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Just Because *You* Don't Want Kids Doesn't Mean *I* Can't Have Them: How Clarifying Definitions of Parent and Procreate Can Prevent the Indefinite Storage of Cryopreserved Embryos

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Just Because *You* Don't Want Kids Doesn't Mean *I* Can't Have Them : How Clarifying Definitions of Parent and Procreate Can Prevent the Indefinite Storage of Cryopreserved Embryos

Linda S. Anderson*

"Making the decision to have a child is momentous. It is to decide forever to have your heart go walking around outside your body." – Elizabeth Stone[1]

"Parenthood is a lot easier to get into than to get out of." – Bruce Lanskey[2]

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[1] Author and English professor at Fordham University. http://thinkexist.com/quote/elizabeth_stone

[2] Children's Poet and author

As the quotes above suggest, becoming a parent is a significant milestone in a person's life. Once made, it is a decision that generally cannot be reversed. Until recently, creating a family was a rather straightforward process. A man and a woman committed to each other, usually in some sort of ceremony, the couple established a household of their own, engaged in sexual intercourse, and welcomed offspring into the family. Some couples never had children; others had many. The decision to have children or not was not entirely within the control of the couple. Though there were some exceptions, most families had two parents – one male, one female, and even when death or divorce disrupted the family unit, the concept of the "traditional family" remained the norm.

Today, family-building can occur in a variety of ways. In the last fifty years or so, family structure has changed.[3] Family structure is being re-conceptualized. Families now consist of adopted children, step-parents and step-children, single parents, blended families, same-sex couples, and combinations of all of these. In addition, in many situations grandparents are raising their grandchildren, children with the same mother may have several siblings who each have different fathers, and children with the same father may have different mothers. In conjunction with these changes, and at times contributing to the changes, couples (heterosexual, transsexual, and homosexual) and single individuals are utilizing assisted reproductive technology (ART) to build families. Not only can the traditional married couple, who in the past would simply remain childless, utilize these services, but others who might be considered situationally infertile, because they were single or in a same-sex relationship and therefore did not have the ability to combine the necessary gametes, can make use of ART techniques.

The use of ART complicates the identification of legal parents. Because of their infertility, many couples who use ART to create their families must use donor gametes[4], even if one member of the couple contributes one of the gametes. Additionally, some couples use donor gametes for both egg and sperm, and others use cryopreserved embryos[5], created by other couples, to build their family. The addition of other individuals who provide some or all of the building material leads to confusion about who should be considered the legal parent. Additionally, regardless of who contributes the genetic building blocks, some people also use a gestational surrogate[6], adding even more potential parents to the mix. These variations from the two-parent model make it challenging

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[3] Center for Disease Control and Prevention (CDC), National Center for Health Statistics, *National Survey for Family Growth* http://www.cdc.gov/nchs/nsfg/abc_list_a.htm#marriage (accessed Aug. 31, 2009). According to the most recent survey by the National Center for Health Statistics 69.6% of women and 58.9% of men believe it is appropriate for an unmarried woman to have a child. In fact, in 2002, the last time the survey was completed, 42.2% of women who had children had given birth to at least one child when the woman was not married.

[4] Gamete is defined as "a mature sexual reproductive cell, as a sperm or egg, that unites with another cell to form a new organism." http://dictionary.reference.com/browse/gamete (accessed February 21, 2010).

[5] Cryopreserved embryos are those embryos, created in a lab setting, that have been frozen for possible future use. When they are to be used, they are thawed, examined, and if viable, placed in the uterus of a woman who will gestate them. *See generally* Judith F. Daar, *Reproductive Technologies and the Law*, 570 (Matthew Bender & Company, Inc. 2006).

[6] A gestational surrogate refers to a woman who carries a child who is not genetically related. *See* Usha Rengachary Smerdon, *Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India*, 29 Cumb. L. Rev. 15, 17 (2008-2009).

to identify the legal parent or parents of some children born through ART. For instance, consider this possibility: A single man decided to have a child. He is unmarried, not involved in a committed relationship, and not interested in finding a partner, whether male or female. However, this man desperately wanted to raise a child, and he has the financial resources to provide a healthy, stable home. The man engages the services of a fertility clinic, which locates an egg donor and a separate gestational surrogate. The egg donor relinquishes any parental rights she might have, and the clinic successfully creates several embryos, using donor eggs and the man's sperm. Several embryos are implanted in the gestational surrogate, who eventually becomes pregnant with twins. Shortly before the twins are born the gestational surrogate and her husband decide they do not want to surrender the babies to the intended father, despite their initial agreement and contractual obligation to do so. This is where things get complicated – and potentially different – depending on the jurisdiction. In virtually all states, unless a valid surrogacy agreement exists, a woman who gives birth is presumed to be the mother, and, if she is married, her husband is the presumed father.[7] However, many states that have statutes regulating surrogacy contracts suspend this presumption when a proper surrogacy agreement exists.[8] But what happens when a surrogacy

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[7] *E.g.* The Uniform Parentage Act (UPA) §204 provides that:

(a) A man is presumed to be the father of a child if:

(1) he and the mother of the child are married to each other and the child is born during the marriage;

(2) he and the mother of the child were married to each other and the child is born within 300 days after the marriage is terminated by death, annulment, declaration of invalidity, or divorce [, or after a decree of separation];

(3) before the birth of the child, he and the mother of the child married each other in apparent compliance with law, even if the attempted marriage is or could be declared invalid, and the child is born during the invalid marriage or within 300 days after its termination by death, annulment, declaration of invalidity, or divorce [, or after a decree of separation];

(4) after the birth of the child, he and the mother of the child married each other in apparent compliance with law, whether or not the marriage is or could be declared invalid, and he voluntarily asserted his paternity of the child, and:

(A) the assertion is in a record filed with [state agency maintaining birth records];

(B) he agreed to be and is named as the child's father on the child's birth certificate; or

(C) he promised in a record to support the child as his own; or

(5) for the first two years of the child's life, he resided in the same household with the child and openly held out the child as his own.

(b) A presumption of paternity established under this section may be rebutted only by an adjudication under [Article] 6.

This UPA of 2000 has been adopted by seven states: Delaware, North Dakota, Oklahoma, Texas, Utah, Washington, and Wyoming. Unif.Parentage Act (2000) Refs & Ann. (Westlaw Current through 2008 Annual Meeting of the National Conference of Commissioners on Uniform State Laws). A similar provision in the Uniform Parentage Act of 1973 (Section 4) was adopted, and remains in effect, in thirteen additional states: California, Colorado, Hawaii, Illinois, Kansas, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, Ohio, and Rhode Island. Unif. Parentage Act (1973) Refs & Ann. (Current through 2008 Annual Meeting of the National Conference of Commissioners on Uniform State Laws). Other states have similar provisions, but have not adopted the language of either of the uniform acts.

[8] The UPA (2000) includes the following language related to parentage when a surrogate agreement is involved: (a) Upon birth of a child to a gestational mother, the intended parents shall file notice with the court that a child has been born to the gestational mother within 300 days after assisted reproduction. Thereupon, the court shall issue an order:

(1) confirming that the intended parents are the parents of the child;

(2) if necessary, ordering that the child be surrendered to the intended parents; and

agreement exists, but it does not comply with the statutory requirements? For instance, in Florida, only married couples can enter surrogacy agreements,[9] so even if the agreement was identical to one involving a married couple, our single intended father would not have a legal surrogacy agreement. Should the courts ignore the fact that our single intended father was the person who initiated the entire process of creating the children, and is genetically related to them? This is the type of dilemma courts face because the law is not keeping pace with the advances in technology and changing values of those using the technology.

Determining when one becomes a parent is essential to determining who will be the legal parents. As courts and legislatures attempt to address the changes in relationships and processes involved with becoming a parent, they often struggle. When determining who a legal parent is, courts seem to include the term "parent" within their definition of "legal parent," yet that key term – parent – is never actually defined. When deciding disputes between various parties with some potential interest in the gametic material that is used to create potential children, or between those who have combined their genetic material to create a pre-embryo, courts balance competing interests[10]. At times they characterize these as the conflict between an interest in becoming a parent and an interest in avoiding becoming a parent. At other times the court characterizes this balance as the tension between the right to procreate and the right to avoid procreating. Regardless of how the interests are labeled, now that there are multiple ways to build families, it is critical to define what the terms "parent" and "procreate" actually mean. Doing so will: (1) allow courts and legislatures to determine the rights of those involved in ART situations in a manner that more accurately reflects the intent of the parties involved; (2) allow courts and legislatures to relieve objecting progenitors of parental responsibility while still allowing others to use cryopreserved embryos for family building; and (3) eliminate some of the uncertainty and confusion that accompanies these new methods of family-building. Now that science has provided multiple ways to become a parent, we need to know more precisely how that occurs and what rights and obligations are, and are not, associated with this designation.

This article will discuss the need to clarify and redefine the terms "parent" and "procreate" when used in connection with assisted reproductive technologies. Part I will examine the manner in which a parent is currently identified, and will describe the way that determination has evolved as a result of technology and changing social pressures. Since decisions about parentage in ART situations often consider the parties' right to procreate, Part II will describe the existing

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> (3) directing the [agency maintaining birth records] to issue a birth certificate naming the intended parents as parents of the child.
> (b) If the parentage of a child born to a gestational mother is alleged not to be the result of assisted reproduction, the court shall order genetic testing to determine the parentage of the child.
> (c) If the intended parents fail to file notice required under subsection (a), the gestational mother or the appropriate State agency may file notice with the court that a child has been born to the gestational mother within 300 days after assisted reproduction. Upon proof of a court order issued pursuant to Section 803 validating the gestational agreement, the court shall order the intended parents are the parents of the child and are financially responsible for the child.

UPA (2000) §807 (Westlaw, Current through 2008 Annual Meeting of the National Conference of Commissioners on Uniform State Laws)

[9] Fla. Stat. Ann. 742.15 (1) (Westlaw, Current through Chapter 2009-270 (End)).

[10] *See e.g., Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1982).

understanding of what this right entails. Using existing cases involving disputes about parental determinations and rights when ART is used, Part III will explain why a more precise definition of these terms is necessary. Part IV points out the reason using the current definition of parent and procreate does not make sense in situations that involve ART, and Part V suggests more precise definitions for these terms when they are used in ART situations. Finally, Part VI demonstrates how the application of more precise definitions of parent and procreate can address the social pressures that parental designations relieve, as well as allow for more predictability and clarity for those who wish to make use of assisted reproductive techniques.

I. Current Understanding of "Parent"

Parenthood has traditionally been connected to marital status, genetics, and legal presumptions. In the past several decades courts have been willing to entertain the idea that people who cannot qualify as parents through these tests might also be entitled to some sort of parental interests.[11] In order to understand how the term should be redefined, it is important to understand its current meaning.

A. Genetics Alone is Not Enough

Recently, when resolving custody disputes involving non-traditional families, courts have begun to recognize varying ways of becoming a parent, acknowledging that some parental rights and obligations can arise even without a genetic or gestational connection. Aspects of parenting have been separated from the whole, with those aspects of parenting that involve relationships with children or support for their needs often recognized even without a genetic or legal tie. Psychological parents, or "de facto" parents are frequently recognized as important enough to be provided at least visitation rights and support obligations.[12] In fact, some legislatures are recognizing the same thing. In Delaware, the legislature recently added an additional method to establish a parent-child relationship by adding a statutory provision establishing requirements which, when demonstrated, allow the court to recognize a de facto parent.[13] Additionally, the

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[11] *See,* Linda S. Anderson, *Protecting Parent-Child Relationships: Determining Parental Rights of Same-Sex Parents Consistently Despite Varying Recognition of Their Relationship*, 5 Pierce L. Rev. 1, 11 (2006). *See also*, Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 Buff. L.Rev. 341, 351 (2002).

[12] *See* Anderson, *supra* n. 11 at 8, 10; Jacobs, *supra* n. 11 at 351.

[13] Del. Code Ann. tit. 13 §8-201(c) (Westlaw current through 77 Laws 2009, chs. 1 – 198. Revisions to 2009 Acts made by the Delaware Code Revisors were unavailable at time of publication.) The relevant language states**:**

> (a) The mother-child relationship is established between a woman and a child by:
>
> . . .
>
> (4) A determination by the court that the woman *is a de facto parent* of the child.
>
> (b) The father-child relationship is established between a man and a child by:
>
> . . .
>
> (6) A determination by the court that the man *is a de facto parent* of the child.
>
> (c) *De facto parent status* is established if the Family Court determines that the de facto parent:

District of Columbia recently amended its code to allow domestic partners – regardless of gender – to be presumed a parent when the other partner has a child.[14] Montana child custody statutes allow nonparents who have established a parent-child relationship to seek a parental interest in the child.[15] Recent application of the Montana custody provisions to a situation where the nonparent asserting a parental interest was the former same-sex partner of the genetic parent demonstrates that parental interests do not depend on genetics or gestation. In *Kulstead v. Manciani* the Montana Supreme Court upheld the constitutionality of the statute and allowed the former same-sex partner who had co-parented the children for twelve years to be granted a parental interest without affecting the parental interest of the original adoptive parent.[16]

Several United States Supreme Court cases have also made it clear that genetics alone does not create a parent. In *Michael H. v. Gerald D.,* a plurality of the United States Supreme Court held that a California statute that declared genetic relationships to be irrelevant to paternity decisions was constitutional.[17] Specifically, the Court recognized that the genetic link between a father and his offspring created a potential for a relationship between the two, but when the unmarried father's opportunity to build such a relationship conflicted with a similar opportunity of the mother's

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> (1) Has had the support and consent of the child's parent or parents who fostered the formation and establishment of a parent-like relationship between the child and the de facto parent;
> (2) Has exercised parental responsibility for the child as that term is defined in § 1101 of this title; and
> (3) Has acted in a parental role for a length of time sufficient to have established a bonded and dependent relationship with the child that is parental in nature.
> (emphasis added)

[14] 2009 D.C. Stat. Law 18-33. This legislation amends D.C. Code §16-907 to read

> (c) A child born to parents in a domestic partnership shall be treated for all legal purposes as a child born in wedlock. For the purposes of this subsection, the term "domestic partnership" shall have the same meaning as provided in § 32-701(4), but shall exclude a domestic partnership where a domestic partner is the parent, grandparent, sibling, child, grandchild, niece, nephew, aunt, or uncle of a woman who gives birth to a child.

[15] Mont. Code Ann. §40-4-211(4)(b)(Westlaw current through all 2009 legislation). This provision allows a parenting plan proceeding to be instituted "by a person other than a parent if the person has established a child-parent relationship with the child, by filing a petition for parenting in the county in which the child resides or is found."

[16] ____ P.3d _____, 2009 WL 3179441, ¶ 91 (Mont. Oct. 6, 2009) Similar progress has been made in Texas and Oregon. In *In re M.K.S-V*, the Texas Court of Appeals granted standing to the same-sex partner of a biological mother, allowing her to petition for a conservatorship, even though standing was based on provisions of the Texas Family Code that considered the child's principal residence. ___ S.W.3d __, 2009 WL 4263820 (Tex. App. Dec. 1, 2009). Similarly, in *Shineovich and Kemp*, 214 P.3d 29, 39 (Or. App. 2009)(cert. denied), the Oregon Court of Appeals declared legislation that granted parentage to a husband of a woman who gave birth, regardless of whether the man was biologically capable of fathering a child, unconstitutional when applied to the same-sex partner of a similarly situated woman. The court remedied the situation by extending the coverage of the legislative presumption to same-sex couples. *Id.* at 40.

[17] 491 U.S. 110, 120, 124, 129 (1989) (plurality) (involving a dispute between a genetic father who had acknowledged the child as his own and the husband of the child's mother). The California paternity statute created a presumption of paternity in favor of the mother's husband. Only the husband or wife could challenge the presumption, and only within two years of the child's birth. *See* Linda S. Anderson, *Adding Players to the Game: Parentage Determinations When Assisted Reproductive Technology is Used to Create Families,* 62 Ark. L.Rev. 29 (2009).

husband, the state could constitutionally give preference to the husband to preserve the marital and family relationships.[18]

The Court expressed a desire to use parental behaviors, rather than just genetics, to determine whether a father had parental status in a series of cases beginning with *Stanley v. Illinois*.[19] This was the first of several cases dealing with the potential adoption of children by a mother's husband, over the unwed father's objections. Though at the time *Stanley* was decided unwed fathers did not have any recognized rights,[20] the Court granted custody of three children to the father after their mother's death because Stanley had fulfilled all of the responsibilities that a husband would have, except for marrying the mother. He had supported the children, lived with them, cared for them and their mother, and had a biological connection to the children.[21] Six years later, in *Quilloin v. Walcott,* the Court's emphasis on the interactions and assumption of parental roles became even more apparent when it refused to grant parental status to a biological father who had not been involved with his child prior to the dispute over his adoption.[22] One year later, an additional case fell factually in the middle of *Stanley* and *Quilloin*, further refining the Court's emphasis on behavior instead of genetics. In *Caban v. Mohammed*,[23] the father had lived with the mother and his children, though was not doing so any longer, had maintained a relationship with them, and had provided financial support. The Court decided these behaviors were enough to qualify as a parent.[24] These cases demonstrate that the Court was rewarding the behavior of acting like a parent – maintaining a relationship, and supporting the children, both financially and emotionally, regardless of whether married to the mother or not. Without these behaviors, genetic tie or not, a father had no parental rights or obligations.

The insignificance of genetic ties absent any sort of parental behaviors or relationships became more explicit in *Lehr v. Robertson.*[25] In this adoption dispute, the Court made its views explicit when it found New York's statutory scheme for adoption did not violate a genetic father's constitutional rights when it failed to allow him to contest the adoption of his child. [26] Addressing the constitutional issues, the Court focused on the social and emotional connections between a man and the child's mother and between the man and the child.[27] After recognizing that a mother's parental relationship is clear from the fact of giving birth,[28] the Court noted that "[t]he validity of the father's parental claims must be gauged by other measures. By tradition, the primary measure

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[18] *Id.* at 129.
[19] 405 U.S. 645 (1972).
[20] *Id.* at 650. Under Illinois law the state had to prove that married parents and unwed mothers were unfit parents before their children could be removed in a neglect proceeding, but unwed fathers were presumed unfit, so had no right to prevent the termination of their parental status unless they could prove it was in the best interest of the child for them to remain as a parent.
[21] *Id.* at 651-652, 658.
[22] 434 U.S. 236, 255-56 (1978).
[23] 441 U.S. 380 (1979)
[24] *Id.* at 393.
[25] 463 U.S. 248
[26] *Id.* at 268-79.
[27] *Id* at 262.
[28] Note that the Court was not addressing any type of situation where the incidents of motherhood are split among more than one person.

has been the legitimate familial relationship he creates with the child by marriage with the mother."[29] The fact that Lehr was a genetic father of the child was only a part of the Court's analysis and ultimate decision to deny him parental rights or obligations. Lehr did not have parental rights because he had not done anything to establish a relationship.[30] In New York, a putative father could register with the state to establish paternity.[31] Additionally, marrying the child's mother before the child was six months old, being adjudicated the father by the court, or being named on the child's birth certificate could have helped establish his parental status, yet he had taken none of these steps.[32] The result of *Lehr* and the earlier cases on which it's analysis is based, is a "biology-plus" analysis of paternity.[33] According to Professor Melanie Jacobs, a prolific scholar in the area of parentage determinations, "[t]he cases also demonstrate the inherent paradox in predicating paternity determinations on biology alone, without the father demonstrating any commitment to the child or intent to parent."[34]

B. History of genetic parenthood

Using genetics to identify legal parents is actually a relatively new phenomenon. Accurate and reliable genetic testing has only been available for the last 25 years.[35] Prior to the availability of DNA testing, the legal presumptions regarding parentage confirmed that children of a married couple were genetically related to that couple, or, in some cases, created the legal fiction that the children were genetically related to the couple. According to family law scholar Professor Katharine K. Baker, maintaining an easily determined two-parent family situation serves both the state's interests, and the genetic parents' interests.[36] The state's interest in biological connections between parent and child arose with the advent of social welfare programs. In order to avoid government support for children in poverty, who were often children with only one easily identifiable parent - the mother - federal child support legislation allowed minors to sue their

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[29] *Lehr*, 463 U.S. at 261, n. 16 (1983) (quoting *Caban v. Mohammed,* 441 U.S. 380, 397 (1979) (J. Stewart dissent)).
[30] *Id.* at 268.
[31] *Id.* at 250-251.
[32] *Id.*
[33] Melanie B. Jacobs, *My Two Dads: Disaggregating Biological and Social Paternity*, 38 Ariz. St. L. J. 809, 831-32 (Fall 2006). For a full discussion of how the concept of biology and "biology-plus" are related to the fiscal responsibilities of the state, see 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 (Fall 2004).
[34] Jacobs, *supra* n. 33 at 832.
[35] In 1984 Sir Alec Jeffreys, a noted genetic researcher at the University of Leicester (England), developed the ability to use DNA to identify individuals and their relationships to others. The Royal Society, *Sir Alec Jeffreys FRS - DNA fingerprinting,* http://royalsociety.org/page.asp?id=1523 (accesses 8/31/2009). *See also*, DNA Diagnostics Center, *1980s - DNA Testing Using RFLP Technique,* http://www.dnacenter.com/science-technology/dna-history-1980.html (accessed 8/27/2009). DNA testing for paternity was first done in the mid 1980s using the RFLP technique. RFLP stands for restriction fragment length polymorphism, and was the first genetic test using DNA.
[36] *See* Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 Georgia Law Review 649, 660 (Spring 2008). Though Professor Baker uses the term biological parent, I prefer genetic parent, as this allows the distinction between a parent who provides the gametic material (genetic parent) with the mother who carries and delivers the child (gestational parent.) Since both involve biology, using the more precise terms creates less opportunity for confusion.

biological fathers for child support. This focused the determination of paternity on genetics. [37] The state has an interest in establishing genetic parentage[38] because it can then shift any obligation to support the child to the genetic parent ,[39] but if the child is being supported by two parents (and not the state), the courts often dismiss the genetic connection.[40] In doing so, though, the state adheres to the genetic concept of two parents, even when faced with the opportunity to name more than two.[41] According to Baker, "a liberal state prefers a norm that keeps legal parental disputes to a minimum while ensuring access to sufficient resources for the child."[42] Baker goes on to suggest that "[b]y minimizing the number of people who can claim parental rights, while also ensuring that there are at least two potential sources of support for a child, [relying on genetics] serves the state's interest."[43]

The state's interest in bionormativity is not tied to biology as much as the privacy and simplicity that it provides. By relying on biology to determine parentage, the state does not have to make the initial determination – most biological parents accept the designation of parent, and the financial and emotional burdens that accompany that designation. This allows the state to avoid having to evaluate a person's ability to parent from the outset. By using biology, only two parents are named, which cuts down on the need to address competing claims to parenthood. Relying on biology allows the state to avoid the issue as much as possible. Biology provides the answer, so the state does not have to.[44] This reliance on a biological model may be helpful to the state under most circumstances, but it is not helpful in situations involving ART.

C. Gestational parenthood

Current statutes that attempt to identify parents, especially fathers, create a presumption that the woman who gives birth is a mother, and is therefore a parent. At least one court has found that gestation is an important part in the determination of who is a parent. For example, in *In re C.K.G.*, the Tennessee Supreme Court was asked to identify a child's mother when the gestational mother had carried triplets created by her boyfriend's sperm and donated eggs.[45] The unmarried couple had originally intended to raise the resulting children as their own, but once their relationship ended, the father of the children claimed the gestational mother was only a surrogate and should

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[37] *See Id.* at 660.

[38] At the time the state began to connect welfare programs to identification of parents, the only real question involved the identity of the genetic father.

[39] *Id*. at 672.

[40] *Id.* at 674. *See e.g. Turner v. Whisted*, 607 A.2d 935 (Md. Ct. App. 1992) In *Turner,* the Court of Appeals of Maryland applied the state statute related to the presumption of paternity to deny a putative father the right to request a blood test despite the fact that the putative father had been in a relationship with the mother prior to her marriage and she acknowledged the child as his. *Id*. at 937. After determining that the presumption statute was applicable, the court determined that the trial court should have looked at the child's best interests to determine whether the putative father's request for blood tests to establish his paternity were appropriate. *Id*. at 940.

[41] Baker, *supra* n. 36 at 675.

[42] *Id.*

[43] *Id.* at 676.

[44] *Id.*

[45] 173 S.W.3d 714, 720 (Tenn. 2005).

not have parental rights.[46] The court rejected the genetic tests established by the Tennessee adoption and parentage statutes[47] and declined to adopt either the intent test established by the California court in *Johnson v. Johnson*[48] or the genetic test established in *Belsito v. Clark*[49] by Ohio.[50]

The court went on to look at the situation from a genetic, an intent, and a gestational point of view.[51] Though the woman had not contributed genetic material, her involvement in the procreation process was significant enough that genetics alone could not be the controlling factor.[52] Because the couple's intent at the outset clearly indicated they would each consider the other a parent and Tennessee precedent supported the use of intent in parenting decisions,[53] the court also took this intent into consideration as it resolved the case.[54] Noting that the woman who wanted to be considered a parent in this case had also gestated the triplets, the court recognized that gestation has long been a determining factor in identifying a child's mother.[55] The court also found the lack of dispute between competing maternity interests significant, noting that this dispute was only between the gestator and the genetic father.[56] In essence, if the gestator of the triplets was not considered the mother, both potential mothers would have waived their rights to the children.[57] Consequently, based on an evaluation of all the circumstances of the situation, the Tennessee court determined that the gestational mother was the legal mother of the triplets.[58]

D. Rights and obligations of parenthood

What rights and obligations are people trying to obtain or avoid? As the Supreme Court noted in *Stanley v. Illinois,* there is an important difference between a legal custodian and a parent.[59] Parents generally have the right to raise their child as they see fit, to make decisions on behalf of the child, and to be free from state interference.[60] In addition, parents have the responsibility to provide for the health, education and welfare of their children, and failure to do so can result in neglect

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[46] *Id*.

[47] *Id.* at 723.

[48] 857 P.2d 776,782 (Cal. 1993)(looking to the parties' intent to procreate and raise the child as their own to identify the legal parents).

[49] 644 N.E.2d 760, 762 (Ohio Com. Pl. 1994)(using genetics to address the legal status of the genetic contributors when the gestational surrogate was a sibling of the genetic mother).

[50] 173 S.W.3d at 725.

51. *Id.* at 727-28.

52. *In re C.K.G.*, 173 S.W.3d at 727-28.

[53] *See* Davis v. Davis, 842 S.W.2d 588, 604 (Tenn. 1992) (addressing control of cryo-preserved embryos that had not yet been implanted, and allowing the progenitor's intent to be the basis of the decision).

[54] *In re C.K.G.,* 173 S.W.3d at 728.

[55] *Id*. at 729.

[56] *See id.* at 730.

[57] *See id.*

[58] *Id*.

[59] 405 U.S. 645, 648 (1972)

[60] *Troxel v. Granville,* 530 U.S. 57, 68-69 (2000). See also, Lehr v. Robertson, 463 U.S. 248, 257-58 (1983)(listing parental rights identified by various decisions of the Supreme Court).

proceedings.[61] These rights and responsibilities are afforded to all legal parents and adoptive parents. Others, who may have a strong parent-like relationship with the child may be subject to interference from the state or others who are legal or adoptive parents.[62] This freedom from interference is what many who may not easily qualify as legal parents seek, and the responsibility to provide for children is often what those who wish to avoid parenthood attempt to avoid.

E. When does one become a parent?

In the normal course of events, one becomes a parent when a child is born. Traditional sexual intercourse allows one to procreate – to beget a child, to generate offspring.[63] Adoption laws create an exception and allow one to become a parent by completing a legal process that is approved by a court.[64] Between the time of conception and the birth, progenitors are prospective parents. Likewise, between the initial application and the final court order, adoptive parents are also prospective parents. Until the living child is born, or the court authorizes the status change, the parties are not considered legal parents. Cases that have addressed ART situations seem to assume that progenitors will automatically be considered legal parents, despite the fact that the cryopreserved embryos may never be used, or may not be viable when they are used. Consequently, it is possible that no child may ever be born as a result of the cryopreserved embryos,[65] or the child that is born may be born to another couple who will be considered the legal parents, similar to adoption situations. Therefore, assuming that the progenitors will be the ultimate parents, and determining their rights and obligations based upon that assumption, creates a potentially false premise. It seems that the courts that use this analysis assume that a genetic connection between a progenitor and the resulting pre-embryo creates a parent-child relationship. Changing this assumption can change the entire analysis because courts will no longer need to resolve conflicts about whether progenitors should or should not become parents. Identifying parents at the time of the child's birth, rather than at some prior time, and allowing courts to focus on intent and parental behavior, rather than genetics, means some progenitors can be released of parental status, and those who are using ART because they cannot create a genetic link to a child can more easily gain parental status.

II. Current understanding of the "right to procreate."

Since some courts frame disputes involving cryopreserved pre-embryos as tensions between the right to procreate and the right to avoid procreating, defining this term explicitly is also necessary. The basic dictionary meaning of what it means to procreate is not very helpful. It essentially

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[61] *See Stanley v. Illinois,* 405 U.S. at 649.
[62] *See Stanley v. Illinois,* 405 U.S. at 649.
[63] *See* Merriam-Webster's Online Dictionary, http://www.merriam-webster.com/dictionary/procreate (accessed 9/1/09).
[64] *See e.g.* Ark. Code Ann. §9-9-201 *et seq.*(Westlaw current through end of 2009 Reg. Sess.)
[65] For a discussion of the similarities between the chances of an ART embryo becoming a child compared to a naturally fertilized egg becoming a child, see Bridget M. Fuselier, *The Trouble With Putting All Your Eggs in One Basket: Using a Property Rights Model to Resolve Disputes Over Cryopreserved Pre-Embryos*, 14 Tex. J. on C.L. & C. R. 143, 156 (Spring 2009).

defines procreate as to beget a child or to generate offspring.[66] The Supreme Court has identified a right to procreate[67], but what this right actually entails is not clear. According to Laurence Tribe it is possible to articulate this right as "whether one person's body shall be the source of another life." [68] Others, such as Carter Dilland, have suggested that the act of procreation "refers to any voluntary act taken by an individual that is either one of the two most proximate causes of the conception of a future person or persons eventually being born."[69]

Tribe's definition is appropriate for traditional situations where only two people are involved in the reproductive process. However, when applied to situations involving surrogates or any form of ART, this definition becomes too vague. Even if the progenitors are also the intended parents, if a surrogate is used to gestate the resulting child, that surrogate is also using her body to be the source of another life, and would therefore be procreating. Even more complicated is the situation of donated gametes. Each donor is procreating, since without the genetic material produced by the donor's body, no embryo would be formed, yet there is still a separate gestational carrier, whether the intended mother or not, who becomes a third person with a procreational interest in the resulting child.

Dilland's definition of procreation is slightly less problematic when applied to ART situations, since it limits the potential procreators to those who are the two most proximate causes of the eventual child. While eliminating the potential for three procreators, Dilland's definition still gets confusing when using donor gametes or a gestational surrogate. By separating the gestation from the provision of gametes, it could be difficult to identify the two most proximate causes of the child's birth. Without a gestational surrogate the embryo would not develop and be born, yet without the combination of two separate gametes, the embryo would never exist, so the resulting child would never be born.

Two potential resolutions seem reasonable. First, we could modify Tribe's definition to be more specific to the genetic material of one's body, causing procreation to be explicitly tied to genetic consanguinity. This would limit the right to procreate to the right to control whether genetic material is available for incorporation into another potential human being, regardless of whether the procreator is ultimately the parent or not. Alternatively, we could alter Dilland's definition to focus on the person or persons who cause an embryo to be placed in an environment in which it can develop into a child, focusing on the actors who actually cause the potential child to be brought to fruition.

Given the strong psychological need to identify genetic relationships[70], it would seem that narrowing the right to procreation to whether one's genetic material shall be used as the source of

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[66] *See* Merriam-Webster's Online Dictionary, http://www.merriam-webster.com/dictionary/procreate (accessed 9/1/09).
[67] *Skinner v. State of Oklahoma, ex. Rel. Williamson*, 316 U.S. 535, 541 (1942).
[68] Laurence H. Tribe, *American Constitutional Law* 1340 (2d ed 1988)
[69] Dillard, Carter , *Future Children as Property* (October 10, 2009). ___ Duke J. Gender L. & Policy, ___ (Forthcoming). (available at SSRN: http://ssrn.com/abstract=1486790).
[70] *See generally,* Naomi Cahn, *Necessary Subjects: The Need for a Mandatory National Donor Gamete Databank*, 12 DePaul J. Health Care 203, 214-215 (2009).

another potential life would be in keeping with the original intent of this fundamental right. This right would be limited to the use of the individual gametes. Once combined to form a pre-embryo, the right would be extinguished, because it would have been exercised and no longer subject to the control of only the progenitor. In addition, defining procreation in this manner, while defining parent as the person or persons who cause the pre-embryo to be placed in a situation where it has the potential to develop with the intent to raise the resulting child, allows the use of ART while still allowing one who does not want a genetic link, regardless of parental rights or the release of those rights, to avoid creating that link, by avoiding the use of any ART processes.

III. Why This Matters to ART

When courts are faced with disputes about the use of cryopreserved pre-embryos, they generally follow the analysis first established in *Davis v. Davis.*[71] There, the Tennessee Supreme Court established the outline for analyzing such disputes, holding that decisions should be made

first, by looking to the preferences of the progenitors. If their wishes cannot be ascertained, or if there is dispute, then their prior agreement concerning disposition should be carried out. If no prior agreement exists, then the relative interests of the parties in using or not using the preembryos must be weighed. Ordinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than use of the preembryos in question. If no other reasonable alternatives exist, then the argument in favor of using the preembryos to achieve pregnancy should be considered. However, if the party seeking control of the preembryos intends merely to donate them to another couple, the objecting party obviously has the greater interest and should prevail.[72]

While this analysis may be helpful when the only persons interested in the fate of the cryo-preserved embryos are the original progenitors, it fails to assist in determining who has an interest, or what that interest is, when other potential candidates vie for the status of legal parent.

A. ART processes can involve multiple potential parents

1. The process involved in ART

Advances in ART have led to the creation of thousands of cryopreserved pre-embryos.[73] When a couple chooses to use in-vitro fertilization (IVF) they almost always produce multiple pre-embryos that must be cryopreserved in order to be stored for later use.[74] Though it is possible to create only one pre-embryo at a time, it is not practical to do so. Since the retrieval process involves super-

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[71] 842 S.W.2d 588, 604. *Infra* pt. III.B. (discussing the case law in detail).
[72] *Id.*
[73] *See* David I. Hoffman, Gail L. Zellman, et. al. *Cryopreserved embryos in the United States and their availability for research.* 79 Fertility & Sterility 1063 (May 2003). (determining that there were almost 400,000 cryopreserved embryos being stored in the U.S. as of April 11, 2002). Though this study was designed to determine how many embryos were available for research, it surveyed all ART practices and estimated that, at the time, there were 396,526 embryos in storage. That number has likely increased in conjunction with the increase in the use of ART procedures. *See 2006 ART Report – Section 5 – ART Trends*, supra, n. 4
[74] *See* Yoko Kumasako, Eiko Otsu, Takafumi Utusomiya, & Yasuhisa Araki. *The efficacy of the transfer of twice frozen-thawed embryos with the vitrification method*. 91 Fertility & Sterility 372 (Feb. 6, 2009).

stimulation of the ovaries through the administration of high dose hormones, and an invasive retrieval procedure which can lead to complications, the fewer times a woman undergoes the retrieval process the less risk she faces.[75] Retrieving and fertilizing multiple eggs and freezing those fertilized eggs (now pre-embryos) that are not used immediately reduces this risk.[76]

The process of in vitro fertilization involves a series of procedures.[77] First, the woman who is providing the eggs must undergo a series of hormone injections that cause her body to produce multiple eggs. During this process her ovaries are monitored by periodic vaginal ultrasounds and blood tests to determine when she is about to ovulate. This process usually takes eight to fourteen days. Just prior to ovulation, the woman is given additional hormones that cause the eggs to mature, and shortly thereafter the eggs are harvested. The retrieval process involves a minor surgical procedure called a transvaginal ultrasound aspiration, which essentially draws the eggs from the ovaries through a needle passed through the vaginal wall. Though an outpatient procedure, the woman is given some form of anesthesia. Occasionally eggs must be retrieved laproscopically, which is a somewhat more invasive procedure.[78]

Once the eggs are retrieved they are transferred to a culture medium to be fertilized. Sperm is either injected directly into the egg or added to the culture and allowed to fertilize the egg using its own motility. Approximately forty to seventy percent of the eggs are successfully fertilized, and they are allowed to develop for up to five days before being transferred to the uterus of the woman who is attempting to become pregnant. The transfer process requires the physician to insert a probe through the woman's cervix to place the pre-embryos into the woman's uterus. The number of pre-embryos transferred depends primarily on age.[79]

Since more eggs are retrieved and fertilized than transferred, the remaining pre-embryos are generally cryopreserved to allow for additional transfer attempts in the future. [80] Cryopreservation techniques continue to evolve, but generally involve protecting the pre-embryos in a chemical

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[75] *See Id*. at 374.

[76] *Id*.

[77] In vitro fertilization has been distinguished from the less complicated process of artificial insemination. One court describes the process of IVF as follows:

> After the woman has taken injectable ovulation-inducing medications . . . , multiple oocytes are retrieved from the woman's ovaries by a minor surgical procedure. The oocytes are placed in a petri dish with her male partner's sperm (in vitro) and placed in an incubator for fertilization to occur. The embryos are allowed to grow for a period of three to five days before they are placed back into the woman's uterus.

Finley v. Astrue, 270 S.W.3d 849, 850 n.2 (Ark. 2008) (quoting 17-289 *Attorneys' Textbook of Medicine* P. 289.65 (3d ed.2007).

[78]American Society for Reproductive Medicine, Assisted *Reproductive Technologies – A Guide for Patients,* 2008 http://www.asrm.org/Patients/patientbooklets/ART.pdf (accessed 8/31/09).

[79] *Id.*

[80] *Id.*

solution and then freezing them and storing them at extremely low temperatures. Once frozen, these pre-embryos can be thawed and some remain viable for transfer and development.[81]

Not all cryopreserved pre-embryos are ultimately needed. Couples who use ART processes often find they have excess cryopreserved pre-embryos[82] because they have decided to discontinue the ART process because of divorce, success in building their family, or decisions to stop trying. Consequently, someone must decide what to do with the remaining cryopreserved pre-embryos. Most often, as part of the ART process, participants enter into agreements that specify who will decide the fate of the pre-embryos, or what that fate will be under certain circumstances.

2. The pool of potential parents

The use of ART introduces new players into the pool of potential parents. Through ART it is possible to have up to six potential parents: the couple who wish to raise a child;[83] the sperm provider and egg provider; and the gestator and the gestator's spouse. At times, some of these roles can be held by the same individual, but the potential exists to have each role held by a separate person, thereby creating six potential parents for one child.

To further complicate matters, both parents can be identified and both can be the genetic contributors. Alternatively, one or the other, or both, contributors can be an anonymous donor, or one or the other, or both, contributors can be known donors with no genetic connection to the intended parent.

Another variable involves the gestational arrangements. The various combinations of genetic material can also be used with a variety of gestational situations. A woman can be implanted with the pre-embryo created by her own egg and her husband' sperm, similar to the traditional way children are born, but utilizing assisted reproductive technologies. This same woman could also gestate a pre-embryo created through the use of an anonymous egg and her husband's sperm, a combination of two anonymously donated gametes, or the combination of her own egg and an anonymously donated sperm. Finally, these same combinations can be gestated by the intended mother but rather than anonymous donations, the donors may be known to the intended parents. These same combinations may be carried by a gestational surrogate, though as a gestational surrogate she would not use her own egg but would use the egg of either the intended mother or a donor. Finally, most of these combinations could be carried by a traditional surrogate, though there would be no option to use the intended mother's egg or an anonymous donor's egg, since traditional surrogacy involves the use of the surrogate's egg.

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[81] *See* Yoko *supra* . 74; Michael S. Simon, "*Honey I Froze the Kids": Davis v. Davis and the Legal Status of Early Embryos*, 23 Loy. U. Chi. L.J. 131, 131-32 n.7 (1991).

[82] Various courts and commentators use different terms, but we are all talking about fertilized eggs that have been allowed to develop to the 4-8 cell stage and have not yet been returned to a woman for further development.

[83] Referred to as either the intended parent(s) or the commissioning parent(s).

B. The Case Law

Tennessee was one of the first states to directly tackle the question of how to handle pre-embryo disputes.[84] In *Davis v. Davis* the parties, a married couple, had undergone ART processes several times, had several unsuccessful pregnancies , and had several cryopreserved pre-embryos remaining.[85] The couple eventually divorced. As part of the divorce proceeding, the court attempted to resolve the dispute between the parties over the control and disposition of the cryopreserved pre-embryos.[86] In doing so, the court specifically noted that the parties did not have an agreement that gave any indication of their wishes regarding the cryopreserved pre-embryos,[87] and pointed out that, had such an agreement been available the agreement "should be presumed valid and should be enforced as between the progenitors."[88] In light of the absence of an agreement the court was forced to examine whether the pre-embryos "should be considered 'persons' or 'property,'"[89] what type of interests each progenitor had,[90] and what rights of the parties were implicated by deciding who could control the disposition of the pre-embryos.[91]

According to *Davis*, pre-embryos deserve special respect because of their potential for human life.[92] To support this result, the court rejected the idea that the pre-embryos were simply property that could be divided the same way divorcing parties divide furnishings or other assets. Recognizing that there was no guarantee the pre-embryos would ever develop any farther, it also rejected the idea that the pre-embryos were similar to children, who would be entitled to an analysis of their best interests. Instead, the court decided that pre-embryos fall into an interim category where they are entitled to special respect because of their potential to become human life, but are not yet beings with specific rights of their own.[93]

Since the progenitors had each contributed to the creation of the pre-embryos, they had some form of shared ownership interest, at least to the point of having some control over the disposition of the pre-embryos. The result of this special respect and unique ownership interest meant the progenitors were entitled to an ownership interest to the extent that they were able to determine the disposition of the pre-embryos.[94] Recognizing that the Davises disagreed about the disposition of the pre-embryos, the court focused the analysis on the respective rights of the parties to determine whether they would become parents.[95] In doing so, the court assumed that a genetic connection to the resulting child meant the person would be considered a parent. Noting that progenitors had interests in the pre-embryos different than any other's interests, the *Davis* court

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[84] *See Davis v. Davis,* 842 S.W.2d 588 (Tenn. 1992).
[85] *Id.* at 592.
[86] *See id.* Originally, the wife wanted to use the cryopreserved pre-embryos and the husband wanted them destroyed. As the proceeding continued, the wife changed her position, ultimately desiring to donate the pre-embryos to another couple for use.
[87] *Id.* at 593, n.9
[88] *Id.* at 597.
[89] *Id.* at 594.
[90] *Id.* at 597
[91] See *id.* at 599.
[92] *Id.* at 597.
[93] See *id.* at 596-597.
[94] *Id.* at 597.
[95] *Id.* at 598.

reasoned that this was so "because no one else bears the consequences of these decisions in the way that the gamete-providers do,"[96] and, despite the more significant burden on the woman in the creation of the pre-embryo, when balancing their rights regarding disposition of the pre-embryo, both progenitors were on equal footing because they were both "on the brink of parenthood."[97] Had the couple intended to use the pre-embryos together to build their family, this may have been the case, but it is not clear whether each of them would have been considered the legal parents if only one had used the pre-embryos or of they had been donated for someone else's use. This imprecise use of the term "parent," when the term itself is used as part of the test to determine who should be the legal parent is flawed logic. Despite this, the court suggests that the profound impact of becoming a genetic parent gives the progenitors the sole decisional authority regarding the pre-embryos.[98]

The result of *Davis* is a three step process to resolve disputes between progenitors. According to the *Davis* court the first step is to look "to the preference of the progenitors."[99] If this does not resolve the situation, the next consideration is enforcing the prior agreement, if it exists.[100] If there is no prior agreement, the parties' interests in becoming or not becoming a parent must be weighed,[101] with the person who wishes to avoid procreation prevailing unless there is no reasonable alternative (including adoption) for the other progenitor to become a parent.[102]

As noted above, in *Davis*, the husband wanted to prevent the use of the pre-embryos and the wife wanted them to be used – first by herself, but later in the proceeding she changed her mind and wanted them donated to someone else to be used. Had the woman not changed her mind, instead maintaining her position that she wanted to use the pre-embryos herself, the decision might have been different. The court would have been forced to balance the man's right not to procreate against the woman's right to procreate, with the additional factor of whether she had any other reasonable means to become a parent. Instead, the court balanced the man's interest in avoiding parenthood against the woman's interest in knowing that the pre-embryos she created would never reach their full potential, and found the avoidance of unwanted parenthood was greater than the desire to see the ART process completed.[103]

Over the next sixteen years several other state courts faced similar disputes. Following the lead of *Davis*, allowing the party who wishes to avoid unwanted parenthood to do so appears to

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[96] *Id.* at 602.
[97] *Id.* at 601.
[98] *Id.* at 603.
[99] *Id.* at 604.
[100] *Id.*
[101] The *Davis* court assumed that a person has not only the right to determine whether to become a parent, but also the right to determine whether to avoid becoming a parent. After examining United States Supreme Court jurisprudence regarding the right to procreate that is part of the right to privacy, the D*avis* court stated: "For the purposes of this litigation it is sufficient to note that, whatever its ultimate constitutional boundaries, the right of procreational autonomy is composed of two rights of equal significance-the right to procreate and the right to avoid procreation." *Id.* at 601.
[102] *Id.*
[103] *Id.* at 605.

control the outcome. Most cases either explicitly[104] or implicitly[105] agreed with the *Davis* court that progenitors had the right to control the disposition of the cryopreserved pre-embryos created with their gametes. Many of the later cases also lauded the *Davis* court's acknowledgement that the dispositional wishes should be established in a written agreement between the progenitors and the facility storing the pre-embryos.[106]

Interestingly, regardless of the approach taken, all of the cases decided after *Davis* have reached similar results – the cryopreserved embryos that are at the center of the disputes, are not allowed to be used. In four cases the reviewing court found an agreement between the parties valid and enforceable, creating no reason to look to the relative interests of the parties.[107] Three cases refused to enforce an agreement over one of the party's objections.[108] In *J.B v. M.B.* and *A.Z. v. B.Z.* the New Jersey and Massachusetts courts, respectively, moved to a balancing test because, despite an agreement to the contrary entered into at the time of cryopreservation, one party no longer wanted to become a genetic parent.[109] Consequently, like the *Davis* court, the *J.B.* and *A.Z.* courts found the interest in avoiding parenthood outweighed the interest in allowing the pre-embryos to be used.[110] Also, like the *Davis* court, the *J.B.* and *A.Z.* courts assumed that each progenitor would be considered a parent even if they did not approve of the use of the pre-embryos.[111] The Iowa Supreme Court similarly refused to enforce a prior agreement over one party's objection.[112] However, that court required contemporaneous agreement of the parties and, rather than moving to a balancing of their interests, required that the pre-embryos remain in storage until such contemporaneous agreement was reached, or the storage agreement term expired.[113] The practical effect of this decision is the progenitor who wants to avoid parenthood prevails.

The high court of New York held that contracts regarding the disposition of cryopreserved pre-embryos do not violate public policy and should be enforced. In *Kass v. Kass* the informed consent agreements that specified what would happen to the pre-embryos in the event they were not to be used by the parties and the parties could not agree on their disposition were enforced to require that the pre-embryos be donated for research.[114] Other courts have agreed that contracts between the parties should be enforced, but only if either party has the right to change their mind before the

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[104] *In re Witten*, 672 N.W.2d 768, 780-81 (Iowa 2003); *J.B v. M.B..,* 783 A.2d 707, 715 (N.J. 2001); *Roman v. Roman*, 193 S.W.3d 40, 50 (Tex. App. 1st. Dist. 2006). *See also Litowitz v. Litowitz*, 48 P.3d 261, 267-68 (Wash. 2002)(en banc)(allowing an intended mother and the genetic father to determine disposition of the pre-embryos by virtue of the contract between the egg-donor and intended mother).
[105] *In re Dahl*, (In re Marriage of Dahl and Angle) 194 P.3d 834, 840 (Or. App. 2008);
[106] *See e.g*., *Kass v. Kass*, 696 N.E.2d 174, 180 (N.Y. 1998); *Roman*, 193 S.W.3d at 50; *Litowitz*, 48 P.3d at 267. *Cf*. *In re Witten*, 672 N.W.2d at 782 (finding "enforcement of an agreement *between a couple* regarding their future family and reproductive choices would be against public policy").
[107] *Kass*, 696 N.E.2d at 181; *In re Dahl*, 194 P.3d at 840-841; *Roman*, 193 S.W.3d at 50; *Litowitz*, 48 P.3d at 271.
[108] *In re Witten*, 672 N.W.2d at 782; *A.Z.v. B.Z,* 725 N.E.2d 1051, 1057-1058 (Mass. 2000); *J.B.,* 783 A.2d at 719.
[109] *A.Z.*, 725 N.E.2d at 1059; *J.B.,* 783 A.2d at 719.
[110] *A.Z.*,725 N.E.2d at 1057-1058; *J.B.,* 783 A.2d at 719.
[111] *See A.Z.* at 725 N.E. 2d 1051, 1057-1058; *J.B.,* 783 A.2d at 717.
[112] *In re Witten*, 672 N.W.2d at 772.
[113] *Id.* at, 783.
[114] *Kass*, 696 N.E.2d at 181.

pre-embryos are used or destroyed.[115] This interpretation of the manner in which the agreements are enforced essentially requires that the parties agree at the time the decision is to be made, which leaves many cryopreserved embryos in storage since the parties cannot agree, regardless of what they had indicated at the time the process was begun.

On the other hand, Massachusetts courts have refused to enforce contracts between progenitors because the decision to become a parent is so "delicate and [of] intimate character" that public policy prohibits enforcing contracts related to these decisions.[116]

Regardless of how the court analyzes the issue, generally, courts reach a result that enforces a party's right not to become a parent. Even when enforcing the agreement between the parties, the courts have suggested that they must balance a person's right to become a parent against the other's right to avoid unwanted parenthood. In these situations, the person trying to avoid parenthood has generally prevailed, though the court has yet to face a situation where a person who wants to use the cryopreserved embryos has no ability to create any more.[117] When choosing not to enforce an agreement because of public policy, courts still enforce the right of a party to refuse to become a parent.[118]

C. The Fatal Flaw – Assuming the Definition of a Critical Term

There are several problems with the analysis employed by all of these courts. The problems arise because the courts assume the definition of a critical term that they use in the analysis – "parent." As noted above, in the past, this assumption might have been reasonable, but as our ability to create families has expanded, the term parent can be problematic, as it can include more variations than in the past.[119]

IV. ART Does Not Yet Involve Parents

In ART situations creating a pre-embryo does not invoke the parental status; pre-embryos are not yet children. They may be entities that are entitled to special respect, but, with the exception of in Louisiana, where they are recognized as juridical persons,[120] pre-embryos are not legally considered human beings.[121] Even as the pre-embryos are cryopreserved, they still only have the potential for life; as such, they do not have parents. Once the decision to use a pre-embryo has been made, the parties involved in that decision become prospective parents, not based on their genetic connection to the pre-embryo, but because of their intent to create a child to raise as their own. Even at this point, no one is identified as a "legal parent."

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[115] *In re Witten*, 672 N.W.2d at 782-783; *J.B.* 783 A.2d at 719; *Roman,* 193 S.W.3d at 53.
[116] *T.F. v. B.L.*, 813 N.E. 2d 1244, 1251 (Mass 2004); A.Z., 725 N.E. 2d at 1059.
[117] *See generally Davis,* 842 S.W. 2d 588.
[118] *See generally A.Z,* 725 N.E. 2d 1051.
[119] *See* Anderson, *supra* n. 17 at 32-33.
[120] La. Stat. Ann. §9:125. "An in vitro fertilized human ovum as a juridical person is recognized as a separate entity apart from the medical facility or clinic where it is housed or stored."
[121] For an expanded discussion of why it does not make sense to consider pre-embryos human beings, see Fuselier, *supra* n. 65 at 156.

Consequently, as the courts determine what to do when the progenitors who created a pre-embryo disagree about what should be done with that pre-embryo, they should not take into consideration the balancing of rights to be a parent versus rights to avoid being a parent. The progenitor who does not want the pre-embryos used is not consenting to the creation of a child to raise as his or her own, so he or she should not be named as a parent. The progenitor who chooses to use the pre-embryo to create a child can be considered a parent should that child actually come into existence. At that time others who might be intending to raise the child as their own might also be identified as the parent, but the person who contributed the genetic material in the first place, but then decided against going further, would not be considered a parent at all[122].

V. Redefining Parent by Statute is Preferred

When looking at parental interests, it is apparent that most parents want to parent children who carry their genes. Even those who go through ART make every attempt to use their own genetic material before moving to a donor gamete . However, "[t]he fact that most people who want to parent would prefer a genetic link does not mean that all people who have a genetic link want to parent."[123]

The use of intent when identifying parents of those created through ART satisfies the same concerns as the use of biology does when identifying parents of children conceived naturally. Those who make use of ART generally have the resources and the desire to support the child, so the concerns of the state about financial burdens are assuaged. Just like the situations where the courts ignore the biological connections because there are two supportive parents, regardless of biology, most ART situations involve two supportive parents who are willing to support the child. Additionally, the state usually does not have to get involved in determining the parents – the agreements between the parties allow this determination to remain essentially private.[124]

Altering the way "parent" and "procreate" are defined in ART situations will satisfy these same concerns, and remove the disputes between progenitors from the courts. Those disputes will no longer exist. Parties who enter into ART agreements will understand that they have no parental rights or responsibilities unless and until they cause the pre-embryo to be placed in a situation where pregnancy might occur. They will also understand that by engaging in ART processes they are engaging in procreation, exercising the right to perpetuate their genetic lineage, with no ability to retrieve this right with regard to this specific action in the future. Until that point, should they not wish to become a parent, even if the co-progenitor does wish to do so, the objecting progenitor will not be a parent –will not have any parental obligations and will not have parental responsibilities. Like anonymous gamete donors, the progenitors may be asked to provide medical history information to the eventual child, but that will be the extent of their obligation or expectation. And, like anyone who engages in unprotected sexual intercourse, they are exercising their right to procreate by providing their genetic material for contribution to a potential embryo.

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[122] This approach is not appropriate for retroactive application to the existing cryopreserved pre-embryos, since those who provided genetic material may have expected to be able to control its use in perpetuity.
[123] Baker, *supra,* n. 36 at 677.
[124] *Id.*at 702.

Almost every court that has addressed a dispute about the disposition of cryopreserved pre-embryos has pleaded for legislative guidance.[125] Some states have statutes that might apply to some of these disputes, but they were not enacted with cryopreserved pre-embryos in mind, so their application is confusing or incomplete. Other states have mandated that parties provide for the disposition in the ART agreements, but have not provided enough guidance to demonstrate what the public policy of the state is regarding the disposition or the hierarchy of rights that the court must consider. This lack of legislation is understandable, as the public policy of most states is just developing as their citizenry grapple with these new technologies and the moral and ethical conundrums they generate. In the meantime though, the courts must still decide these disputes.[126] There is some guidance available, so courts need not operate in a vacuum.

A. The Model Act Governing Assisted Reproductive Technology

On February 11, 2008, the American Bar Association approved the Model Act Governing Assisted Reproductive Technology.[127] This model legislation strongly encourages written agreements between the parties and the clinics.[128] These agreements should describe why the pre-embryos are being created; what should happen to them of the parties divorce, die or become incapacitated; and under what conditions the pre-embryos will be considered abandoned, allowing the clinic to cease storing them.[129] The model act includes a provision that allows either of the parties to change his or her mind and withdraw consent for the transfer, disposal, or use of the pre-embryos, and sets a five

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[125] *See e.g. In re Marriage of Buzzanca,* 61 Cal. App 4th 1410, 1428-1429 (1998). After ruling that the intended parents were the legal parents, the court went on to say:

> Again we must call on the Legislature to sort out the parental rights and responsibilities of those involved in artificial reproduction. No matter what one thinks of artificial insemination, traditional and gestational surrogacy (in all its permutations), and-as now appears in the not-too-distant future, cloning and even gene splicing-courts are still going to be faced with the problem of determining lawful parentage. A child cannot be ignored. Even if all means of artificial reproduction were outlawed with draconian criminal penalties visited on the doctors and parties involved, courts will still be called upon to decide who the lawful parents really are and who-other than the taxpayers-is obligated to provide maintenance and support for the child. These cases will not go away.
>
> Courts can continue to make decisions on an ad hoc basis without necessarily imposing some grand scheme, looking to the imperfectly designed Uniform Parentage Act and a growing body of case law for guidance in the light of applicable family law principles. Or the Legislature can act to impose a broader order which, even though it might not be perfect on a case-by-case basis, would bring some predictability to those who seek to make use of artificial reproductive techniques. As jurists, we recognize the traditional role of the common (i.e., judge-formulated) law in applying old legal principles to new technology. [citations omitted] However, we still believe it is the Legislature, with its ability to formulate general rules based on input from all its constituencies, which is the more desirable forum for lawmaking.

*Id.*at 1428-1429.

[126] Some practitioners would suggest that courts have enough precedent to make a reasoned decision. S*ee* Elizabeth E. Swire Falker, *The Disposition of Cryopreserved Embryos: Why Embryo Adoption is an Inapposite Model for Application to Third-Party Assisted Reproduction*, 35 Wm. Mitchell L. Rev. 489, 493 (2009). However, even among the various cases there is no consistent analysis that provides predictability.

[127] American Bar Association, *Model Act Governing Assisted Reproductive Technology*, [Hereinafter *Model Act*] available at http://www.abanet.org/family/committees/artmodelact.pdf. (last accessed 8/27/2009).

[128] Charles P. Kindregan, Jr. & Steven H. Snyder, *Clarifying the Law of ART: The New American Bar Association Model Act Governing Assisted Reproductive Technology*, 42 Fam. L.Q. 203, 217 (2008).

[129] *Model Act*, *supra* n. 127 at §501-1

year window for the storage of the pre-embryos unless the parties take further action to renew the agreement.[130] The model act also provides for the intervention of the court in the event the parties cannot agree about the disposition of the pre-embryos.[131] As noted in the preamble, "[t]he Model Act is intended to provide 'a flexible framework that will serve as a mechanism to resolve contemporary controversies, to adapt to the need for resolution of controversies that are envisioned but that may not yet have occurred, and to guide the expansion of ways by which families are formed.'"[132] It provides a starting place for legislatures to consider the most appropriate way to address the new concerns that arise with ART. The ABA Model Act also establishes the parental status of those who use ART. ART parental determinations are carved out as separate from traditional parent determinations; just as adoptive parent determinations are different. The donor of gametes or embryos is not a parent, unless providing gametes for, or consenting to the use of ART by a partner with the intent to become a legal parent.[133]

As a guide for states to consider, the model act is a good starting place. It identifies all of the nuances that should be considered, and provides some suggestions for ways to address those nuances. Like other model acts, the Model Act for Assisted Reproductive Technology is unlikely to be adopted whole by most states. Instead, it will provide fodder for discussion and each state will develop its own way to address these new dilemmas.

At the same time states are considering whether to take legislative action to guide parties who utilize these technological advances, competing legislation exists and continues to be introduced in many states and at the federal level that could have just as significant an impact on the use of ART services.[134] A wave of anti-abortion initiatives attempting to define persons as "any organism with the genome *homosapiens*"[135] or similar language intending to include a one-celled organism at the moment of fertilization have been proposed. Passage of some of these statutes may alter the analysis by causing genetic progenitors to be "parents" of these unborn persons, regardless of whether they eventually become children.

Like the anti-abortion legislation that has been proposed in places like North Dakota and Wyoming,[136] statutes that effect ART situations may not be identified as specifically connected to ART. Some statutes regulate the agreements between the parties and the clinics; some require that

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[130] *Id.* at §504-1(a)
[131] *Id.* at §504-2.
[132] Kindregan, *supra* n. 128 at 209.
[133] *Model Act supra* n. 127 at §602, 603.
[134] The federal Unborn Victims of Violence Act, 18 U.S.C.A. §1841 (Westlaw, current through P.L. 111-49 approved 8-12-09), creates a separate criminal offense for injury or death of a child in utero, §1841(a)(1), and defines a child in utero as "a member of the species homo sapiens, at any stage of development, who is carried in the womb." §1841(d). This definition, which technically excludes cryopreserved embryos that have not yet been implanted, causes concern because it expands the definition of human being to the unborn.
[135] *See e.g.* North Dakota HB 1572 (2008). This proposed legislation did not pass in the most recent legislative session. *See also* Federal H.R. 881 and S. 346, neither of which became law in the session in which they were introduced.
[136] North Dakota HB 1572 61st Leg. Assembly (Jan 19, 2008); Wy S 97 2009 Gen. Sess, (Jan. 15, 2009). The North Dakota bill would have defined personhood as beginning at fertilization and would have re-defined "human being" to include an unborn child, fetus and embryo. The Wyoming bill would have amended the definition of "human embryo" to include an embryo or fetus from the moment of conception.

parties designate what will happen to the cryopreserved pre-embryos; and some attempt to identify the legal parents. At least seven states – Alabama, Colorado, Delaware, North Dakota, Wyoming, Washington, and Virginia[137] – have legislation that allows a party to withdraw consent to the use or transfer of cryopreserved pre-embryos up to the point of use or transfer. Two other states, Texas and New Jersey, allow withdrawal of consent to the use of embryos created through assisted reproductive technology as a result of case law rather than statutory provisions. [138] When consent is withdrawn, the cryopreserved embryos are maintained in their current state until the parties reach an alternative agreement, or they are destroyed under the agreement with the storage facility. Louisiana, Oklahoma, and to some degree Florida attempt to identify the parents of the cryopreserved pre-embryos.[139] Louisiana specifies that at the moment of conception, the pre-embryo is a "legal person" with specific legal rights that prevent any pre-embryo from being destroyed or used for research.[140] Oklahoma specifies that a child born to a couple using donated embryos is the child of the couple to which the embryos are donated, and any parental rights and responsibilities that the progenitors might have had are extinguished.[141] Florida's surrogacy statutes imply that pre-embryos can be donated to others, and allow the progenitor or progenitors who intend to donate the pre-embryos to relinquish any parental rights and obligations they have, essentially being put in the same status as an egg or sperm donor.[142] What is unclear about the statutory provisions that attempt to identify the parents is whether they are to be applied to each individual independently, or whether they apply to the couple whose genetic material created the pre-embryo, as a unit.[143] This leaves some question about whether the statutes could be used to decide who has control of the disposition when one progenitor want to become a parent and the other does not.

B. Recent Efforts Are Promising

Legislatures are beginning to address issues related to assisted reproduction, though with differing strategies. One state that has recently tackled this issue head on is Georgia. There, on May 5, 2009, the Governor of Georgia signed legislation called the "Option of Adoption Act."[144] This act, effective July 1, 2009, amended the statutory provisions related to adoption by adding a section specifically

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[137] Ala. Code §26-17-704 (Westlaw current through Act 2009-812 of the 2009 Regular and First Special Sessions, except Act 2009-513; Colo. Rev. Stat. Ann. §19-4-106 (Westlaw current through the end of the First Regular Session of the 67th General Assembly (2009); Del.Code Ann. tit. 13, §8-706 (Westlaw current through 77 Laws 2009, chs. 1 – 198. Revisions to 2009 Acts made by the Delaware Code Revisors were unavailable at time of publication); N.D. Cent. Code §14-20-64 (Westlaw current through the 2008 general election); Va. Code Ann. §20-158 C (Westlaw current through end of 2009 Regular Session); Wash. Rev. Code Ann. §26.26.725 (Westlaw current with amendments received through July 1, 2009); Wyo. Stat. Ann. §14-2-906 (Westlaw Current through the 2009 General Session).

[138] *See J.B.,* 783 A.2d at 719; *Roman*, 193 S.W.3d at 50.

[139] *See* La. Stat. Ann. tit. 9, §§126, 130; 10 Okla. Stat. §556; Fla. Stat. Ann. §§742.11; 742.16.

[140] *See* La. Stat. Ann. tit. 9, §§123; 124; 125.

[141] 10 Okla. Stat. §556.

[142] *See* Fla. Stat. Ann. §§742.14.

[143] In fact, many of these statutes use the terms "husband" and "wife," which seems to imply that the statutes only apply to married couples.

[144] 2009 Ga. Laws Act 171 (H.B. 388) (May 5, 2009) (available at http://www.legis.ga.gov/legis/2009_10/sum/hb388.htm (accessed 9/1/2009)).

addressing the process by which a progenitor can relinquish rights to a cryopreserved pre-embryo.[145]

What is important to note is the new category created by the Georgia legislature–" legal embryo custodian." The legal embryo custodian is defined as "the person or persons who hold the legal rights and responsibilities for a human embryo and who relinquishes said embryo to another person or persons."[146] Section 19-8-41 of the Georgia Code allows a legal embryo custodian to relinquish any rights and obligations to the pre-embryo prior to its transfer to a woman's uterus.[147] If the pre-embryo is successfully transferred, and a child is born as a result, the parents of the child are the recipient intended parent, as long as the procedures established by the statute are followed.[148] It is important to note that, upon completion of the process, the legal embryo custodian is not a parent of any sort –Georgia is redefining parent – removing the genetic connection in certain circumstances when it comes to ART, and focusing on who intends to cause a child to be born, or at least who causes a pregnancy to occur.

The Georgia statute also defines the "recipient intended parent" as "a person or persons who receive a relinquished embryo and who accepts full legal rights and responsibilities for such embryo and any child that may be born as a result of embryo transfer."[149] Since no child has yet been born, this definition is not the same as "parent." Conceivably, if the progenitors of the pre-embryo, the legal embryo custodians, disagreed about whether to transfer the embryo in an attempt to bring about the birth of a child, the progenitor who did not want to become a parent could relinquish his or her rights and obligations to the progenitor who intended to cause the pre-embryo transfer, who would be the recipient intended parent. The procedure described in the statute requires the signature of each legal embryo custodian to effect a transfer.[150] However, it does not expressly prohibit the transfer by one legal custodian to another.[151] Because this would mean the person wanting to create the child would essentially be signing an agreement to relinquish his or her rights to the pre-embryo and signing the same agreement accepting the rights and responsibilities related to the pre-embryo and resulting child, if any, it is unclear whether this would be allowed. However, since the statute indicates the recipient intended parent can be an individual rather than a couple, this interpretation does not violate the statute. Interpreting the statute in this manner will allow the decision about whose interest trumps the other's to be avoided and the results will allow both parties to be more satisfied with the result.

Other states have chosen to use the Uniform Parentage Act as a model, yet in an adjusted format. [152] New Mexico recently passed a new Uniform Parentage Act, effective on January 1, 2010.[153] Though the 2002 Uniform Parentage Act drafted by the National Conference of Commissioners of Uniform

[145] *See* Ga. Code Ann. §19-8-41.
[146] *Id.* at 19-8-40(4)
[147] *Id*. at 19-8-41(a)
[148] *Id.* at 19-8-41(d).
[149] *Id*. at 19-8-40(5)
[150] *Id*. at § 19-8-41
[151] *See Id.*
[152] No state has adopted the 2002 Uniform Parentage Act verbatim.
[153] 2009 N. M. Laws Ch. 215 (S.B. 463)

State Laws does not go as far as the Model Act Governing Assisted Reproductive Technology,[154] its provisions related to children of assisted reproduction provide some guidance about how to resolve disputes between progenitors who have created cryopreserved pre-embryos.

Article Seven of the New Mexico Uniform Parentage Act applies to children born by means other than sexual intercourse.[155] It specifies that those who "*donate* eggs, sperm, or embryos"[156] are not parents, but those who *provide* the same "with intent to be a parent" or consent to assisted reproduction with the same intent, are parents of the resulting child.[157]

New Mexico courts faced with disputes regarding the disposition of pre-embryos do not have specific answers as a result of this new legislation, but it can provide important guidance nonetheless. Section 7-706 describes the effect of the dissolution of a couple's marriage, or the withdrawal of consent by one of the progenitors, on the parentage of a child resulting from artificial reproduction. If one member of the marriage uses eggs, sperm, or embryos created by the couple prior to the dissolution of the marriage, the former spouse is not a parent without that person's specific written consent.[158] Additionally, whether still married or not, if one year has passed between a party's consent to use the sperm, eggs, or embryos and that person withdraws his or her consent in writing, the person is not a parent of the resulting child.[159] This section is important for what it does not say. Though these two provisions explain how one avoids becoming a legal parent, they do not suggest that one progenitor can prevent the other from using the reproductive materials. In fact, by indicating that one who withdraws consent is not the legal parent of the resulting child, this section implies that the eggs, sperm, or embryos will actually be used and the progenitor who does not consent will be treated as a donor and therefore not a parent.[160]

Whether using a new statutory scheme like Georgia's new legislation or one similar to New Mexico's version of the Uniform Parentage Act, it is clear that recent legislative efforts are recognizing that a genetic connection does not create a legal parentage connection when assisted reproduction is used. Instead, the legal parentage is established by the intent to raise the child as one's own, and until the child is born the parties involved do not have parental rights and obligations. This clarification of how one becomes a parent, and when that occurs, is consistent with the Supreme Court's rulings that, even in more traditional situations, genetics alone is not how one determines the legal parents of a child. By recognizing this, courts that face disputes between progenitors over the disposition of cryopreserved pre-embryos must reconsider the analysis employed by *Davis* and its progeny and stop balancing the progenitors' interests in becoming or not becoming a parent. Instead, they should look at whether there was consent for the use of the pre-embryos and whether that consent is still valid. If there was no consent, or it has been effectively withdrawn, the courts should allow the use of the pre-embryos, but identify as the parent only the progenitor who is causing the use of the pre-embryos to create a child to raise as his or her own.

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[154] See Part VI.A, *supra.*
[155] 2009 N.M. Laws Ch. 215 §7-701.
[156] *Id.* at §7-702 (emphasis added)
[157] *Id.* at §7-703
[158] *Id.* at §7-706(A).
[159] *Id*. at §7-706(B)
[160] *See Id*. at §7-702.

More legislation like Georgia's and New Mexico's is necessary to help resolve these disputes in other jurisdictions. In ART situations creating a pre-embryo does not invoke the parental status; pre-embryos are not yet children. They may be entities that are entitled to special respect, but, with the exception of in Louisiana, where they are recognized as juridical beings, pre-embryos are not considered persons. Even as the pre-embryos are cryopreserved they still only have the potential for life; as such, they do not have parents. Georgia's designation of a legal embryo custodian recognizes this, and other states considering legislation should do the same. Once the decision to use a pre-embryo has been made, the parties involved in that decision become prospective parents, but not based on their genetic connection to the pre-embryo, instead because of their intent to create a child to raise as their own. Even at this point, no one is identified as a "legal parent" because no child exists yet.

VII. Courts and Legislatures Alike Can Benefit From Redefining Parent

Consequently, as the courts determine what to do when the progenitors who created a pre-embryo disagree about what should be done with that pre-embryo, they should not consider the balancing of rights to be a parent versus rights to avoid being a parent. Instead, they should look at who has custody and control of the pre-embryo and determine whether it is appropriate to allow one or both of those parties to relinquish that custody and control in favor of the other or in favor of an entirely different person or persons. The progenitor who does not want to become a parent is not consenting to the creation of a child to raise as his or her own, so he or she will not be named as a parent. The progenitor who chooses to use the pre-embryo to create a child can be considered a parent should that child actually come into existence. At that time others who might be intending to raise the child as their own might also be identified as the parent, and prior to the child's birth might be considered a recipient intended parent, but the person who contributed the genetic material in the first place, but then decided against going further, would not be considered a parent at all.

This same theme of not holding progenitors responsible as parents even if they have a genetic connection to the child ultimately produced is reinforced in statutory schemes of those states that address gamete donors.[161] By treating the cryopreserved pre-embryo the same way individual gametes are treated the legislatures and the courts would still be affording them "special respect" by refraining from allowing their sale, like traditional property, but instead providing for the most chance that they will be transferred and given the potential to develop into living human beings.

Almost every state has enacted legislation that terminates a sperm donor's parental obligations as long as the sperm is donated according to the statutory guidelines.[162] Statutes establishing the

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[161] *See e.g.* Colo Rev Stat §19-4-106; Del. Code Ann. Tit. 13, §8-702; N.D. Cent. Code §14-18-04; Tex. Fam. Code Ann.§160 .702 (Westlaw current through Chapters effective immediately through Ch. 87 of the 2009 Regular Session of the 81st Legislature); Va. Code Ann. §20-158A3; Wash. Rev. Code §26.26.705; Wyo. Stat. Ann. §14-2-902.

[162] *See, e,g.* Kan. Stat. Ann. §38-1114(f) (Westlaw current through End of 2007 Reg. Sess.)(providing "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 birth father of a child thereby conceived, unless agreed to in writing by the donor and the woman.").

husband of a woman who undergoes artificial insemination with his consent as the father of the resulting child[163] create parenthood with no genetic connection and ignore the genetic contributor's role. In states that have statutes addressing surrogacy arrangements, most require the consent of the surrogate's husband to forego his presumptive paternity to honor the intent of the commissioning parents,[164] indicating that the husband may have had some parental obligations despite the fact that he had no genetic connection to the child.

Redefining parent in ART situations, as one who causes the pre-embryo to be put in a situation where development is possible, and not attaching the term "parent" until the child is born, as well as clarifying the right to procreate, will assist courts in resolving disputes between progenitors of cryopreserved pre-embryos and will allow more of these pre-embryos to be given the chance to develop. Though people may still feel the emotional tug of having a genetically related child in the world, they will have no legal rights nor obligations toward that child. Knowing this going into the process may prevent some people from going through with this, but it at least provides some predictability and certainty.

[163] *See, e.g.* Alaska Stat. §25.20.045 (Westlaw current through legislation effective June, 30, 2008 passed during the 2nd Reg. Sess. of the 25th Legislature)(providing "A child, born to a married woman by means of artificial insemination performed by a licensed physician and consented to in writing by both spouses, is considered for all purposes the natural and legitimate child of both spouses.").

[164] *See, e.g.* N.H. Rev. Stat. Ann. §167-B:25, II, Westlaw (Updated with laws through the end of the 2008 Regular and Special Session) (requiring the surrogate's husband to consent to relinquish his parental rights, or accept his status as parent if the surrogate opts to keep the child).