, 766 F.3d 648, 663 (7th Cir.), cert. denied, 135 S. Ct. 316 (2014) (noting that the number of children being raised by same-sex couples supported an argument that marriage to protect unplanned pregnancy was not a good enough reason to preclude same-sex marriage).

53. Samuels, *supra* note 30, at 527 n.131 (citing CHILD WELFARE LEAGUE OF AM., CWLA STANDARDS OF EXCELLENCE FOR ADOPTION SERVICES 142 (rev. ed. 2000)) ("The CWLA describes open adoption as an 'arrangement that recognizes the child's connection to both the birth family and the adoptive family by supporting interaction among the birth parents, adoptive parents, and the child through telephone calls, correspondence, or personal contact, depending upon the particular situation.'").

54. See Atwell, *supra* note 43, at 233 n.131. Atwell notes:

A closed adoption is one in which the parties to the adoption do not share identifying information. To facilitate the privacy of the parties, the original birth certificates are sealed and a new one created with the names of the adoptive parents.

Id. (internal citations omitted).

55. See *id.*

56. See Tammy M. Somogye, *Opening Minds to Open Adoption*, 45 U. KAN. L. REV. 619, 619 (1997) (quoting Marianne Berry, *Risks and Benefits of Open Adoption*, in 3 THE FUTURE OF CHILDREN 125, 126 (Richard E. Behrman ed., 1993)) ("Open adoption is 'the

contemplates that the legal rights to care, custody, and control of the child will belong to the adoptive parents, but the birth parents will play some sort of social role in the child's life based upon the birth parents' relationship with the adoptive parents.⁵⁷ Open adoption may also take place in juvenile dependency settings when biological parents' legal rights are terminated.⁵⁸ This flexibility allows the biological parents to remain in contact with, and perhaps have visitation with, their child after the termination of their biological parents' rights.⁵⁹

The question arises whether, as an intended parent who has ceded legal parental rights, a birth parent retains some sort of intentional parent status. If an intended parent, from a social perspective, is thought of as someone who has a biological connection to a child, recognizes the child as their own, seeks to provide for the child (albeit through another), and has some relationship with that child, then a birth parent in an open adoption could be considered an intentional parent under the traditional model.⁶⁰ Conferring intentional parent status on a birth parent in an open adoption would not, however, mean that the state could grant a birth parent superior legal rights over the adoptive parents, as those rights have been affirmatively transferred to the adoptive parents. Based on the traditional model, conferring intentional parental status on a birth parent means the birth parent would satisfy the definition of an intentional parent who may be able to assert some sub-set of parental rights, particularly in the case of an adoption agreement that afforded any such rights.

The same can be said of another type of open adoption: adoptions resulting from the loss of parental rights in juvenile dependency cases. To some extent, the recognition of the importance of keeping a biological parent in a child's life, even if that parent is unfit to raise the child, is framed in terms of the connection that remains between parent and child

sharing of information and/or contacts between the adoptive and biological parents of an adopted child, before and/or after the placement of the child, and perhaps continuing for the life of the child."').

57. *Id.* at 621–22.

58. See generally Joshua Gupta-Kagan, *Non-Exclusive Adoption and Child Welfare*, 66 ALA. L. REV. 715 (2015) (discussing the benefits of allowing non-exclusive adoption in termination of parental rights and dependency proceedings and statutes that have permitted it).

59. *Id.*

60. The author is not advocating that birth parents should have legally recognized parental rights that might conflict with the adoptive parents. But, in thinking through the idea of intentional parenthood, particularly in conjunction with an expanded notion of parental form beyond the two-parent model, it becomes important to consider how far that model will extend and what types of rights should be included within it, including heretofore unrecognized rights of an intended parent in an open adoption type of situation.

and which can form the basis of intent.⁶¹ The distinction between the two types of open adoption, in terms of intent, is that the former contemplates a relationship that has not yet developed and is inchoate, while the latter recognizes a relationship that already exists and the benefit of maintaining that realized relationship has been identified. Thus, open adoption shares some of the same markers for intended and intentional parenthood as known donors in ART in that a known donor in ART has some relationship with the commissioning parents—they are known to each other and often contemplate maintaining some type of relationship beyond the birth of the child. The extent of that relationship may be even more extensive than that contemplated by parties in an open adoption because the nature of the ART process is in many ways more deliberate. There, the intended parents who seek to use ART to have a child may seek out the known donor to participate in the process prior to conception rather than developing a relationship after the birth mother in an open adoption becomes pregnant.

II. WHEN INTENDED PARENT BECOMES A LEGAL CATEGORY

While the contours of intended and intentional parent have always been present in the determination of parentage, it is fair to say the specific terms did not always have a legal meaning of their own.⁶² Legal meanings have changed with the advent of ART and, specifically, with the advent of surrogacy. Thus, while anonymous sperm and egg donation allowed reproductive donors to maintain a plausible distance so long as the intentional mother was also the gestational mother, this distance, both real and perceived, disappeared where parties used known donors or where a surrogate became involved in the baby-making process. Courts have held that, in these cases, a non-biological parent can be given “intended parent” status prior to, or after, birth based on the agreement of the parties.⁶³ In fact, Robertson has advocated that “if bearing, begetting, or parenting children is protected as part of personal privacy or liberty, those experiences should be protected whether they are achieved coitally or noncoitally’ and that ‘[o]nly substantial harm to tangible interests of others should . . . justify restriction [on the use of

61. Although this type of adoption is usually done for the benefit of the child and in the hope that an open adoption will ease the transition for a child who has been removed from his or her parents after an extended period of time.

62. Instead the Court has spoken in terms of the parents’ “intention” as demonstrated through the act of marriage or established relationship. *See generally* *Lehr v. Robertson*, 463 U.S. 248, 261 (1983); *Stanley v. Illinois*, 405 U.S. 645, 665 (1972).

63. *See generally* *Purvis*, *supra* note 2.

reproductive technologies].”⁶⁴ The problem is, particularly with respect to surrogacy, the lack of uniformity in the surrogacy laws.⁶⁵

“Donor gametes,” which are sperm or egg donations, are used by many groups of people across the spectrum—single, married, straight, gay, infertile, and fertile but otherwise incapable of conceiving without assistance.⁶⁶ “Having a child through donor conception creates new family relationships, but the dominant paradigm [remains] health law with its focus on patients.”⁶⁷ Less thought has been given to the social ramifications of a child being told or not being told that they are donor-conceived.⁶⁸ And, conversely, less thought has been given to whether a donor can know what children have resulted from the donation, or the donor’s willingness to be a “known” donor.⁶⁹

Known donors, both true donors and donors who contribute in non-traditional relationships where there is no true donation but rather a utilization of ART methods to accomplish procreation, clearly illustrate the problems that arise when new conceptions of family are shoehorned into an existing system that never contemplated their existence.⁷⁰ Donor cases reflect a confluence of several issues within the “traditional” family law model and the way in which the law must adapt and where it has failed to adapt.⁷¹ While issues related to known donors have been discussed frequently over the last 25 years, focusing on recent cases highlights the lingering problems that remain and helps explain why the shifting sands of intent have made these cases even harder.

A. *The Easy Case*

William Breit and Beverly Mason, an unmarried heterosexual couple in Virginia, turned to ART to have a child.⁷² The child was conceived through in vitro fertilization using Breit’s sperm and Mason’s

64. Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 854 (2000) (quoting JOHN A. ROBERTSON, *CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES* 39–41 (1994)).

65. See Darra L. Hoffman, “Mama’s Baby, Daddy’s Maybe:” *A State-By-State Survey of Surrogacy Laws and Their Disparate Gender Impact*, 35 WM. MITCHELL L. REV. 449, 450 (2009).

66. See generally Cahn, *supra* note 45, at 1079–87.

67. *Id.* at 1087.

68. *Id.* at 1096.

69. *Id.* at 1109.

70. See *In re R.C.*, 775 P.2d 27, 29 (Colo. 1989) (reasoning that the parental rights of a semen donor are least clearly understood when the semen donor is known and the recipient is unmarried); *K.M. v. E.G.*, 117 P.3d 673, 675 (Cal. 2005) (concerning an egg donation to lesbian partner for gestation).

71. *In re R.C.*, 775 P.2d at 29; *K.M.*, 117 P.3d at 675.

72. See *L.F. v. Breit*, 736 S.E.2d 711, 715 (Va. 2013).

eggs, with Mason serving as the gestational mother.⁷³ Prior to their child's birth in 2009, the parties entered into a written custody and visitation agreement, and after their child's birth, the parties jointly executed a written acknowledgment of paternity identifying Breit as the child's legal and biological father.⁷⁴

As with all legal cases of this nature, the relationship fell apart, and the couple separated. But, Breit continued to financially support the child; he visited regularly and took an active role in his child's life until Mason unilaterally terminated all contact.⁷⁵ Breit was forced to file a petition to determine parentage with the court, and Mason argued in response that "Breit was barred from being [the child's] legal parent because he and Mason were [not] married and [the child] was conceived through [ART]."⁷⁶ Virginia Code § 20-158 provided that the "donor is not the parent of a child conceived through assisted conception, unless the donor is the husband of the gestational mother."⁷⁷ The Code was enacted specifically to protect married parents who use ART.⁷⁸ In essence, Mason argued that Breit's status as a donor negated his paternity claim as the child's biological and social father because the statute protecting donors negated his intent to parent. The court dismissed Breit's petition on that basis.⁷⁹

The court of appeals reversed the decision and held that Breit, as a known sperm donor, could maintain an action for paternity where both parties executed an uncontested Acknowledgment of Paternity after the child's birth.⁸⁰ Despite the language in the statute, the court held that the parties' conduct after the birth of their child conferred parental status on Breit.⁸¹ In reaching this decision, "[t]he Court of Appeals concluded that it would create a 'manifest absurdity' to interpret Code § 20-158(A)(3) to foreclose any legal means for an *intended*, unmarried, biological father to

73. *Id.* at 715.

74. *Id.*

75. *Id.*

76. *Id.* at 715–16.

77. Interestingly, this statute also provides for who is a legal parent in surrogacy and indicates that regardless of who the intended parents may be, the surrogate, and even more interestingly, her husband, are deemed the legal parents of the child if neither of the intended parents is the genetic parent of the resulting child, and further, the child must be adopted by the intended parents. See VA. CODE ANN. § 20-158 (LEXIS through 2015 Reg. Sess. Assemb.).

78. *Breit*, 736 S.E.2d at 717 (noting that the assisted conception statute was enacted in response to *Welborn v. Doe*, 394 S.E.2d 732 (Va. Ct. App. 1990), which held that "the only sure way for the husband of the gestational mother to secure parental rights" was to adopt a child born via ART and donor sperm).

79. *Id.* at 716.

80. *Id.* at 716.

81. *Id.*

establish legal parentage of a child born as a result of assisted conception, merely by virtue of his status as a ‘donor.’”⁸²

The Virginia Supreme Court approached the issue differently and addressed the equal protection problem created if the ART statute was read to exclude Breit as a legal parent after he had established a parent-child relationship.⁸³ The court found that if the ART statute was not harmonized with existing legal means to establish paternity, then it would “unconstitutionally infringe on Breit’s fundamental parental rights” and “absolutely foreclose any legal means for Breit to establish parentage . . . solely by virtue of his status as an unmarried donor.”⁸⁴ The supreme court upheld the court of appeals’ harmonization of the ART and paternity statutes and permitted a known donor with an established relationship with a child to seek legal recognition of paternity, as well as visitation and custody.⁸⁵

As an initial observation, Breit more than satisfied even the most stringent requirements for acknowledgment of paternity for an unmarried biological father: he had been present throughout the pregnancy; he had acknowledged the child as his own; and he had developed a parental relationship with the child, albeit a short one.⁸⁶ He easily fit within the simple, standard understanding of who could be a parent, absent the intervening action of Virginia’s donor statute that negated his parental status based upon his marital status.

Ultimately, Breit’s marriage-like relationship with Mason, his ability to fill an open parental slot (in the two-parent scheme), and the recognition that Breit was both the intended and intentional parent allowed him to prevail. But because the statute favored married couples, Breit was subjected to a challenge to his parenthood that would never have occurred but for his unmarried status and his additional status as a “donor.” Thus, the “intended parent by marriage” proxy is carried into donor statutes. The appellate court and the supreme court diverged, however, in how to protect that parental right and fix the problem. The appellate court considered the parties’ intent *prior to* the child’s birth and sought to enforce the intent of the parties at that time. The supreme court, on the other hand, considered the parties’ conduct *after* the child was born to assign intent and find that Breit could not be excluded from claiming paternal rights based solely on his marital status.

82. *Id.* (emphasis added) (quoting *Breit v. Mason*, 718 S.E.2d 482, 489 (Va. App. Ct. 2011)).

83. *Breit*, 736 S.E.2d at 721–22.

84. *Id.* at 722.

85. *Id.* at 724.

86. *Id.* at 715.

B. *A Slightly Harder Case*

In a strikingly similar case, a biological mother who donated ova to her lesbian partner was initially denied legal parental recognition because she did not satisfy the exception to the donor definition in Florida's ART statute.⁸⁷ The statute did not discriminate between married and unmarried donors, but instead discriminated between same-sex and opposite-sexed donors by only protecting commissioning couples, which were defined as the mother and the father.⁸⁸ Thus, as a same-sex partner, donor, and the non-gestational mother, she was deemed to be a donor who had affirmatively relinquished her parental rights to her child.⁸⁹

In *T.M.H. v. D.M.T.*,⁹⁰ the court of appeals held that T.M.H., as the biological mother, was not a donor within the meaning of the ART statute because that was not her intent, and that the application of the ART statute, which required an egg donor to relinquish all of her maternal rights to a resulting child, violated her constitutionally protected parental rights to that child.⁹¹ The statute required an affirmative relinquishment of rights for gamete donors with only two exceptions: one for fathers in preplanned adoptions and one for "commissioning couples," defined as the intended "mother and father" of the child.⁹² The parties had been in a same-sex domestic partnership when they sought ART to have a child together and specifically chose this method to have a connection to the child, one mother as birth mother, one as biological mother.⁹³ After the child's birth, they parented their child together as planned, but when the couple's relationship ended, the gestational mother sought to deny the biological mother any rights.⁹⁴

The problem presented in this scenario was two-fold. First, the statute clearly exempted commissioning couples—traditional intended parents—from the relinquishment of rights based on donation, but the definition limited intended parents to a mother and a father in a heterosexual relationship. Second, the parties' actions after the donation was made invoked the constitutionality of depriving the biological

87. *T.M.H. v. D.M.T.*, 79 So. 3d 787, 790 (Fla. Dist. Ct. App. 2011), *aff'd in part*, 129 So. 3d 320 (Fla. 2013).

88. *Id.* at 790–91 (citing FLA. STAT. § 742.14 (2011)).

89. *Id.* at 789–90.

90. *T.M.H. v. D.M.T.*, 79 So. 3d 787 (Fla. Dist. Ct. App. 2011), *aff'd in part*, 129 So. 3d 320 (Fla. 2013).

91. *Id.* at 798.

92. *Id.* at 809; *see* FLA. STAT. § 742.13(2) (2014) ("'Commissioning couple' means the intended mother and father of a child who will be conceived by means of assisted reproductive technology using the eggs or sperm of at least one of the intended parents.").

93. *T.M.H.*, 79 So. 3d at 788–89.

94. *Id.* at 797–98.

mother of her fundamental rights via statute where a parental relationship had developed.

The appellate court focused heavily on the parties' intent at the time of donation and found that the biological mother was not a donor under the statute based on her subjective intent at the time of the donation. On review, however, the Florida Supreme Court clearly addressed the equal protection issues that arose at both moments in time—at the time of donation and at the time of the challenge to the biological mother's fundamental right to parent.⁹⁵ The Florida Supreme Court held that the statute was unconstitutional to the extent that same sex commissioning parents were treated differently, and the court recognized and protected the biological mother's fundamental due process right to be a parent to her child, based on a developed relationship.⁹⁶ The Florida Supreme Court echoed the appellate court in holding that this was not an all-or-nothing proposition between two parents and that T.M.H. retained her right to parent her child, presumably based on the application of the statute to the women as a "commissioning couple" without the unconstitutional limitation of mother and father.⁹⁷

The appellate court's reliance on the parties' intent at the time of donation raises a concern. Generally, intended and intentional parenthood was not fixed at conception; rather, intended and intentional parenthood was fixed at birth. Under the standard intended/intentional parent analysis, only the gestational mother would have been the intended parent. Technically, the biological mother had no rights based on biology alone because she was not the gestational mother and not the husband or the biological father of the child such that a presumption of paternity could attach. To the extent the courts in *T.M.H.* considered the biological mother's parental claim in a paternity context, she was able to demonstrate the hallmarks of intended *and* intentional parenthood—and satisfy the requirement of biology plus—permitting her to establish legal parenthood. The gestational mother was afforded rights at birth based on gestation alone even though she had no biological connection to the child. There is a concern that all gestational mothers could make similar claims, although this one was clearly distinct because of the nature of the relationship.⁹⁸

95. *D.M.T. v. T.M.H.*, 129 So. 3d 320, 328 (Fla. 2013).

96. *Id.* at 328. The protection the court gave in this case is similar to the protection afforded an unmarried father in such circumstances.

97. *Id.*

98. There are scholars who have suggested that gestational mothers do and should have rights. See, e.g., Pamela Laufer-Ukeles, *Mothering for Money: Regulating Commercial Intimacy*, 88 IND. L.J. 1223, 1226 (2013); Pamela Laufer-Ukeles, *Gestation: Work for Hire or the Essence of Motherhood? A Comparative Legal Analysis*, 9 DUKE J. GENDER L. & POL'Y 91, 134 (2002).

Despite the legal gymnastics, the decision to award parental rights was easy here, with two parents who intended to parent the resulting child together and who both had a biological connection to the child through ovum or gestation. The courts also managed to avoid conflict with the donor statute, which was designed primarily to protect anonymous donors and donees.

C. *A Not So Simple Case*

Most donor statutes contemplate fixing intended parent status upon donation, thereby ensuring that rights and obligations are clearly delineated even if legal intervention is later required to confirm those rights. Thus, intended parent status is assigned based upon who is donating and to whom they are donating, and the status reflects the understanding of the parties at the time a donation is made or conception occurs. When the parties' intentions change after the fact, for example, when a non-traditional relationship ends, the court, through an equal protection analysis and application of traditional intended and intentional parent rules, has enforced the parties' intent at the time of the donation to the extent that the law has failed to do so.⁹⁹ But what happens when a known biological donor decides that he or she wants to be recognized as a legal parent? How can a court balance the current intended/intentional parent model with the law and the parties' wishes? Does that balance too easily favor the heteronormative two-parent model of parentage? What risks do we incur by invoking intention at the point of donation and conception instead of applying the rules as conceived?

Jason Patric had no intention of being a father.¹⁰⁰ After several attempts to have a child with his then-girlfriend Danielle, he agreed to donate sperm so that she could become pregnant and raise the child alone.¹⁰¹ Patric asked that his donation remain confidential.¹⁰² California Family Code § 7613¹⁰³ permitted this because Patric, as the donor, was not married to Danielle; there was no written agreement to the contrary *prior* to the donation and insemination; and they used a licensed facility.¹⁰⁴ The couple signed informed consent waivers at the

99. See, e.g., *D.M.T.*, 129 So. 3d at 328; *L.F. v. Briet*, 736 S.E.2d 711, 722–24 (Va. 2013).

100. *Jason P. v. Danielle S.*, 171 Cal. Rptr. 3d 789, 790 (Cal. Ct. App.), review denied, (Cal. Ct. App. 2014).

101. *Id.* at 791. Danielle had by then moved out and was looking into artificial insemination and raising the child alone. *Id.*

102. *Id.*

103. CAL. FAM. CODE § 7613 (West, Westlaw through Ch. 2 of 2015 Reg. Sess.).

104. *Jason P.*, 171 Cal Rptr. 3d at 790. California Family Code § 7613 provides: The donor of semen provided to a licensed physician and surgeon or to a licensed sperm bank for use in assisted reproduction of a woman other than the

clinic, and Patric donated sperm that was used in an in vitro fertilization procedure for Danielle.¹⁰⁵ Gus, Danielle's son, was born in 2009, and for two and a half years Patric had some contact with Gus, including personal visits and Skype calls.¹⁰⁶ Gus also called Patric "Dada."¹⁰⁷ All went according to plan until the parents' relationship failed and Danielle permitted no further contact between Patric and Gus.¹⁰⁸ As a result, Patric sought parental rights to Gus.¹⁰⁹

Danielle argued that, pursuant to their agreement, Patric agreed to give up his parental rights prior to Gus's birth.¹¹⁰ The clear intent of the parties at the time of donation was that he was simply a donor, no different than an anonymous donor, and covered by the applicable statute in California for donors.¹¹¹ Patric made two arguments. First, that he was a presumed parent as an unmarried biological father who had established a relationship with his son, and second that he was, in fact, an intended parent based on language in the forms he signed when consenting to the ART procedure.¹¹²

The trial court found that the donor statute was not unconstitutional as applied to Patric.¹¹³ The court noted that the public policy choice made by the legislature was not unconstitutional, finding that

the Legislature has weighed competing public policies regarding paternity and sperm donors, and has reconciled those considerations by affording "to unmarried women a statutory right to bear children by artificial insemination (as well as a right of men to donate semen) without fear of a paternity claim [and] likewise provided men with a statutory vehicle for donating semen to married and unmarried women alike without fear of liability for child support."¹¹⁴

donor's spouse is treated in law as if he were not the natural parent of a child thereby conceived, unless otherwise agreed to in a writing signed by the donor and the woman prior to the conception of the child.

§ 7613(b). The written agreement provision came after the IVF procedure in this case so that the court did not directly consider its applicability because the parties did not have such an agreement. *Jason P.*, 171 Cal. Rptr. 3d at 791, 797.

105. *Id.* at 790.

106. *Id.* at 792.

107. *Id.*

108. *Id.*

109. *Jason P.*, 171 Cal. Rptr. 3d at 792

110. *Id.* at 791.

111. *Id.* at 794; *see also* Steven S. v. Deborah D., 25 Cal. Rptr. 3d 482, 487 (Cal. App. Ct. 2005) (finding that a known donor has no right to claim paternity).

112. *Jason P.*, 171 Cal. Rptr. 3d at 791.

113. *Id.* at 793.

114. *Id.*

The appellate court found, conversely, that the ART statute could not be used to prevent Patric's attempt to maintain a paternity claim.¹¹⁵ The court specifically found that it was inappropriate to prevent Patric, as a biological father, from alleging that he satisfied the "presumed parent" requirement of § 7611 of the California Code because it gave him fewer rights than any other unmarried biological father.¹¹⁶ The court held that "a sperm donor who has established a familial relationship with the child, and has demonstrated a commitment to the child and the child's welfare, can be found to be a presumed parent even though he could not establish paternity based upon his biological connection to the child."¹¹⁷

The court seemed to miss the point that as a "donor," Patric was not in the same position as an unmarried biological father because he had affirmatively assented to giving up his parental rights pursuant to the statute by virtue of his donation status.¹¹⁸ The court also disregarded the fact that Patric had no legal relationship or any legal-type relationship with Danielle at the time. Although the court permitted Patric to maintain a paternity action, single mothers received some small consolation from the court's ruling, as the court explained that "holding that a sperm donor is not precluded from establishing presumed parentage does not mean that a mother who conceives through assisted reproduction and allows the sperm donor to have some kind of relationship with the child necessarily loses her right to be the sole parent."¹¹⁹ Instead, the question is whether that relationship has become a "familial relationship."¹²⁰ The court then chose to move beyond traditional intended/intentional parent relations and even "marriage as proxy," in this circumstance. Patric's status as Gus's biological father, and the absence of a second legally recognized parent, may explain the court's willingness to do so.

While Patric's argument regarding the informed consent form failed, it deserves closer attention. Patric argued that the 2011 amendment to the donor statute, which permitted parties to agree in writing that an unmarried donor would be considered the father, should apply retroactively. He also argued that the informed consent forms he and Danielle signed indicated their intent that Patric be Gus's father.¹²¹

115. *Id.* at 795.

116. *Id.*

117. *Jason P.*, 171 Cal. Rptr. 3d at 796.

118. *Id.*

119. *Id.* at 797.

120. *Id.* Thus, the court suggests that a mother who wishes to be the sole parent simply ensure she does not cross that line and create a relationship where the sperm donor can claim he received the child into his home and held him out as his own.

121. *Id.* at 798. Both courts decided this issue without considering whether the amendment applied retroactively.

Upon arriving at the fertility clinic, Patric was required to sign forms related to Danielle's procedure that included a block for identifying the "intended parents."¹²² Danielle's argument was that "intended parent" referred only to the biological material donor.¹²³ The problem, however, is that the definition offered by Danielle is not the definition that has been ascribed to the term intended parent when used in the ART context, although it would correctly describe a traditional biological parent. Instead, the form should have reflected a different term in order to properly identify Patric as a donor. The language and designations in ART are of critical importance because the rights being assigned, abandoned, or reassigned are wholly outside the realm of what is traditionally understood in conception. Precision matters. To the extent courts have failed to follow through to the logical conclusion demanded by ART statutory definitions of intended parent, courts have done so on equal protection grounds when the parties' initial intent is clear and there is no conflict between the initial intent and the realized acts post-birth.¹²⁴ Resolving these conflicting claims of parental rights then requires a legal parsing of language used on a standard consent form without considering what the intention of the parties really was, let alone whether that intention changed after Gus's birth, when his mother allowed Patric to become a parent in any form. Ultimately, the court returned to consider the intent of the parties, not the language of the forms, and found that "[t]he fact that Jason is listed in the spaces for 'Intended Parent' says nothing about the parties' understanding regarding his *legal* status as a parent."¹²⁵

In one sense, Patric's claim as an unmarried biological donor parent is no different than the claims presented in *L.F. v. Breit*¹²⁶ and *T.M.H.*, to the extent that the supreme court in each state foreclosed an examination of the intent of the parties at the time of donation and focused solely on the parties' behavior after the child was born. Under the traditional intended/intentional parent analysis, this is the right result. So why is Patric's case more troubling than the others? For one, if the situation had been reversed and Patric did not seek custody but Danielle sought child support, there is a high likelihood that Danielle would have lost her bid

122. *Jason P.*, 171 Cal. Rptr. 3d at 798. These were informed consent forms for the procedures related to the IVF procedure, including micromanipulation, oocyte collection, embryo cryopreservation, and embryo transfer. *Id.*

123. *Id.*

124. See, e.g., *L.F. v. Breit*, 736 S.E.2d 711, 722–24 (Va. 2013); *D.M.T. v. T.M.H.*, 129 So. 3d 320, 328 (Fla. 2013).

125. *Jason P.*, 171 Cal. Rptr. 3d at 798.

126. *L.F. v. Breit*, 736 S.E.2d 711 (Va. 2013).

for child support based upon the statute.¹²⁷ In addition, the case's result creates instability and uncertainty where there should be none. In *Breit* and *T.M.H.*, the result dovetailed with the initial intent of the parties. Thus, the parties' intent and post-birth behavior were congruent. Here, the parties never intended to parent together, and the court's decision seems to be based more on maintaining the two-parent model to the exclusion of a single-parent model. The court also seems to ignore the fact that the legislature provided for this kind of protection in 2011 when it permitted the parties to enter into a written agreement to have the donor be treated as a parent. The court's decision appears to render that requirement moot, allowing the donor to rely on post-birth conduct to claim parental rights even without complying with the statute as written.

As a result of this case, the California legislature proposed a new law, Senate Bill 115 ("SB 115"), which would amend § 7613 to permit a known donor to claim paternity rights based on the holding out and established relationship standard despite the requirements of the donation statute.¹²⁸ The amendment would, in essence, allow a biological father who intended to be only a sperm donor and who had no intention of parenting, to change his mind and seek parental rights as long as he could demonstrate he otherwise acted as any other unmarried biological father in terms of holding the child out as his own and having some sort of relationship with the child. SB 115 would allow any interested party, notwithstanding his treatment under § 7613 as a sperm donor, to have standing to bring an action at any time for the purpose of determining the existence or nonexistence of a father-and-child relationship presumed on the "holding out" standard in § 7611(d). The sperm donor would still have to prove he met the standard of a presumed father by proving he received the child into his home, held the child out as his own, and had a

127. In finding in favor of Patric, the Appellate Court made the same observation in supporting its decision to permit Patric to maintain a paternity suit under § 7613, explaining that:

For example, suppose an unmarried couple who had tried unsuccessfully to conceive a child naturally, finally was able to conceive through assisted reproduction. They then got married, after conception but before the birth of the child, and raised the child together. After several years, they divorced and the mother sought child support because she could not afford to care for the child on her own. Under Danielle's interpretation of section 7613(b), the mother's ex-husband would have no obligation to support the child because he was a sperm donor under section 7613(b) and could not be found to be the child's presumed father under section 7611, despite having been married to the mother at the time of the child's birth and having raised the child as his own. The Legislature could not have intended this result.

Jason P., 171 Cal. Rptr. 3d at 797.

128. Meldie Moore, *Senate Bill 115 Would Give Sperm Donors Standing To Petition for Paternity*, ORANGE COUNTY LAW., Sept. 2013, at 38, 38.

relationship with the child under § 7611. If parentage is proven, then the father may seek custody rights.¹²⁹

A move toward permitting such a claim also moves away from the traditional model in ART cases in California, where the intent of the parties is established prior to birth.¹³⁰ This approach to known donors also impermissibly tweaks the ART intended parent model in a way that gives primacy to intentional parenthood, which not only changes the paradigm but takes the paradigm completely out of the traditional notions of intended and intentional parenthood. Legally, the state is, in essence, giving any adult male the ability to seek paternity rights to a child to whom he has no other legal connection as long as there is an established relationship.¹³¹ From a practical perspective, this means that legal parental rights will always be in flux where there is a known donor and further, that a known donor will retain some residual parental rights at all times regardless of the understanding of the parties. There is a danger inherent in legal parental rights acting as a moving target, if for no other reason than the existence of such a right will also likely dissuade parents of children conceived through known donors from encouraging a relationship if their own custody rights might be jeopardized by doing so. It also seems to confirm the suspicion that a birth parent in an open adoption retains similar residual rights, but simply does not have legal recourse to enforce those rights in the same way.

D. The Hardest Kind of Case: Surrogacy, Intent, and Biology

The toughest problems arise when competing claims to parental rights between more than two parents exist, and a conflict presents itself between competing applications of the intended and intentional parent paradigm as understood traditionally and as understood within ART. A Wisconsin surrogacy case highlights the vulnerability of parents who have no rights under the traditional iteration of the intended/intentional framework.¹³²

David and Marcia wanted to have a child, but because Marcia had been rendered infertile by cancer treatments, they could not have one without assistance.¹³³ Monica, Marcia's close friend, who was married and had five children of her own, offered to act as a surrogate for the

129. *Id.*

130. *See Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993).

131. Clearly the lack of a biological connection in this situation is a legal fiction created by the statute itself. Also, this is not to say that such an arrangement might not be desirable in some circumstances. For the purposes of this conversation, such a right is troubling because of the uncertainty it may cause.

132. *In re Paternity of F.T.R.*, 833 N.W.2d 634, 637–38 (Wis. 2013).

133. *Id.* at 637.

couple.¹³⁴ The parties agreed to move forward with the surrogacy, with David providing the sperm and Monica providing the egg and carrying the child, over Marcia's express concern about Monica being both the biological and gestational mother.¹³⁵ The couples negotiated an extensive Parentage Agreement that contemplated Monica voluntarily surrendering her parental rights after delivering the child and assisting with the adoption.¹³⁶ Corey, Monica's husband, simply waived his rights via the Parentage Agreement.¹³⁷ The understanding was that Monica would have no legal relationship with the child and no placement, but she would enjoy informal social visits.¹³⁸ David and Marcia signed the Parentage Agreement as "Father" and "Mother," Monica signed as "Carrier," and Corey, her husband, signed as "Husband."¹³⁹

Just prior to the child's birth, Monica advised David and Marcia that she no longer was willing to give up her parental rights and that she would be seeking custody.¹⁴⁰ At birth, Monica and her husband Corey would be the child's legally recognized parents under the law, based on a traditional understanding of who is an intended parent. Monica would also satisfy the role of intentional parent; however, her decision to permit David and Marcia to take the child home from the hospital would have impacted that designation.¹⁴¹ David would be able to seek paternity as a biological/intentional parent and challenge Corey's claim to legal parental status, which presumably Corey would not assert.

David filed suit for paternity and custody of the child shortly after his birth.¹⁴² He also sought enforcement of the Parentage Agreement.¹⁴³ The circuit court framed the issue as a question of whether it could compel Monica to assent to an adoption or a termination of her parental rights based on the provisions contained within the Parentage Agreement.¹⁴⁴ After determining that it could not so require, the court

134. *Id.* at 637–38.

135. *Id.* at 638.

136. *Id.* at 638–39.

137. *In re Paternity of F.T.R.*, 833 N.W.2d at 638.

138. *Id.* Thus, this situation was in many ways similar to an open adoption with the exception that David was biologically related to the child as well.

139. *Id.* at 639.

140. *Id.* at 638.

141. There are too few facts in the court's opinion to surmise whether Corey also wanted to parent this child. However, depending on the state involved, it would be possible, in theory, for Corey and Monica to even assert his presumption of paternity as superior to David's paternity claim, as Corey was married to Monica at the time of the birth. This claim would have been further complicated by the fact that Corey was sterile as he had a vasectomy prior to Monica's pregnancy.

142. *In re Paternity of F.T.R.*, 833 N.W.2d at 638.

143. *Id.*

144. *Id.*

awarded David primary custody as the biological father, while Monica, as the biological mother, received secondary custody and limited visitation based on a standard custody analysis that did not include the consideration of the parties' intent as expressed in the Parentage Agreement.¹⁴⁵ Marcia was not awarded any rights because the Parentage Agreement was unenforceable and she had no other legally cognizable claim to the child.

The Wisconsin Supreme Court, after accepting review of the certified question, found that the clause that required Monica to cooperate with the termination of her parental rights was unenforceable against Monica.¹⁴⁶ While the court found that both David and Marcia were the intended parents as that term is understood in ART, the court also recognized that Marcia had no parental rights under Wisconsin law.¹⁴⁷ The court found that:

The [termination of parental rights]-and-adoption scheme does not provide relief for a party in Marcia's circumstance: she is the wife of the biological father, she currently has no parental rights over the child, the surrogate/egg donor refuses to voluntarily terminate her parental rights, and there are no facts in the record to indicate that there would be grounds to terminate the surrogate's parental rights.¹⁴⁸

Marcia's only rights were those derived from David's paternity through her marriage. If David died, or if Marcia and he divorced, she would have no legal right as an intended or intentional parent under the traditional analysis. A disconnect exists between the ART version of intended parent and the legal version that actually confers parental rights.¹⁴⁹ While the Wisconsin Supreme Court was able to honor the parties' original intent to some extent by giving primary custody to David, resulting in the child's placement with the commissioning

145. *Id.*

146. *Id.* at 645.

147. *In re Paternity of F.T.R.*, 833 N.W.2d at 643, 645. The court further explained that:

It is clear that the more complex surrogacy relationships do not easily fit into Wisconsin's statutory scheme. The statutes do not refer to compensation of surrogate mothers or sperm and egg donors. No provisions address the interests of the child created in this process or by in vitro fertilization. Thus, parties seeking relief in Wisconsin courts are provided no guarantee that relief can be had. Further, circuit court judges attempting to determine if relief is appropriate are given no guidance on how to apportion that relief.

Id. at 646-47.

148. *Id.* at 645.

149. Many states, but not all, have resolved this issue by recognizing the validity of surrogacy contracts or by creating statutes that recognize these relationships. The lack of such recognition gave rise to the problem presented to the Wisconsin Supreme Court in this case.

parents, Marcia remained without parental rights and Monica was able to maintain rights that she previously contracted away in a situation where her intention to parent arose after the parties' initial agreement. While this is similar to traditional adoption to the extent that a birth mother may change her mind after the birth of her child for a limited period of time, it is not generally the method in surrogacy, where intent is presumed to be fixed pre-conception. The traditional limitation of a two-parent model also has an adverse impact here as the law simply does not yet recognize the ability to grant legal rights to more than two parents.

III. RECONSIDERING DELIVERY OF PARENTAL RIGHTS

Individuals, whether intended or intentional parents, known or anonymous donors, or gestational surrogates, are highly vulnerable to the legal parental rights and obligations ascribed to them, to the exclusion of others, by the state.¹⁵⁰ “[T]he significance, universality, and constancy of vulnerability mandates that politics, ethics, and law be fashioned around a complete, comprehensive vision of the human experience if they are to meet the needs of real-life subjects.”¹⁵¹ Clearly, the current model of legal parentage, as developed through common law, shaped by equal protection, and promulgated by state statutes (or lack thereof) fails to protect the vulnerability of those subject to its imposition. The state has always assigned a shared and bundled set of rights to two legal parents, and the state has always proceeded from the presumption that the married woman who gives birth and her husband are the model for the conferral of those rights and the related privileges.¹⁵² As the model family becomes myth, the state should seek to craft better relational models that look to parents' (all parents') expected relationship to a child instead of parents' relationships to one another.

Different proposals have been made to clarify the confusion created by adherence to this outmoded model in terms of identifying who may be a parent and how that identification is made.¹⁵³ More specifically,

150. See Martha Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 10 n.27 (2008) (noting that “vulnerability . . . is profoundly shaped by social institutions” and is, to a large extent “socially constructed in its particularities”).

151. *Id.* at 10.

152. Kisthardt, *supra* note 1, at 591–92.

153. See, e.g., Melanie B. Jacobs, *More Parents, More Money: Reflections on the Financial Implications of Multiple Parentage*, 16 CARDOZO J.L. & GENDER 217, 224 (2010) [hereinafter Jacobs, *More Parents*] (“[D]espite the difficulties of managing multiple parenthood, children will benefit from greater security from maintaining care giving relationships and financial security.”); Melanie B. Jacobs, *Why Just Two?*

scholars have encouraged, and states are beginning to accept, the idea that a child may have more than two legal parents.¹⁵⁴ Intent in a heteronormative model still carries great weight in making these assessments, even as they clarify the playing field for all those involved.

A. Fixing Identities and Expanding the Parental Pool

British Columbia has promulgated statutes, housed in the new Family Act, that seek to identify the intended parent in any birth scenario, both in traditional conception and ART.¹⁵⁵ The statutes set forth whom will be afforded legal rights in any given birth circumstance, and the statutes specifically define the term intended parent.¹⁵⁶ The Family Act also permits more than two persons to receive parental recognition in certain circumstances.¹⁵⁷ The statute defines and delineates how parentage is assigned in traditional conception, heteronormative ART without surrogacy, gestational surrogacy, and other parental arrangements that would not be covered by the other definitions.¹⁵⁸ The statute defines “intended parent” as:

[A] person who intends, or 2 persons who are married or in a marriage-like relationship who intend, to be a parent of a child and, for that purpose, the person makes or the 2 persons make an agreement with another person before the child is conceived that . . . the other person will be the birth mother of a child conceived through assisted reproduction, and . . . the person, or the 2 persons, will be the child's parent or parents on the child's birth, regardless of whether that person's or those persons' human reproductive material was used in the child's conception.¹⁵⁹

California has also enacted a statute that permits more than two people to be recognized as a parent.¹⁶⁰ The statute gives the court discretion in whether to grant legal recognition beyond two parents depending upon the circumstance and detriment to the child, but that recognition is not a matter of right for legal parentage.¹⁶¹ The statute was promulgated in response to a difficult case, *In re M.C.*, where the biological mother was incarcerated, her child was in foster care, and only

Disaggregating Traditional Parental Rights and Responsibilities To Recognize Multiple Parents, 9 J.L. & FAM. STUD. 309, 312 (2007) [hereinafter Jacobs, *Why Just Two*].

154. Jacobs, *More Parents*, *supra* note 153, at 224.

155. Family Law Act, 2011 S.B.C., ch. 25, §§ 20–36.

156. *Id.* §§ 23–30.

157. *Id.*

158. *Id.*

159. *Id.*

160. CAL. FAM. CODE § 7612(c) (West, Westlaw through Ch. 2 of 2015 Reg. Sess.).

161. *Id.*

a legal parent could be involved in the dependency proceedings.¹⁶² In that case, both the biological unmarried father and the biological mother's registered domestic partner sought legal rights.¹⁶³ While the court recognized both parties had a legitimate claim under the Uniform Parentage Act, the court was forced to choose between them. The California statute sought to resolve the problem and offer more, not less, protection to children who were at risk based upon the nature of their parents' relationships.¹⁶⁴ The statute certainly helps resolve difficult cases, but it is more of a safety net than an affirmative clarification of parental status due to its discretionary nature. At the same time, however, California has also promulgated a new statute which allows a known donor to reinstate parental rights on the basis of an established relationship that occurs after the known donor has affirmatively surrendered those rights upon donation that will continue to create uncertainty for parents who accept reproductive materials from known donors.¹⁶⁵ In theory, this new statute may extend that right to known donors to the exclusion of other fathers. What remains to be seen is whether the interplay between these statutes could permit known donors to make further reaching claims than anticipated. On the plus side, this type of statute—that permits multiple legal parents—may help intentional parents in circumstances where the law leaves them otherwise unprotected, such as a woman in the same circumstances as Marcia, who had no legal relationship to her child despite a surrogacy agreement to the contrary.

B. *Repurposing Intent and Returning to Biology First*

Historically, the application of intended and intentional parent created a hierarchy of who received rights and often ran afoul of equal protection.¹⁶⁶ Social factors and societal prejudices often overshadowed simple biological relations that could mean the difference between having parental rights and having no rights at all.¹⁶⁷ Expanding the pool of who may be recognized as a parent beyond two parents should, in theory, solve some of these problems. Where a combination of legal, biological, and social parents exists—and in some cases commissioning

162. *In re M.C.*, 123 Cal. Rptr. 3d 856, 861 (Cal. Ct. App. 2011).

163. *Id.*

164. Joanna L. Grossman, *California Allows Children To Have More Than Two Legal Parents*, VERDICT: LEGAL ANALYSIS & COMMENT. FROM JUSTIA (Oct. 15, 2013), <http://verdict.justia.com/2013/10/15/california-allows-children-two-legal-parents>.

165. CAL. FAM. CODE § 7611 (West, Westlaw through Ch. 2 of 2015 Reg. Sess.).

166. See Kolinsky, *supra* note 10.

167. See generally *Quilloin v. Walcott*, 434 U.S. 246 (1978).

parents—the law will now permit the bundle of rights to be shared, and the law will become more inclusive.

One wonders, however, if we are simply repackaging the same biases in a different form. The benefit of relying on and recognizing the commissioning parents in ART as the “legal parents” naturally gives some finality and a fixed point in time to assign rights. The rise of ART and the promulgation of parentage laws to address the process permits intended parent to take on a new meaning and be used in a clear and concise manner in determining rights. As Professor Purvis notes:

[U]sing intent as a parentage standard where it can be most easily identified begins to integrate intent, which solves problems of too many parents, alongside other parentage rules such as biological connection, which solves problems of too few parents. Furthermore, intent solves many of the tangible problems that currently arise with nontraditionally conceived children.¹⁶⁸

However, in traditional conception, the problem remains, as the concept of intent does not capture the complexities of human relationships and the evolving embodiment of maternity and paternity as pregnancy and parenthood progress. In a simplistic way, intent is still most readily recognized through marriage, and a lack of marriage requires an affirmative showing of intentionality.

It may be worth considering that the original version of intended parent, fostered by marriage and gestation, needs to be fully dismantled in favor of the vertical relationship that exists between parent and child biologically. Marriage, and the two-parent model, has become an entrenched asset in terms of bestowing parental privilege and assigning parental obligations. Traditionally, the intended parent was a proxy for biological parent. Now that we can accurately determine maternity and paternity through scientific means, perhaps using biology as the sole determinant is better. Children’s putative parents can submit to a paternity or maternity test upon the child’s birth, and the result will establish with certainty whether there is a convergence of both biology and social responsibility.¹⁶⁹ If there is no convergence of biology and marriage, a married father can decide to accept paternity as a social father, which will prevent paternity fraud claims later in the child’s life that could potentially be more damaging.¹⁷⁰ Additionally, with the ability to assign legal rights to more than two parents, a child may have a

168. Purvis, *supra* note 2, at 212.

169. See Meyer, *supra* note 2, at 137 (citing June Carbone & Naomi Cahn, *Which Ties Bind?: Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 WM. & MARY BILL RTS. J. 1011, 1019–20 (2003)).

170. See generally Jacobs, *supra* note 42.

social and legal father within the marriage, and a biological and legal father outside the marriage. No one needs to be the absolute loser in this circumstance.

Removing the traditional concept of intended parent as a determiner and using only the legal definition borne of ART would be beneficial in any birth circumstance. In ART, the biological donors, known or unknown, will have assigned their biological rights to the commissioning parents so that legal parentage would be fixed prior to birth.¹⁷¹ This includes any rights a gestational carrier may have.¹⁷² In a non-ART birth situation, biology would rule, not the relationship between the parents nor the parents' intent.

Using biology first would mean that a parent is entitled to seek a relationship with the child unless that parent affirmatively gives up that right. The right would be surrendered prior to conception in donor cases and at birth (or hopefully soon thereafter) in traditional conception cases. But it also means, most likely, removing the presumption that a woman is incapable of ceding her rights to a child prior to birth, particularly where her role is solely one of gestation. As a rule, giving this right to biological parents also fixes their obligations such that they may only terminate those rights if someone else is willing to undertake the care and custody of the child in question.¹⁷³

Also, while recognizing more than two legal parents is an important step, an obvious concern would be whether traditional notions of intended and intentional parenthood will infuse such a determination with gender bias and heteronormativity or create a hierarchy of rights—much as the hierarchy of rights evolved between mothers and fathers in terms of presumed intent.¹⁷⁴ For example, between a social father, married to a mother at birth, and the biological father, who should have custody rights? Should the marriage trump any custody claim from the biological father in this instance if the presumption is that all three parents share legal rights? The question is not how will it work when everyone is in agreement, but how will it work from a conflict perspective. As David Meyer observed a decade ago, “[a]s law continues to open up new routes to parenthood and discards its traditional insistence upon bright-line entry markers such as adoption,

171. See Purvis, *supra* note 2, at 212; Mary Kate Kearney, *Identifying Sperm and Egg Donors: Opening Pandora's Box*, 13 J.L. & FAM. STUD. 215, 224 (2011).

172. Although some scholars have argued for parental-type rights on behalf of gestational surrogates as well, this Article does not seek to consider whether gestational carriers have a biological claim to a child.

173. To be clear, the author is not advocating for male abortion nor does she intend to engage regarding that subject in this Article.

174. See generally Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 683, 707–08 (2008); Gupta-Kagan, *supra* note 58.

marriage, or childbirth, courts will inevitably be called upon to prioritize the competing values at stake,” arguably even when every party has a legal stake in the outcome.¹⁷⁵ What if there is a best interests challenge? Should some parents, properly recognized, receive fewer rights? For example, should Jason Patric receive fewer rights because he initially chose not to be a parent? Should there be “primary” parents and “secondary” parents? Should persons who simply qualify as intentional parents not be entitled to primary custody without a biological connection or the assignment of those rights to that person by a biological parent?

The question is whether, in opening the door to more than two parents, and to perhaps something less than fully shared rights, we should reconsider the notions of intended and intentional parenthood. The term intended, at its inception, constituted shorthand for who planned to raise this child—it assigned and fixed family at birth as a proxy for paternity, which was not otherwise discernable. But, aside from biology, the concept represented social responsibility. In the absence of a biological certainty, the nuclear family became the next best way to ensure the proper care and custody of children.

Parentage is now assigned with respect to ART because both biology and social responsibility are evident *ab initio*. That same convergence of intended and intentional, once presumed, is actually present, and the biology can be managed in a way that it cannot be managed in traditional conception. Removing traditional notions of intended and intentional parents from the equation helps remove the roadblocks to definitive identity and importantly, provides stability.

Known donors remain a thorny problem in this analysis because the courts have allowed back door access to known donors where a relationship has developed. Thus, intentional parenthood, as a delayed claim, may now be permitted even though the later intent does not match the intent formed at the time of conception. In considering this problem, it is helpful to refer back to open adoption. In open adoption, a mother gives up less than all of her rights. She retains the ability to have contact with the adoptive family and in essence becomes a “known donor.” Theoretically, having affirmatively relinquished her rights, she could never come back and assert parental type rights regardless of the nature of the relationship she shared with her child. Similarly, when open adoption occurs in conjunction with a termination of parental rights case, the parties often agree that some connection and communication remain. In essence, the court permits more than two parents of the child to be recognized: the primary parents who will serve the child’s needs and the

175. Meyer, *supra* note 2, at 136.

birth parents who will remain within the family structure in a limited capacity. Thus, in considering some of the problems created by using known donors, perhaps creating an open adoption type relationship with known donors and requiring judicial recognition of their decision to assign parental rights is necessary to avoid post-birth behaviors creating new rights. Because there is a move to permit recognition of more than two parents, the open adoption concept and the known donor issues may lend themselves to a hybrid type of custody and care that contemplates different bundles of rights depending on a parent's status and intent at the time of conception or birth.

Biology determines if one is a parent. But the law's recognition of parentage determines whether one may exercise the right to care, custody, and control of a child. Thus, potential parents are subject to the method that the state creates to assign rights. At this point, the state requires that they be assigned in a two-parent package as a bundle of rights with little variation.

CONCLUSION

The idea that what two persons intend to accomplish when they engage in procreative sex is knowable is ludicrous. To that extent, presuming parentage based on their expressed intent or their behavior becomes problematic when assigning parental rights. The idea that intention is a fixed notion occurring at only one place at one point in time is also a fallacy. At a time when society required a way to confirm biology and to prescribe social responsibility, intent to parent a child conceived by a woman was presumed based on the fact of her pregnancy and her marriage to a man who was presumed to be the father of the child based on their legal relationship. Because our ability to procreate has moved beyond this two-person heteronormative marital model, our understanding of the use of intent needs to evolve as well. Courts will consider what the parties intended whether they should or not. Courts will consider intent outside of the legal restrictions of what intent means. Thus, regardless of the definitions provided or the accommodations made, intent remains a constant in parentage determinations, despite the fact that the fundamental right, as conceived, simply suggests that one has a right to the care, custody, and control of one's own children and does not require one to affirmatively demonstrate intent to do so. Marriage is no longer a sufficient proxy for intent, and contractual arrangements do not always capture intent sufficiently either.

As new forms of family are considered and the law evolves to match modern needs in parent/child relations, the power of intent in the formation of family should remain a constant consideration such that we

do not carry the outdated notions of family that may be attached to intent as it was first conceived forward into new familial forms.
