

Defining Parenthood

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Introduction

Advances in reproductive medicine require us to rethink concepts previously taken for granted, including the notion of parenthood. On the one hand, it has always been possible to distinguish between the biological aspect of being a parent, or reproduction, on the one hand, and the social component, or rearing, on the other. Adoption and fostering of children are nothing new, and neither are disputes over custody. On the other hand, assisted reproductive technology (ART) compounds the potential for complication. A child can have five different parents: the genetic father, who provides the sperm; the genetic mother, who provides the egg; a surrogate who is not genetically related to the child she carries and bears; and the intended rearing parents who have no biological connection to the child. Indeed, the notion of 'genetic mother' can be even further divided. Using a technique known as egg cell nuclear transfer, the nucleus containing most of the DNA can be taken from one woman and transplanted into an enucleated egg cell from another woman.¹ The new egg cell would have the nuclear DNA from one woman, while its ooplasm, containing mitochondrial DNA, would come from another woman. The resulting child would thus have genetic material from two different women, and thus six contenders for the role of parent. Sometimes this multiplication of parents results in custody disputes, and courts have had to decide who are the 'real' parents.

Surrogate Motherhood Cases²

In the famous 'Baby M' case,³ biological parentage was not at issue. William Stern was the child's biological father, and Mary Beth Whitehead her biological mother. Rather, the issue was whether signing a surrogacy agreement deprived Ms. Whitehead of the status of 'mother', even though she carried and gave birth to her own genetic child. In another well-known case, *Johnson v. Calvert*,⁴ the biology was more complicated because the surrogate, Anna Johnson, gestated an embryo created by the Calverts. Ms. Johnson was the

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gestational mother, but Ms. Calvert was the genetic mother. The California Supreme Court did not rule that one sort of connection is stronger than the other as regards claims to custody. Rather, it held that when there are two mothers, the one 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'.

However, the intended rearing parents might not have either a genetic or a gestational connection to the child. This was so in a widely reported California case, *in re Buzzanca*,⁵ in which the couple had used sperm donation, egg donation, and a surrogate in their attempt to have a child. The Buzzancas ended up in court because John Buzzanca divorced his wife before the child, Jaycee, was born and then refused to pay child support, arguing that the resulting child was not a child of the marriage. The trial court agreed with his biological interpretation and held that Jaycee Buzzanca had *no* legal parents. John Buzzanca did not owe child support because he was not the father. Luanne Buzzanca, who had cared for the child from birth, was a 'temporary custodial person', and would have to adopt her to become her legal mother.

Commenting on the decision, columnist Ellen Goodman writes:

Now, from all reports, the toddler is being lovingly cared for by that temporary custodial person she illegally calls 'mommy'. But as the case goes to appeal, I am trying to imagine how a judge, who is supposed to act in the best interests of the child, could leave a child without any parent at all. How could the same judge rule that the man responsible for a child's creation, had no responsibility for her support?

Common sense, Goodman suggests, tells us that '... John Buzzanca is as responsible for the existence of Jaycee as any man who ever created a child the lo-tech way. Perhaps more so, since he did it so intentionally'.⁶ If this is right – and I think it is – it suggests that being a parent is about more than reproduction in the narrow genetic sense.

The California Appeals Court agreed. It overturned the decision, holding that the intent to parent made John and Luanne the lawful parents of Jaycee. The court wrote, 'Let us get right to the point: Jaycee never would have been born had not Luanne and John both agreed to have a fertilized egg implanted in a surrogate'.⁷ It rejected John Buzzanca's contention that he had no parental responsibility for the child by analogizing the case to one in which a woman is artificially inseminated. 'If a husband who consents to artificial insemination [under California law] . . . is 'treated in law' as the father of the child by virtue of his consent, there is no reason the result should be any different in the case of a married couple who consent to in vitro fertilization by unknown donors and subsequent implantation into a woman who is, as a surrogate, willing to carry the embryo to term for them'.⁸ Luanne Buzzanca was given legal custody of Jaycee, while the matter of child support was remanded.

Lesbian Mothers

In a very recent case, the San Francisco Court of Appeals ruled that the genetic mother of twins born to her lesbian partner has no parental rights because she signed a waiver of parental rights at the time of donating her eggs.⁹ K.M. and E.G. began living together in March 1994 and registered as domestic partners in San Francisco in October 1994. Long before their relationship began, E.G. had been exploring ways to have a child on her own. She underwent 12 rounds of artificial insemination, but did not become pregnant. Attempts at IVF using E.G.'s eggs and donor sperm failed because E.G. was unable to produce enough eggs. At that point, E.G.'s fertility doctor suggested that she might like to try IVF using K.M.'s eggs. E.G. was reluctant to do so because the couple's relationship was still new. Moreover, a mutual friend of theirs was then involved in a child custody dispute with her lesbian partner, something E.G. wanted to avoid. Eventually, however, E.G. overcame her misgivings, and asked K.M. to donate her eggs, provided that K.M. would be a 'real donor' and E.G. would be the only legal mother. The possibility of a future adoption by K.M. was discussed, but the women agreed that this should not happen for at least 5 years when the relationship was proven stable and permanent.

The consent forms K.M. signed explicitly provide that the egg donor must waive any right and relinquish any claim to any offspring resulting from the donated eggs. After meeting with a psychological counsellor, K.M. and E.G. discussed what they would disclose publicly about the parentage of a child formed from K.M.'s donated eggs. They agreed to tell the child eventually that K.M. was the genetic mother, but that E.G. would decide when. They also agreed not to tell other people about K.M.'s role and to reveal only that E.G. was the mother.

In April 1995, K.M. underwent the egg retrieval procedure, her eggs were fertilized with sperm from an anonymous donor, and four of the resulting embryos were implanted in E.G.'s uterus. E.G. gave birth to twin girls on December 7, 1995. Soon afterward, E.G. asked K.M. to marry her and on Christmas Day the couple exchanged rings. For the next 5 years, they all lived as a family unit, with both women caring for and raising the girls.

In 2000, K.M. became insistent that she wanted to adopt the girls, but E.G. had misgivings. They separated in March 2001, and E.G. filed a notice of termination of the domestic partnership. They got back together in July, but in August 2001, E.G. moved to Massachusetts with the girls. In February 2002, K.M. filed a new petition to establish a parental relationship. She also sought joint custody. In response, E.G. filed a motion to quash and dismiss the petition on the ground that K.M. lacked standing to assert parentage.

At trial, K.M. testified that she and E.G. had planned to have children together from the very beginning. She denied that there had been any

agreement that E.G. would be the sole legal mother. She admitted signing the ovum donation consent form, but claimed that she had not understood the legal implications, and treated it as merely a matter of form necessary to proceed with the egg donation. She never intended to relinquish her parental rights, she alleged, and thought that the language of the donor form wouldn't apply to her because she knew the recipient.

The trial court did not buy K.M.'s story. It found that K.M. relinquished her claim to parentage when she knowingly, voluntarily, and intelligently signed the ovum donor consent form. Further, the court found substantial evidence that the parties had agreed that E.G. would be the sole legal parent. Accordingly, the court ruled that K.M. lacked standing and granted E.G.'s motion to quash and dismiss the petition.

The Court of Appeals upheld the trial court's decision, although it disagreed with its ruling that K.M. lacked standing to bring the action to determine parentage under the Uniform Parentage Act (UPA). As the genetic mother, K.M. qualified as an 'interested party' for purposes of obtaining a judicial declaration of her status as a parent. However, K.M.'s claim to be a legal parent was rejected. Following *Johnson*, the court said that when there are two biological mothers, the legal mother is the one who 'from the outset intended to be the child's mother.' In subsequent cases, appellate courts have construed the *Johnson* test to mean that the intent to be the parent is the 'tie-breaker' when two women have equal claims.¹⁰

The court explicitly declined to consider the parental role played by K.M., saying that the appellate courts have consistently held that the domestic partner of a child's natural mother does not qualify as a parent under the UPA despite the parental role the partner played.¹¹ Nor was the court willing to consider the interests of the children, who had established a loving relationship with K.M. It noted that in *Johnson*, the Supreme Court expressly rejected the assertion that parentage can be based on the best interests of the child: 'such an approach raises the repugnant specter of governmental interference in matters implicating our most fundamental notions of privacy, and confuses concepts of parentage and custody. Logically, the determination of parentage must precede, and should not be dictated by, eventual custody decisions.'¹² Basing parentage on a best interests standard would put at risk the rights of any natural parent who entered into a relationship and encouraged the formation of parental bonds between the children and the new partner.

Thus, *K.M. v. E.G.* reaffirms the approach taken in *Johnson*. Ordinarily, the 'natural' parent is the legal parent, but where there are two biological mothers, it is the initial intent to parent that matters, not the parental role, not the best interests of the child. The appellate court also rejected the assumption of the trial court that under California law there could be two legal mothers. 'As we understand *Johnson*, although genetic consanguinity gives a woman a col-

orable claim of maternity, the biological connection does not ripen into parentage unless the evidence establishes that the genetic mother intended to raise the child as her own.¹³ But what if both women had intended to raise the children together? The court did not address this issue, because this was not the situation in this case. It is virtually certain, however, that such a case will arise, if one is not already making its way through the courts. It seems likely that in a case where there are two biological mothers, who intended to raise the children together, the California courts will have to recognize both as legal parents.

The *Baby M*, *Johnson*, *Buzzanca*, and *K.M.* cases all involved collaborative reproduction¹⁴ in which one of the contracting parties had a change of mind after the initial agreement was made, and either sought to establish or, in the case of Mr. Buzzanca, to disavow, parental rights and responsibilities after the child's birth. However, disputes over parentage and custody are not occasioned solely by contractual relations and a subsequent change of mind; sometimes medical error leads to competing parental claims.¹⁵

Switched Embryos

*Perry-Rogers v. Fasano*¹⁶ was a case in which medical error led to implanting the wrong embryos into a woman, causing an "accidental surrogacy". In April 1998, two couples began an IVF programme. Embryos created by Deborah Perry-Rogers and Robert Rogers were mistakenly implanted in the uterus of Donna Fasano, along with embryos created by Donna and Richard Fasano. On May 28, 1998 both couples were notified of the mistake and of the need for DNA and amniocentesis tests. The Rogerses attempted to contact the Fasanos, but the Fasanos did not respond. Nor did Mrs. Fasano undergo any testing to find out the genetic identity of the babies she was carrying. However, the truth became obvious on December 29, 1998, when she gave birth to two male infants, one white and one black. In April 1999, DNA testing was conducted, and the results established that the Rogerses were the genetic parents of the black child, now known as Akeil Richard Rogers. However, according to Ms. Perry-Rogers, the Fasanos agreed to relinquish custody of Akeil only upon the execution of a written statement, which entitled the Fasanos to future visitation with Akeil. Ms. Perry-Rogers stated that during the period between Akeil's birth on December 29, 1998 and May 10, 1999, the Fasanos permitted her only two brief visits with Akeil, and that she felt compelled to sign the agreement in order to gain custody of her son. The visitation agreement provided for visits one full weekend per month, one weekend day each month, one week each summer, and alternating holidays. The agreement also contained a liquidated damages clause, providing that a violation of the Fasanos' visitation rights under the agreement would entitle them to \$200,000.

The legal situation became unbelievably complex, with numerous applications, orders, and counter-orders. The upshot is that the Rogerses were named Akeil's legal and biological parents, and given sole and exclusive custody, while the Fasanos were given visitation with Akeil every other weekend. The Rogerses then challenged the visitation order, which led the Fasanos to appeal the order giving the Rogerses custody of the child.

The Rogerses maintained that the Fasanos had no basis for a legal claim to Akeil, because they were 'genetic strangers' to him. The court rejected their argument, saying, 'In recognition of current reproductive technology, the term "genetic stranger" alone can no longer be enough to end a discussion of this issue. Additional considerations may be relevant for an initial threshold analysis of who is, or may be, a "parent".' The court declined to accept the 'broad premise' that in *every* case the genetic parents would necessarily win against a gestational surrogate who claimed parental rights. It acknowledged that there might be cases in which there could be more than one 'natural mother'; for example, a lesbian couple who had agreed from the outset to create and raise a child together. The Fasanos had not sought custody, but if they had, the court noted parenthetically, application of the 'intent' analysis employed in *Johnson v. Calvert* would, in its view, require that custody be awarded to the Rogerses. 'It was they who purposefully arranged for their genetic material to be taken and used in order to attempt to create their own child, whom they intended to rear.'¹⁷ The court's decision in favor of the Rogerses, however, was not based on an 'intent' analysis, but rather on the fact that the Rogerses' embryo was implanted in the 'gestational mother' by mistake, and the Fasanos knew of the error not long after it occurred. Therefore:

. . . the happenstance of their nominal parenthood over plaintiffs' child should have been treated as a mistake to be corrected as soon as possible, *before development of a parental relationship*. It bears more similarity to a mix-up at the time of a hospital's discharge of two newborn infants, which should simply be corrected at once, than to one where a gestational mother has arguably the same rights to claim parentage as the genetic mother.¹⁸

The court held that the Fasanos were not entitled to a full evidentiary "best interests" hearing to determine whether a psychological bond exists that should not be abruptly severed. Any bonding on the part of Akeil to his gestational mother and her family 'was the direct result of defendants' failure to take timely action upon being informed of the clinic's admitted error. Defendants cannot be permitted to purposefully act in such a way as to create a bond, and then rely upon it for their assertion of rights to which they would not otherwise be entitled.'¹⁹

There is little doubt that the Fasanos behaved badly. First they ignored the attempts of the Rogerses to contact them, probably because they did not want to acknowledge that any mistake had been made. Next, when the mistake could

not be ignored, given the race of Akeil, the Fasanos extracted from Deborah Perry-Rogers, in exchange for custody of her own child, a visitation agreement that no court would have issued or upheld. Small wonder that the Rogerses wanted the Fasanos out of their family and their lives! In light of the Fasanos' shoddy treatment of the Rogerses, the decision to deny them visitation rights seems eminently reasonable. However, the analogy on which the court based its decision – a mix-up of newborns in the hospital – is deeply flawed. A woman who learns that she has taken the wrong baby home can give it back to its rightful parents before a 'parental relationship' develops. What exactly was Donna Fasano supposed to have done when she learned she was carrying someone else's baby? Obviously, she could not return the mistakenly implanted embryo. Should she have promised the Rogerses that she would not form a gestational bond with their son, and that she would give the baby back at birth? Admittedly, this is what surrogates are supposed to do (and not always successfully, as the Baby M case dramatically shows), but at least surrogates can decide whether they would be able to carry a child for nine months and never regard it as their own before they contract to gestate someone else's child for money. Donna Fasano did not make that decision. She carried the Rogerses' child, at additional risk to her own health and that of her own biological child, without any compensation, because she had no other realistic choice. It seems most unfair to blame her for not correcting the mistake as soon as she learned of it.

Courts make rulings based on the facts of the case, rather than on hypothetical situations. Nevertheless, we may wonder how the court would have decided the issue of visitation, if the Fasanos had behaved honourably. Suppose that they had not ignored the attempts of the Rogerses to contact them, had undergone prenatal genetic testing, and had acknowledged the mistake from the outset. Suppose further that Mrs. Fasano was willing to correct the mistake by relinquishing the Rogers baby to his parents upon his birth. But then suppose that the experience of gestation and birth had a profound and unexpected psychological effect on Mrs. Fasano. She might be unable to think of Akeil as just 'someone else's child', but as her own baby and the twin brother of her other child. In this imaginary scenario, Mrs. Fasano does nothing blameworthy. In fact, our moral opinion of her is likely to be higher than our opinion of a woman who finds it easy to give up a child she has carried and birthed. If the Fasanos had done nothing wrong, would they have been entitled to visitation rights, or perhaps even joint custody?

All the above cases make it clear that courts are increasingly required to make Solomonic decisions regarding the parental rights and responsibilities of those involved in artificial reproduction. The *Buzzanca* court issued a plea to the Legislature 'to sort out the parent rights and responsibilities of those involved in artificial reproduction', saying:

No matter what one thinks of artificial insemination, traditional and gestational surrogacy (in all its permutations), and – as now appears in the not-too-distant future, cloning and even gene splicing – courts are still going to be faced with the problem of determining legal parentage. A child cannot be ignored. Even if all means of artificial reproduction were outlawed with draconian criminal penalties visited on the doctors and parties involved, courts will still be called upon to decide who the lawful parents really are and who – other than the taxpayers – is obligated to provide maintenance and support for the child. These cases will not go away.²⁰

In deciding who the lawful parents really are, courts must ask themselves, What makes someone a parent? As one writer has put it, ‘What exactly makes a child “ours”? The DNA we contribute or the time and love? The womb or the sweat equity?’²¹

Bases of Parenthood

Mary Shanley extracts four major positions concerning the question of what should give someone a claim to be recognized as a legal parent.²²

1. Genetic link between the adult and offspring. ‘... this position would make it reasonable to give parental rights to a biological lesbian mother, while denying them to her partner, and to allow gamete donors to seek legal recognition of their parenthood.’²³

This standard makes biology the most important factor, but biological connection is not identical with genetic connection, as the switched embryo and gestational surrogate cases make clear. What if two women have a claim to be the biological mothers? This leads to the next criterion:

2. Contract or ‘intent-based parenthood’.²⁴ ‘[T]his position would make it possible for a caregiver who was genetically unrelated to a child to assume parental status by agreement or contract.’²⁵
3. Social role or parenting. This position is likely to favour the parental claims of adoptive parents over biological parents, and to recognize the parental claims of non-biological care givers like lesbian co-mothers.²⁶
4. Best interest of the child. This position focuses not on the adults’ rights, but the child’s needs. This gives it a moral significance that is missing in the other three viewpoints. As Mary Shanley explains it:

The strength of the best interest standard is that it places the child at the center of the analysis and allows (indeed invites) a particularized ruling in the light of the specific facts of a given child’s situation. It distinguishes the grievances adults have with one another from their respective abilities to provide for and nurture a child. The best interest standard directs attention not to adults’ self-ownership, intent, or action, but to how best to provide a particular child with physical sustenance and psychological nurture.²⁷

The best interests of the child has great intuitive appeal since it moves away from the presumption that children are property, to be parceled out to their rightful owners. However, a best interest standard has its own difficulties. How do we determine where the best interests of children lie? Should we assume that, in the absence of neglect or abuse, children are better off with a biological parent? Or is it more important that children have two parents rather than one? How important is it that their parents be married? Clearly, our views about what is in the best interests of children are going to be affected by, perhaps determined by, a host of moral, social, and political views.

While such questions are often raised in the context of artificial reproduction, they can occur in a variety of situations. One situation that has required courts to think long and hard about the components of parenthood are cases in which unwed fathers challenge adoptions to which they have not consented. In thinking about the puzzles raised by ART, it may be helpful to examine these cases, and the principles courts have developed to balance the claims of biology and rearing.

Unwed Father Cases

The cases known as ‘unwed father cases’ or ‘thwarted father cases’ provide a vehicle for understanding the different components of parenthood. We can begin with one of the more famous ones, the case of Baby Girl Clausen,²⁸ or Baby Jessica, as the media dubbed her.

Baby Jessica

The U.S. nation watched in dismay as ‘Baby Jessica’ was dragged, sobbing, from the arms of the woman she knew as ‘Mommy’, and returned to her biological parents. The story began in Iowa in 1990 when Cara Clausen, 28 and unmarried, discovered she was pregnant. Cara had just broken up with her boyfriend, Daniel Schmidt, and started dating Scott Seefeldt, so it was Scott’s name she put on the birth certificate when her daughter was born.²⁹ Two days after giving birth on February 8, 1991, Cara waived her parental rights, as did Scott, allowing Roberta and Jan DeBoer, a Michigan couple, who had learned about Cara through an Iowa friend, to take custody of Jessica and begin the process of adopting her. Six days after the birth, Cara regretted her decision and sought to regain custody of her daughter.³⁰ She began by informing Dan Schmidt, whom she had never told she was pregnant, that she believed he was the father of her child. She went to a support-group meeting of Concerned United Birthparents and heard other mothers’ stories of the sorrow they felt at giving up their babies. On March 6, 1991, when Jessica was not yet one month

old, Cara filed a request to revoke her consent to custody, confessing to the court that she had lied about the identity of the biological father. Shortly thereafter, Daniel filed an affidavit of paternity, and a petition to vacate the termination of paternal rights and to intervene in the adoption. An Iowa court voided the entire adoption, and the DeBoers were ordered to turn Jessica over. Because Daniel's consent to the adoption had never been obtained, his parental rights could not be terminated absent a showing of abandonment or unfitness, neither of which was established.

The DeBoers decided to fight for Jessica. They argued that Dan was not a fit parent pointing out that he had had two other children out of wedlock whom he had failed to support and with whom he had only sporadic contact. The Iowa Supreme Court agreed with the DeBoers that they were undoubtedly the better parents, and Jessica would be better off with them.³¹ Nevertheless, the court declined to take a 'best interests' approach and ordered custody of the baby to be transferred to Daniel:

As tempting as it is to resolve this highly emotional issue with one's heart, we do not have the unbridled discretion of a Solomon. Ours is a system of law, and adoptions are solely creatures of statute. As the district court noted, without established procedures to guide courts in such matters, they would 'be engaged in uncontrolled social engineering.' This is not permitted under our law; 'courts are not free to take children from parents simply by deciding another home appears more advantageous.' *In re Burney*, 259 N.W.2d 322, 324 (Iowa 1977).³²

The DeBoers refused to comply and instead filed a petition in their home state, Michigan, asking that the Michigan court refuse to give full faith and credit to the Iowa decree, since the Iowa court failed to make a 'best interest' determination regarding custody between the biological father and the prospective adoptive parents with whom child had lived almost since birth. By the time the case was over, it had been through five courts, including the United States Supreme Court, Dan and Cara had married and had another child, and Jessica was two-and-a-half years old.

An overwhelming majority of the public believed the courts erred in returning Jessica to the Schmidts, taking her from the only parents she had ever known. Harvard law professor Elizabeth Bartholet, author of *Family Bonds: Adoption and the Politics of Parenting*, and an adoptive mother herself, considers it 'outrageous' that the only issue the courts considered was whether Dan Schmidt's rights were appropriately terminated.³³ In an op-ed piece entitled, 'Blood Parents vs. Real Parents', she wrote, 'Dan Schmidt, who hasn't been part of Jessica's life since the sexual act that resulted in her conception over three years ago, is termed the "real" or "natural" parent and given an absolute right to claim his genetic product.'³⁴

Bartholet regards the DeBoers as the real parents: they were the ones who cared for, loved, and raised Jessica. She regards Dan Schmidt as an interloper

into that family unit, a mere 'sperm impregnator',³⁵ someone who had no significant connection to Jessica. Bartholet's dismissal of genetic connection as a basis for parenthood is shared by many adoptive parents. As one of them put it to me, 'Why should being a parent depend on who screwed whom?' Yet surely genetic connection counts for something. It certainly counts for 'financial fatherhood'. States uniformly require men not married to child's mother to pay child support so long as they're proved to be the biological father. The obligation to pay child support is not alleviated by the fact that the woman misled the man into thinking that she was using birth control.³⁶ In fact, even being the victim of statutory rape does not alleviate child support obligations. The Kansas Supreme Court upheld a child support order on a 13-year-old boy who, at the age of 12, had a sexual relationship with his 17-year-old babysitter.³⁷ Other courts have held the same, saying that 'public policy strongly favours legitimization and protection of children' and holding that 'wrongful conduct of one of the parents does not in any way alter the parental obligation to support the child.'³⁸ Biological fatherhood thus imposes parental obligations, but is it a basis for parental rights?

Common Law and Unwed Fathers

Under common law, the father of a child was identified by his relation to the child's mother. If she was his wife, the child was "his" and he exercised exclusive custodial authority. If she was not his wife, the child was "filius nullius," a child of no one.

Because unwed fathers had no responsibility for, or rights to, non-marital children, the common law gave all the decision-making power about adoption to the child's mother, which some feminists think is the way it ought to be. However, common law was hardly feminist. It was profoundly patriarchal, and designed to protect men's authority over their wives and marital children, while protecting them from the claims of non-marital children. The husband's authority over his wife at common law was far-reaching. Her legal personality was subsumed in that of her husband. She couldn't enter into contracts or be sued or engage in legal transactions without her husband. He owned outright her moveable property and had control of (though he could not alienate) her real estate. 'So complete was the husband's custodial authority that during his lifetime he had the power to convey his parental rights to a third person without the mother's consent, and could name someone other than the mother to be the child's guardian after his death.'³⁹ Common law did not protect the interests of women or children, and ironically, in the modern era, it has not protected the interests of men either, insofar as they have attempted to have a say in the raising of their children when they have not married their mothers.

In part, the common law conception of fatherhood is a result of the difficulty

in past eras of ascertaining paternity. As the saying goes, 'Mama's baby, papa's maybe.' Today, of course, the biological father can be determined with near certainty. The question, then, is why have the courts not based paternal rights on genes alone, as they have tended to based paternal responsibilities? The answer, I think, is a recognition that genes alone do not, and should not, determine legal paternity. At stake are more than the interests or rights of biological fathers, but also the interests of children, women, and existing families.

The legal status of unwed father began to change in 1972, when in a series of cases, the Supreme Court held that while biological fatherhood by itself does not confer parental rights, biological connection does give unwed fathers the opportunity to establish a parental role.

The first case in which the Supreme Court considered custodial rights of unwed fathers was *Stanley v. Illinois*.⁴⁰ Mr. Stanley had lived with his three biological children and their mother intermittently for 18 years. When she died, Illinois declared the children wards of the state and placed them with court-appointed guardians without hearing as to Stanley's fitness as a parent. Stanley protested, arguing that Illinois law denied him equal protection of the laws since neither unwed mothers, nor married fathers or mothers, could be deprived of custody of their children unless shown to be unfit. Illinois argued that Stanley's fitness was irrelevant because an unwed father was not a 'parent'; an unwed biological father was presumed unfit because he had not married the mother.

The Supreme Court rejected Illinois's argument. It held that the failure to provide a hearing on parental fitness violated the Equal Protection Clause of the Fourteenth Amendment because it treated Stanley differently from married fathers and unmarried mothers, and it violated the Due Process Clause because it deprived Stanley of a fundamental liberty interest (that of a man in the children he has sired and raised) without a hearing.⁴¹

Biological fatherhood vs. biological motherhood

Chief Justice Burger held that Stanley's right to equal protection was not violated because there are relevant distinctions between biological fatherhood and biological motherhood. Not only are fathers harder to identify but more importantly the biological link between mother and child has social significance. 'The biological role of the mother in carrying and nursing an infant creates stronger bonds between her and the child than the bonds resulting from the male's often casual encounter.'⁴² In other words, gestational connection makes for a stronger claim to parental rights than genetics alone. Why should this be the case? One answer is "sweat equity": the mother's biological role involves a lot more work than the father's, because it includes nine months of gestation, labour, and birth. Another answer alludes to the prenatal bonding between mother and child. Not only does separating the child from its mother impose

emotional harms on the woman, but it also deprives the child of a mother it has already come to know. Recent research indicates that the foetus, late in gestation, is aware of its mother's heartbeat and respiration, recognizes her voice, and shortly after birth has memorized her smell. A third answer, which in some ways combines the first two, considers gestation as a kind of rearing, which includes both work and psychological bonds.

Burger's argument that states may justifiably deprive unwed fathers of the right to consent to adoption, because fatherhood is different from motherhood, is not based only on the fact that mothers gestate. In addition, he argued that most unwed mothers exhibit concern for their offspring either permanently or at least until safely placed for adoption, while unwed fathers rarely burden either the mother or the child with their attentions or loyalties. 'Centuries of human experience buttress this view of the realities of human conditions and suggest that unwed mothers of illegitimate children are generally more dependable protectors of their children than are unwed fathers.'⁴³ Burger rejected the majority's characterization of Stanley as a good father, noting that after the death of the children's mother, Stanley transferred the care of the children to another couple. He made no efforts to be recognized as the father until the State became aware that no adult had any legal obligation for the support of the children. At that time, Stanley made himself known, but only, according to Burger, because he feared losing welfare payments if others were named guardians of the children.

As in many of these cases, there are different versions of the stories, and the differences make a difference. But even if Burger was right that Stanley was not, in fact, a good father, that is no reason to deny Stanley the chance to prove otherwise, still less is it a reason to assume that all unmarried fathers are unfit. The State presumed that Peter Stanley was an unfit father, simply because he was not married to the children's mother. That presumption, I maintain, is unfair not only to Stanley and other unwed fathers, but also to their children.

Both *Stanley* and *Baby Jessica* can be faulted for an exclusive focus on the rights of the biological father; both left out a crucial element, namely, the welfare of the children. On the face of it, depriving children of the man they consider to be their father, and putting them into foster care, hardly can be in their interest. Their welfare is as important, if not more important, than whether Stanley was denied equal protection.

Are Rights the Problem?

A number of commentators argue that 'rights talk' distorts the issues in these kinds of cases.⁴⁴ Some object to rights talk generally,⁴⁵ especially when notions like family and parenthood are involved.⁴⁶ These critics argue that a rights-based conception is grounded in notions of exchange and individual rights and implicitly encourages parental possessiveness and self-centredness. Some do

not reject rights altogether.⁴⁷ They acknowledge that appeals to rights can provide effective tools for protecting vulnerable individuals, including children. Nevertheless, they remain suspicious of the ways in which rights talk can distort matters. Bartlett states, 'Legal disputes over parenthood are an example of how the presentation of claims in terms of individual rights may force controversies into a framework that misstates the harm to be avoided and undermines the values we should promote.'⁴⁸

In my view, this is an over-simplification. The problem is not framing the issue in terms of competing individual rights, but rather that the rights of children are too often given short shrift. There are a number of reasons for this. Historically, of course, children were treated virtually as property. Moreover, constitutional rights, such as equal protection and due process, have very little to do with the rights that children have to loving parents and a stable family. Constrained to analyze cases in these terms, it is little wonder that custody decisions often have nothing to say about the impact on the child. Rejecting this approach, one commentator writes:

Children are not chattels in which adults have rights. Children 'belong' to no one but themselves. Parental rights doctrines should be seen as a way of protecting the child's right to parental relationships free from unwarranted intrusion by the state or third parties. To the extent that a recognition of parental rights would be adverse to the child's interests, the parental rights must give way to the child's best interests.⁴⁹

An important element of a best interests analysis would be the rearing role a biological parent has played, since children are likely to be psychologically damaged if deprived of someone who has played an important role in their upbringing. In cases after *Stanley*, the Court began to acknowledge the importance of rearing, drawing distinctions between unwed biological fathers who were involved in raising the children and those who were not.

The relevance of rearing to paternal rights

In *Quilloin v. Walcott*,⁵⁰ the Court determined that an adoption could take place without an unwed father's consent where he had 'never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child',⁵¹ did not now seek custody, and where adoption did no more than legally recognize the existing living situation of the child and a family unit already in existence. Like *Quilloin*, *Lehr v. Robertson*⁵² also concerned an unwed father's attempt to block adoption of his child by a stepfather. Jessica's mother, Lorraine, married Richard Robertson a few months after Jessica's birth. When Jessica was two years old, Richard sought to adopt her. Lehr, who had never lived with Lorraine and Jessica, and who was not named as the father on the birth certificate, filed a paternity petition shortly after the

adoption proceeding commenced. He challenged the granting of the adoption, claiming that he had a liberty interest in a relationship with Jessica and that the State's failure to provide him notice of her pending adoption violated equal protection because it required the consent of the biological mother, but not the biological father for adoption.

The Court rejected Lehr's claim. 'In doing so, the Court set forth its clearest explication of fatherhood. "Fatherhood" depends on the existence of an actual social relationship with the child and particularly on the man's assumption of parental responsibilities.'⁵³ According to the Court, when an unwed father demonstrates a full commitment to the responsibilities of parenthood by participating in the rearing of his child, his interest in personal contact with the child acquires substantial protection under the Due Process clause. At that point, he acts as a father toward his children. The biological connection by itself does not merit constitutional protection, but merely provides the man with a unique 'opportunity' to develop a relationship with his child. 'The advent of this "biology plus" formula led many to conclude that the Court had ushered in a new era recognizing the rights of fathers based on the parent-child relationship.'⁵⁴ Nevertheless, it is important to recognize that the 'biology plus' formula focused on the father's right to the child, not on what would be best for the child.

Protecting Existing Families

The most recent unwed father case decided by the Supreme Court is *Michael H. v. Gerald D.*⁵⁵ The novel factor in this case is that the child, Victoria, was conceived through an adulterous relationship between Michael H. and Carole, who was married to Gerald D. Carole continued to live with Gerald throughout the pregnancy and for five months after the child's birth and Gerald believed the child was his. During the next three years, although Gerald and Carole remained married, she and the child lived sporadically with Gerald, Michael, and others. When Victoria was three years old, Carole became reconciled with Gerald. They had two more children together. Both Gerald and Carole opposed Michael's petition to establish his paternity. Although Michael engaged in some social parenting and at times held himself out as a parent, Gerald appears to have been the predominant social parent.

Scalia's plurality opinion views the case as pitting a marital father's rights against those of an 'adulterous natural father', who traditionally has never merited rights. Some commentators object to Scalia's analysis as overly moralistic and conservative. However, it can be argued that children should be protected from third parties whose intervention threatens the integrity of their families. Once again, the problem with the analysis is not Scalia's defence of the marital family against an outsider, but rather that the opinion does not focus

on, or even consider, Victoria's interests. The decision stressed Gerald's status as exclusive rights-bearer according to history and tradition, rather than the importance of his parental role to the family and to Victoria. Barbara Woodhouse comments:

If the law were to adopt a child's perspective, however, the question would not be whether each of the daddies in Michael H. has the right to Victoria's company, but whether two daddies are better than one. . . . If parental rights flow from children's needs, as I have argued, then the right of the biological father is defeated not by the right of the marital father but by the fact that the child already has a father who, not unimportantly, is the mother's mate and the father of the child's siblings. The child not only does not need but might be harmed by acquiring a competing father.⁵⁶

Although I agree with Woodhouse that the focus should be on the child's interests, this case exposes some of the difficulties with a best-interests standard. Woodhouse suggests that a child may be harmed by having two daddies. In contrast, Alta Charo suggests that perhaps 'you can never have too many parents to love you.'⁵⁷ Who is right?

The Best Interests of the Child

The 'best interests of the child' standard is clearly an improvement over the out-dated patriarchal, possessive model of children as property. Nevertheless, the best-interests approach is not without problems. It is often criticized as vague, difficult to apply, and reflective of social prejudices (although it can equally be used to refute a socially conservative approach).⁵⁸ An illustration of the potential pitfalls of the best interests approach is given in recent case in Memphis, Tennessee. In May 2004, a judge terminated the parental rights of a Chinese couple, Shaoqiang and Qin Luo He, saying they failed to establish a meaningful relationship with their daughter, now 5, and that their home is unhealthy and unsafe. The Hes have spent four years trying to get their daughter, Anna Mae, back from foster parents who, they say, tricked them into giving up custody when she was a baby. The Hes are convinced that the wealth and community connections of Jerry and Louise Baker stacked the deck against them. "We are just shocked", Mr. He said. "We did not abandon our child." They will appeal, he said, adding "We are convinced that in Memphis, Tenn., justice does not come easy, especially for minorities and immigrants."⁵⁹

The story began in 1998 when Mr. He, who was studying for a graduate degree in economics at the University of Memphis, was accused by a fellow student of sexual assault. He was cleared of the charge, but lost his scholarship and his stipend, the couple's sole means of support. His student visa was revoked and the INS began deportation proceedings. Overwhelmed, Mr. He

turned to Mid-South Christian Services when Anna Mae was born in January 1999. They put the Hes in touch with the Bakers, who were experienced foster parents, and who agreed to take in Anna Mae while the Hes got back on their feet.

Three months later, the Hes signed documents that described the arrangement as temporary. What the Hes did not know is that regaining custody required the consent of the Bakers and a judge. 'Agency and court employees and a Chinese language translator have testified that no one explained the complex nature of the agreement. The couple, they said, was not advised to hire a lawyer.'⁶⁰ Until the child's second birthday, the Hes visited her every week. Tensions increased after Anna Mae's first birthday when the Hes asked a judge for custody. Though they had found work at a Chinese restaurant, the request was denied on the ground that they lacked financial stability. On her second birthday, the Bakers would not let the Hes take her out for a family portrait, and called the police. The Hes say the police ordered them to stay away from the house or face arrest. Fearful of further trouble with the law, Mr. He says he complied. What he did not know was that, under Tennessee law, a four-month lapse in visits can be construed as abandonment, grounds for terminating the Hes' parental rights.

The Bakers want the custody decision to be based on the welfare of 5-year-old Anna May He, who has not seen her biological parents in three years as a result of a court order. They fear that the Hes will return Anna Mae to China. '“What kind of quality of life is the child going to have in China: asked Larry Parris, a lawyer for the Bakers. “Common sense dictates that to take a child out of an environment where she's firmly attached and settled is the ultimate devastation.”'⁶¹

The custody battle is in many ways a struggle over cultural values. Many Americans might find it difficult to believe that the Hes could care about their daughter, yet give her to another couple to raise, even temporarily. Yet it is not uncommon in China for relatives to raise a child until she is three or four, so that the parents can work. Mrs. Baker thinks that if the Hes truly loved their daughter, they would leave her with the Bakers, and not take to a country where girls have inferior status, and where she would live 'in poverty with unstable parents in a dirty house.'⁶² From a Chinese perspective, Anna Mae's life in China would be a good one, as she would benefit from living with an adoring extended family. A Chinese woman who has been attending the trial, comments, 'Some Americans think they can provide better environment for children because of money, but Chinese think love and enduring care is more important.'⁶³

The story of Anna Mae is evidence that a best interests standard could be used against poor and working class people, as well as members of a racial minority. However, that is not an argument against the best interests standard,

but against its misuse. Surely, love and caring *are* more important than material goods when determining a child's best interests. But even when best interests is based on the right values, it remains extremely difficult to determine. For example, how should we weigh the value of remaining with one's biological or 'birth' family against remaining with parents with whom one has become psychologically attached? On the one hand, there is considerable evidence that adopted children often seek information about or contact with their birth families, suggesting that birth families do matter. On the other hand, the ties between adopted children and their parents can be just as strong as those between biological parents and children. How can we possibly know what will be best for the child? According to news reports, Baby Jessica – now Anna Jacqueline Schmidt – has made a happy adjustment to her new life. So, is she better off now, and how can we know?

Or consider a young unmarried woman who becomes pregnant. She wants what's best for her child. Should she attempt to raise him by herself, or give him up for adoption? People have extremely strong views on the topic, but I do not think that the evidence is decisive, one way or the other. What I'm suggesting is that there may not be a 'best interests of the child', or at least not a discoverable one. If the child stays with his mother, he'll become one sort of person, with one set of interests. If he is adopted, he'll very likely become another, with entirely different interests. We cannot decide which choice will serve *his* best interests, as the interests themselves will change, depending on the family and the environment in which he grows up.

But if we cannot know what's in the child's best interests, at least we can try to minimize the harm to children. Prolonged custody battles, such as occurred in the Baby Jessica case, clearly are harmful to children. For this, the DeBoers must take much of the responsibility. It was the DeBoers who appealed each decision, dragging out the legal proceedings until Jessica was two-and-a-half. I think it is ironic that the basis of their claim that the Michigan court should not uphold the decision of the Iowa courts was that those courts did not consider the best interests of the child. Can their decision to continue the fight for Jessica, given its shaky legal basis, be reasonably seen as in her best interests?

The Baby Jessica case provokes allusions to the biblical story of King Solomon who had to decide which of two women was a baby's real mother. As a child, I never understood why his offer to cut the baby in half demonstrated his wisdom; why would even a phony mother want half a dead baby? Yet the story has relevance for us because it shows how adults, bent on parenthood, can put their own needs first, to the detriment of the child. Psychologist Gerald Koocher says that Jessica became a pawn. "The sad thing is that each set of adults has their own agenda. The DeBoers want and need a child, and she's it. And the Schmidts, she's their flesh and blood, and they want to hold on to her."⁶⁴ This may not be entirely fair to the DeBoers, who undoubtedly fell in

love with Jessica (or 'bonded', to use the psychological terminology) as soon as they took her home. She was not just 'a child' to them, even at the beginning. Nevertheless, for her sake, they should have returned her to her biological parents when she was a tiny infant, before she became attached to them.

Forman agrees, correctly, I think, 'Admittedly, the Baby Jessica case was a disaster, but it was caused less by the decision to protect an unwed father's rights than by procedural problems with the case.'⁶⁵ These procedural problems would be greatly reduced if the law on adoption did not vary from state to state. This would eliminate the temptation to 'forum-shop', as the DeBoers did. Another welcome change would be a reasonable waiting period before an adoption is final, as is the law in the United Kingdom. I suggest one month, on the ground that a woman who is still post-partum should not be asked to make an irrevocable decision about giving up her child.

The Uniform Adoption Act requires, as a general rule, that both parents must consent to their child's adoption. However, it distinguishes the men who manifest parenting behaviour and have therefore earned the right to withhold consent from a proposed adoption from the men who fail to perform parental duties and may therefore be denied the right to veto a proposed adoption.⁶⁶ The Act pays special attention to 'thwarted fathers' who have been prevented by the misdeeds of others from functioning as parents. A thwarted father who wants to block a proposed adoption of a child must prove a compelling reason for not having performed parental duties. Even if this is the case, he will not succeed if there is clear and convincing evidence that it would be detrimental to the child to deny the adoption. The Act makes decisions about adoption and custody focus on the needs and welfare of the child, not simply on the rights of adults.

Conclusion

Are there lessons from the unwed father cases for understanding parenthood in the context of artificial reproduction? Clearly there are important differences. For example, the notion of intent, so central to sorting out parenthood in the collaborative reproduction cases plays virtually no role in the adoption cases. Nevertheless, a theme common to both situations is the importance of parenting, of being a parent, that is, caring for and loving a child. However, the importance of parenting is not that it entitles a person to rights in the child. As Janet Leach Richards reminds us, 'Children are not chattels in which adults have rights.' Rather, parenting is important because of its crucial importance in the life of a child.

The potential dangers of a best interests approach, so poignantly illustrated by the case of Anna Mae He, can be avoided if best interests is understood in

terms of psychological well-being, not material wealth. If the Bakers genuinely had Anna Mae's best interests at heart, they would have done what they promised to do: care for the child until her parents were able to care for her themselves. In fact, there is evidence that the Bakers never intended to relinquish Anna Mae. Their foster parent application to the Mid-South Christian Services agency mentions their desire to adopt a child and raise him or her in a Christian home.⁶⁷ The judge's ruling was not a best interests approach, but a perversion of that approach.

The thwarted father cases are among the most troubling. The presumption that children belong with, and are better off with, their natural, biological parents is a reasonable one. Moreover, the fathers in these cases were undeniably wronged. Through no fault of their own they were deprived of the opportunity to play a parental role. However, if we focus on the child's best interests, then we will not take a child from the only parents she has ever known in order to do justice to her biological father. Whatever benefit to the child would come from knowing her biological parents, it is outweighed by the psychological damage resulting from taking from the people she regards as her parents. Thus, it is inconsistent with a child-centred approach.

The San Francisco Court of Appeals based its decision in *K.M. v. E.G.* entirely on the agreement between the two women that E.G. would be the sole legal mother, and on the egg donor form K.M. signed, waiving all parental rights. The court acknowledged that the children would be harmed by being deprived of someone who had been a part of their family all their lives, but said that the children's welfare could be considered only *after* parenthood is determined. K.M.'s genetic connection to the twins might have given her a claim to be a parent, if she had intended from the outset to be a rearing parent. Since she had waived her parental rights, and agreed that only E.G. was the legal mother, K.M.'s claim to be their mother was rejected. Therefore, the best interests of the children were irrelevant and could not be considered.

The test of intent-based parenthood, established in *Johnson* and followed in *K.M.*, is a reasonable way of protecting those who contract with egg donors and surrogates from subsequent claims to offspring. However, this case was not comparable to the normal case of egg donation, where the donor has *only* a genetic connection and plays no parental role. K.M. was not just an egg donor; she was E.G.'s lover, a family member, and a co-parent. It is hardly surprising that K.M. came to regard as her own children the twins she helped to create and to raise. She can hardly be blamed for trying to stop E.G. from taking them away. The psychological counsellor they saw should have foreseen that this arrangement was a disaster waiting to happen, and have strongly advised them against it.

The refusal to consider K.M. a parent stems from the fact that this was a lesbian couple. If the couple had been heterosexual, the man who fathered the

twins (whether coitally or by artificial insemination), and who participated in their rearing, would certainly have been recognized as the twins' legal father, no matter what their agreement or what forms he signed. And if the children's father were married to E.G., there would be no absolutely question that he was the natural, biological, and legal father. Though E.G. asked K.M. to marry her, and they exchanged rings, the marriage was merely symbolic, without legal force. If they were legally married, K.M. would have had the same rights as a member of any other divorced couple. This is another reason in favour of same-sex marriage, as it would protect the interests of children when their parents separate.

In the normal case, where the gamete donor plays no parental role, intent is the correct basis for determining parenthood. But once a biological parent is given the opportunity to play a parental role, that role, and its impact on the children, cannot be ignored. As Alta Charo puts it:

Perhaps it is time to take a great leap in family law . . . Once a parent enters into a child's life, whether by virtue of genes, gestation, or declaration, there is an unbreakable bond of psychology and history between the two . . . In an age when courts have been forced to manage the untidy families created by divorce and remarriage it is simply not enough to argue that it will be difficult to organize a regime of family law that accommodates the permanency of both contractual and biological (both genetic and gestational) ties. And having admitted already that step-parents and grandparents are indeed real family members, what legitimate obstacle remains to accepting the adults who enter family arrangements via group marriage or homosexual marriage? Surely we can be creative enough to create a new category, somewhere between custodial parent and legal stranger, that captures these relationships.⁶⁸

It may be objected that too many parents will be confusing and stressful for children. But I suspect that children are more likely to be damaged by the feeling that they have been abandoned by those who have played a parental role than by having multiple individuals who wish to remain in their lives, in some form or other. The insistence that children can have only one mother and one father is not necessarily in their best interests. However, this is an empirical question, and each case needs to be looked at on the merits. Woodhouse is probably right that Victoria's interests are not served by the intrusion of her mother's ex-lover into their family.

Winston Churchill once said that 'democracy is the worst form of Government, except all those other forms that have been tried from time to time.'⁶⁹ Given the difficulties and potential pitfalls, the same might be said of a best interest approach to determining parenthood. The correct approach is not to give up on a best-interests approach, but to try to minimize its pitfalls. In the words of the *Buzzanca* court: 'A child cannot be ignored.'

Notes

¹ Denise Grady (1998). A different technique, which also results in children receiving genes from two different women, transplants ooplasm from donor eggs into the eggs of women whose infertility is due to ooplasmic defects. J.A. Barritt et al. (2001). The technique was developed by Dr. Jamie Grifo in the United States, but none of his patients became pregnant. Dr. Grifo gave his findings to doctors in China after regulations imposed by the Food and Drug Administration in 2001 made it too difficult to continue the research in the United States. In 2003 Chinese doctors were able to make an infertile woman pregnant with the technique, although the pregnancy ended when the woman went into premature labour and the twin foetuses she was carrying died. Denise Grady (2003).

² Some writers object to the term "surrogate motherhood" on the ground that "referring to the women who have carried a foetus to term and delivered a child as *surrogates* slights their status as mothers, and prejudices the discussion of disputes concerning parental status . . ." James Lindemann Nelson and Hilde Lindemann Nelson (2003). I take the point but use the term "surrogate mother" because it is more familiar than "contract birthgiver".

³ *In the Matter of Baby M.*, 109 N.J. 396 (1988).

⁴ *Johnson v. Calvert*, 851 P. 2d 776 (1993).

⁵ *In re Buzzanca*, 61 Cal. App. 4th, 72 Cl. Rptr. 2d 280.

⁶ Ellen Goodman (1997).

⁷ *In re Buzzanca*, 61 Cal. App. 4th 1410, 1412 (1998).

⁸ *Ibid.*, 1418.

⁹ *K.M. v. E.G.*, A101754, No. CV 020777 (Cal. Ct. Appl, 1st App. Dist., 5/10/04).

¹⁰ Citing *Robert B. v. Susan B.*, 109 Cal. App. 4th, at pp. 1115–1116; see also *In re Marriage of Buzzanca* (1998) 61 Cal. App. 4th 1410, 1421–1422.

¹¹ *Nancy S.*, 228 Cal. App. 3d at p. 836.

¹² *Johnson*, 5 Cal. 4th at p. 93, fn. 10.

¹³ *K.M. v. E.G.*, *supra*, p. 17, footnote 9.

¹⁴ The term "collaborative reproduction" was coined by John Robertson, who defines it this way: ' . . . those situations in which someone other than one's partner provides the gametes or gestation necessary for reproduction, such as occurs with sperm, egg, or embryo donation, or surrogate motherhood.' (John A. Robertson 1994, 119)

¹⁵ See *Leeds Teaching Hospital NHS Trust v. A and others*, [2003] EWHC 259 (QB), [2003] 1 FLR 1091, [2003] 1 FCR 599.

¹⁶ *Perry-Rogers v. Fasano*, 715 N.Y.S.2d 19 (N.Y. App. Div. 2000).

¹⁷ *Perry-Rogers v. Fasano*, 276 A.D.2d 67 at 73.

¹⁸ *Ibid.*, 75.

¹⁹ *Ibid.*, 76.

²⁰ *Ibid.*, 1428–29.

²¹ Ellen Goodman (1998).

²² Mary Lyndon Shanley (2001).

²³ *Ibid.*, 129–130.

²⁴ See, for example, Marjorie Maguire Shultz (1990).

²⁵ Shanley (2001, 130).

²⁶ See, for example, *V.C. v. M.J.B.*, 163 N.J. 200; 748 A.2d 539 (2000). 'Once a third party has been determined to be a psychological parent to a child, he or she stands in parity with the legal parent, and custody and visitation issues are to be determined on a best interests standard . . .'

²⁷ Shanley (2001, 135–136).

²⁸ *In the Interest of B.G.C.*, 496 N.W.2d 239.

²⁹ Nancy Gibbs (1993).

³⁰ Deborah L. Forman (1994).

³¹ See note 28, above.

³² *Ibid.*, 4.

³³ Gibbs, (1993, 49).

³⁴ Elizabeth Bartholet (1993).

³⁵ "Sperm impregnator" was the term used by an adoptive couple to refer to the birth father in *Terraszas v. Riggs*, 612 S.W.2d 461, 466 (Tenn. Ct. App. 1980).

³⁶ An Albuquerque man objected to paying child support after his ex-girlfriend became pregnant because, according to him, she purposely stopped taking birth control pills without telling him. He sued her for breach of contract, fraud, and conversion of property: his sperm. The New Mexico Supreme Court declined to hear the case, giving Kellie Smith her third and final legal victory. See Scott Sandlin (2001).

³⁷ *State ex rel. Hermesmann v. Seyer*, 847 P.2d 1273 (Kan. 1993).

³⁸ *Mercer County Dep't of Social Servs. Ex re. Imogene T. v. Alf M.*, 589 N.Y.S. 2d 288, 289 (Fam. Ct. 1992).

³⁹ Mary Shanley (1995, 68).

⁴⁰ *Stanley v. Illinois*, 405 U.S. 645 (1972).

⁴¹ *Ibid.* 657–58. See also Mary L. Shanley (1995).

⁴² *Stanley* at 665–66 (Burger, C.J., dissenting).

⁴³ *Ibid.*

⁴⁴ See, for example, Wendy Anton Fitzgerald (1994); and Martha Minow (1990).

⁴⁵ Mary Ann Glendon (1991).

⁴⁶ See Thomas A. Murray (1996).

⁴⁷ Katharine T. Bartlett (1988). See also Minow (1990, 303–304).

⁴⁸ Bartlett (1988, 295–296).

⁴⁹ Janet Leach Richards (1994, 1271–72).

⁵⁰ *Quilloin v. Walcott*, 434 U.S. 246 (1978).

⁵¹ *Ibid.*, 256.

⁵² *Lehr v. Robertson*, 463 U.S. 248 (1983).

⁵³ Forman (1994, 975).

⁵⁴ *Ibid.*

⁵⁵ *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

⁵⁶ Woodhouse, (1993, 1858).

⁵⁷ R. Alta Charo, (1992–3, 23).

⁵⁸ See Charo (1992–3). Charo argues that the refusal to recognize non-traditional families, and the fact that multiple adults sometimes play important roles in children's lives, can be harmful to children.

⁵⁹ Ariel Hart, "Chinese Parents Not Tricked, Judge Says in Custody Case," *New York Times*, May 13, 2004, A16.

⁶⁰ Andrew Jacobs (2004).

⁶¹ *Ibid.*

⁶² Hart (2004).

⁶³ Jacobs (2004).

⁶⁴ Don Terry (1993).

⁶⁵ Forman, (1994, 970).

⁶⁶ UAA, p. 41.

⁶⁷ *Ibid.*

⁶⁸ Charo, (1992–3, 22).

⁶⁹ *Hansard* 11 Nov. 1947, col. 206.

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