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## The Birth of a Parent: Defining Parentage for *Lenders* of Genetic Material

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# The Birth of a Parent: Defining Parentage for *Lenders* of Genetic Material

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## I. INTRODUCTION: MEET THE PARENTS

*No man ever steps into the same river twice, for it is not the same river and he is not the same man.*<sup>1</sup>

After nearly a decade together, a loving couple with their lives intertwined socially, emotionally, physically, and financially, decides to have a baby. When it is discovered that the mother-to-be (“Mother”) is infertile, the couple avails itself of modern reproductive technology.<sup>2</sup> A fertilized egg, comprising biological material from one parent and from an anonymous baby donor, is implanted into Mother. Nine months later, a beautiful baby girl is born, and the parents proudly announce her birth.

Two and one-half years later, the parents separate. A divorce is not necessary to disentangle the family, as the couple’s twelve-year relationship had never been memorialized by marriage.<sup>3</sup> Following the separation, each parent continues as parent to their daughter whose surname since birth is the hyphenated last names of her two parents. Each parent shoulders one-half of the child’s expenses. The child resides primarily with Mother but spends roughly equal time with each parent.<sup>4</sup> Though they have ceased to live as a single-family

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1. Heraclitus was a pre-Socratic Greek philosopher who lived in ancient Ephesus near Kusadasi, Turkey. His philosophy embraced change. See Daniel W. Graham, *Heraclitus*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Mar. 29, 2011), <http://plato.stanford.edu/archives/sum2011/entries/Heraclitus/>.
  2. Also called Assisted Reproductive Technology (ART), ART includes all fertility treatments in which both eggs and sperm are manipulated. *Assisted Reproductive Technology*, THE FERTILITY INSTITUTES (July 27, 2013), <http://www.fertility-docs.com/art.phtml>.
  3. The couple could be labeled as “domestic partners.” See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 6.01 (ALI 2002) (“Domestic partners are two persons of the same or opposite sex, not married to one another, who for a significant period of time share a primary residence and a life together as a couple . . . .”); see also *infra* notes 32 & 50. A state’s conferring (or not) a legal title on the relationship of the two parents is of independent legal significance and should not be determinative of parentage. See *infra* notes 32 & 50.
  4. The hypothesized parenting schedule is consensual and nonjudicial. It is, nevertheless, consistent with the national trend toward equal parenting time with each parent. See, e.g., TENN. CODE ANN. § 36-6-106(a) (West 2013). The following language was added to the child custody statute effective July 1, 2012: “In taking into account the child’s best interest, the court shall order a custody arrangement that permits both parents to enjoy the maximum participation possible in the life of the child . . . .” *Id.* See also FLA. STAT. § 61.13(2)(c) (2013), which highlights the importance of a minor child’s “frequent and continuing contact with both parents.” Other states have statutes that maximize parenting time with each parent. See, e.g., ALASKA STAT. § 25.20.070 (2013); D.C. CODE § 16-914 (2013); 750 ILL. COMP. STAT. ANN. 5/602 (2013); IOWA CODE ANN. § 598.41(1)(a) (2013); TEX. FAM. CODE ANN. § 153-131(b) (West 2013); VT. STAT. ANN. TIT. 15. § 650 (2013); WIS. STAT. ANN. § 767.41 (West 2013).

unit, undoubtedly from the child's perspective,<sup>5</sup> she has two loving parents.

When the parents' cooperation turned into animus, Mother relocated with the child to Australia. Devastated, the abandoned parent sought to gain shared custody of the child. However, the trial judge presiding over the case only acknowledged Mother as a parent and summarily rejected the case.<sup>6</sup> Under the applicable state law,<sup>7</sup> the child had only one parent. How could it be that a biological progenitor who had intended, anticipated, planned for, loved, raised, and financially supported a child could possess no rights as parent<sup>8</sup> to that child?

The answer turns on the fact that the *other* parent in this hypothetical was not the father, but rather another mother who, in spite of her genetic link to her daughter, was found to possess no familial relationship to her child under the relevant state law.<sup>9</sup> With the use of ART,<sup>10</sup> the number of participants in the procreative process has increased from the biologically required minimum of two to as many as

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5. In Part III of this Article, I formulate an understanding of parentage that begins with the child and looks up a generation to the parent rather than starting with the purported parent and looking down. Even the nomenclature "parentage" reveals an unstated and misguided premise that the parent-child relationship is evaluated from the top down. Other areas of family law have incorporated the child's perspective. See William V. Fabricius & Jeff A. Hall, *Young Adults' Perspectives on Divorce: Living Arrangements*, 38 FAM. & CONCILIATION CTS. REV. 446 (2000); see also FLA. STAT. § 39.621 (2013) (requiring a court to consider, among other things, the child's preference when determining where to permanently place him or her); TENN. CODE ANN. § 36-6-106(a)(7)(A) (West 2013) (requiring a court to consider the reasonable preference of a child who is at least twelve years old as a factor in deciding custody); TENN. CODE ANN. § 36-6-108(c)(9)(A) (West 2013) (requiring a court to consider the reasonable preference of a child who is at least twelve years old as a factor when a parent is relocating and seeking to take the child with them).
  6. The introductory hypothetical is based upon *T.M.H. v. D.M.T.*, 79 So. 3d 787 (Fla. Dist. Ct. App. 2011), *aff'd in part, rev'd in part*, No. SC12-261, 2013 WL 5942278 (Fla. 2013).
  7. FLA. STAT. ANN. § 742.14 (2013); see *infra* text accompanying note 32.
  8. Parent is defined as the lawful father or mother of someone. BLACK'S LAW DICTIONARY 1222 (9th ed. 2009). The etymology of parent is the present participle of the Latin *parere* meaning "bring forth." See OXFORD DICTIONARY, [http://oxforddictionaries.com/us/definition/american\\_english/parent](http://oxforddictionaries.com/us/definition/american_english/parent) (last visited July 28, 2013).
  9. An egg was extracted from T.M.H., fertilized with sperm from an anonymous donor and implanted into D.M.T., who carried the baby to term and gave birth. *T.M.H.*, 79 So. 3d at 788. The child, thus, had one genetic father, who was not a legal parent as the sperm was supplied through anonymous donation, and two biological mothers, one genetically related to the child through the egg and the other biologically related through gestation. *Id.* at 789. Applying FLA. STAT. § 742.14 (2011) (which declares that an egg donor relinquishes all maternal rights to the resulting child), the trial court awarded maternal rights to the birth mother to the exclusion of the woman who provided the egg. *Id.* at 790-91.
  10. See *supra* note 2 and accompanying text.

six<sup>11</sup> or even eight.<sup>12</sup> The law must adjust to these possibilities. While there may be additional *nonbiological* claimants to parentage,<sup>13</sup> this Article sets forth the conceptual starting point that frames the legal definition of parentage, namely, that the law must recognize as parent any individual (regardless of gender, sexual orientation, or marital status) who is biologically related to a child.<sup>14</sup>

## II. WHY OUR UNDERSTANDING OF PARENTAGE IS SO MUDDLED

Historically, questions surrounding the parentage of a child were limited in scope to the identity<sup>15</sup> of the biological father for support or inheritance purposes.<sup>16</sup> With time, additional parentage issues presented themselves, specifically, the replacement of a biological par-

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11. Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1758 (1993) (notes the existence of two genetic parents, two social parents, and a gestational mother and introduces the concept of a gestational father).
  12. John C. Sheldon, *Test Tube Babies Meet Stone Age Statutes*, 27 ME. BAR J. 140, 140 (2012) (discussing a case of first impression for the state of Maine regarding the parentage of ART children and noting that eight different individuals may qualify as parent).
  13. Nonbiological claimants to parenthood would include (i) adoptive parents (whose claims are *statutorily* substituted for the biological parents' claim) (ii) intentional parents (whose claims are *contractually* created being dependent upon the securing of a release of the biological parents' claims via true donation of genetic material and/or valid surrogacy contracts) and (iii) de facto (also called functional or psychological) parents presenting the hardest cases (whose claims to parentage are judicially created and may be duplicative of the biological parents' claims). *See infra* note 55 and accompanying text.
  14. This Article is intentionally limited to addressing the parentage of those biologically related to the child by genetics or gestation. The claims to parentage by individuals who are not biologically related have been addressed by other scholars. *See generally* Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459 (1990) [hereinafter Polikoff, *Two Mothers*] (advocating expansive interpretation of adoption statutes to permit second-parent adoption by gay and lesbian couples). *See also* Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. C.R. & C.L. 201 (2009) [hereinafter Polikoff, *A Mother Should Not Have to Adopt*] (advocating statutory changes that would eliminate the need for a nonbiological lesbian mother to adopt her own child).
  15. *See* UNIF. ILLEGITIMACY ACT (withdrawn 1960) (the earliest (and largely unsuccessful as evidenced by the fact it was later withdrawn by the National Conference of Commissioners on Uniform State Laws) codification of uniform laws on parentage addressed illegitimacy); UNIF. ACT ON BLOOD TESTS TO DETERMINE PATERNITY OF 1952 (withdrawn 1973); UNIF. PATERNITY ACT OF 1960 (withdrawn 1973).
  16. Historically, all issues of "parentage" in the biological sense were synonymous with "paternity." Sheldon, *supra* note 12, at 141.

ent through adoption or the use of surrogacy arrangements<sup>17</sup> to award parentage contractually to infertile heterosexual couples.<sup>18</sup> Consequently, until fairly recently, the totality of parentage questions could be resolved by reference to a state's paternity, adoption, or surrogacy laws and judicial decisions. If there were a question regarding the identity of a child's father, states provided several alternative means by which a man could establish parental rights in a child.<sup>19</sup> Likewise, in the surrogacy context, under both traditional<sup>20</sup> and gestational<sup>21</sup> surrogacy arrangements, the statutory and common law of the state that governed a surrogacy contract determined who should be recognized as the legal parents of the child.<sup>22</sup> With respect to adoption,

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17. Surrogacy can be viewed as a private, end-run around adoption. Sheldon, *supra* note 12, at 143.

18. "[A]ssisted reproduction technology was first recognized in the context of married couples with fertility difficulties . . ." Ann M. Haralambie, *HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES* § 9:13 (2d ed. 2012).

19. See, e.g., *In re Bernard T.*, 319 S.W.3d 586 (Tenn. 2010) (discussing the various ways in which paternity can be established under Tennessee law and noting that ascertaining paternal status under Tennessee law is less straightforward than ascertaining maternal status).

To be considered a child's legal parent, a man (1) must be married to the child's biological mother at the child's birth or the child must have been born within three hundred days after the termination of the marriage or the entry of a decree of separation, (2) must have attempted to marry the child's biological mother prior to the child's birth in apparent compliance with the law, even if the marriage is declared invalid, as long as the child was born during the attempted marriage or within three hundred days after the termination of the attempted marriage, (3) must have been adjudicated to be the child's legal father by a Tennessee court or administrative body with subject matter jurisdiction or by a court or administrative body of any other state, territory, or foreign country, (4) must have signed an unrevoked and sworn acknowledgment of paternity in accordance with applicable Tennessee law or pursuant to the law of any other state, territory, or foreign country, or (5) must be the child's adoptive parent.

*Id.* at 598–99 (footnotes omitted). See also *In re C.K.G.*, 173 S.W.3d 714, 723 (2005) (noting that the parentage statutes of Tennessee are limited to issues of paternity and do not contemplate disputes over maternity, Chief Judge Drowota writing for the majority stated, "The statutes also employ the term 'mother' in a way that assumes we already know who the 'mother' is.>").

20. A surrogate mother under traditional surrogacy refers to "a woman who becomes pregnant with an embryo that is the product of one of her own eggs. She is genetically related to the embryo. She has agreed to bear the child on behalf of another person, and not to claim parental rights to the child." Sheldon, *supra* note 12, at 141.

21. A gestational surrogate, also called a "gestational carrier" is "a woman who becomes pregnant with an embryo that is the product of another woman's egg. . . . Like a surrogate, she has agreed to bear the children on behalf of another person and not to claim parental rights." Sheldon, *supra* note 12, at 141.

22. The treatment of surrogacy arrangements is far from settled in spite of being in the legal spotlight for more than twenty-five years. Some states prohibit surrogacy arrangements without differentiating between a traditional surrogate and a gestational surrogate. Other states regulate it by, for example, limiting surro-

state law has detailed the process by which the rights of the biological parents are terminated and parental rights are established in the adoptive couple.<sup>23</sup> Within each of these evolving<sup>24</sup> bodies of law, however, the starting point of parentage is a biological connection to the child.<sup>25</sup>

More recently, the parentage conversation has been extended to children of same-sex couples.<sup>26</sup> Generally, the legal discussion surrounding the parentage of children of same-sex couples has focused on establishing parentage using the laws of adoption.<sup>27</sup> This focus is misguided for children born “out of”<sup>28</sup> a lesbian relationship.<sup>29</sup> The adoption process creates a relationship in one who is not a biological or

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gacy to married couples. *Compare Matter of Baby M.*, 537 A.2d 1227 (N.J. 1988) (asserting a surrogate mother’s custody in contravention of the terms of the (traditional) surrogacy contract she had signed), *with In re Paternity of F.T.R.*, 833 N.W.2d 634 (Wis. 2013) (applying Wisconsin law to a traditional surrogacy arrangement that was enforced against the surrogate mother). *See generally* Paul G. Arshagouni, *Be Fruitful and Multiply, by Other Means if Necessary: The Time Has Come to Recognize and Enforce Gestational Surrogacy Agreements*, 61 DEPAUL L. REV. 799 (2012) (advocating national standards of uniform enforcement and regulation of surrogacy contracts to rectify their disparate treatment by states).

23. *See, e.g.*, FLA. STAT. § 63.012–63.2325 (2013); TENN. CODE ANN. § 36-1-101 (West 2013).

24. For a discussion of the evolution of the definition of fatherhood in the context of welfare reform, see Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement and Fatherless Children*, 81 NOTRE DAME L. REV. 325, 326 (2005) (“For centuries the definition of fatherhood under American law was simple: the mother’s husband.”). *See also* June Carbone & Naomi Cahn, *Marriage, Parentage and Child Support*, 45 FAM. L.Q. 219, 223 (2011) (stating “[a]ll states continue to recognize at least a rebuttable presumption that a child born within a marriage is the child of the husband . . . .”); *cf.* Murphy, *supra*, at 326 (noting that the “dramatic shift in family composition over the last several decades in the United States has made the marital presumption increasingly inadequate as the sole definition of fatherhood under the law”).

25. *See, e.g.*, *Caban v. Mohammed*, 441 U.S. 380 (1979) (holding that giving the biological mother but not the biological father a veto over adoption is an Equal Protection violation).

26. In 1973, the National Conference of Commissioners on Uniform State Laws introduced the Uniform Parentage Act (“UPA”). Nineteen states adopted the entirety of the original incarnation of the UPA, and other states embraced portions of the Act. In 2000, the UPA was reworked, in part to be consistent with two other uniform acts addressing issues of child custody and support, namely, the Uniform Interstate Family Support Act (“UIFSA”) (1996) and the Uniform Child Custody Jurisdiction and Enforcement Act (“UCCJEA”) (1997). Article seven of UIFSA, entitled Determination of Parentage, states: Attempting to stay abreast of the times, in 1988, the Conference also introduced the Uniform Status of Children of Assisted Conception. This act, however, was ineffective, enacted only by Virginia and North Dakota before being superseded by the UPA in 2000. The UPA was further amended in 2002. While the 2002 amendments to the UPA address children of same-sex couples, further revisions are needed. *See infra* note 208.

27. Polikoff, *Two Mothers*, *supra* note 14.

28. *See infra* text accompanying note 132.

birth parent.<sup>30</sup> Not only does parentage based upon an adoption model relegate same-gender parents to a conceptually secondary, rather than primary, parental status,<sup>31</sup> but all too often the adoption statutes limit the right to adopt to “couples,” which brings both the gender and the marital status of the adoptive parent into consideration.<sup>32</sup> Adoption laws are premised on the absence of or termination of someone else’s parental status coupled with the demonstrative intent to parent by the adoptive parent.<sup>33</sup> Logically, adoption statutes place both qualitative and quantitative limits on who may fill the parental vacancy through the right to adopt.<sup>34</sup> Someone else’s pre-existing status as parent could constitute sufficient reason for denial of parentage by adoption; an analysis of all parties with parental claims

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29. In denying the adoption petition of a genetic mother whose lesbian partner had given birth to a child conceived with ART using her partner’s egg, the lower court stated that because the adoption laws create a parent–child relationship, adoption by a genetic mother would be an “idle act.” *In re Adoption Petition of C.C.*, No. A 19833, slip op. at 2 (Cal. Sept. 12, 1997), cited in Ryiah Lilith, *The G.I.F.T. of Two Biological and Legal Mothers*, 9 J. GENDER SOC. POL’Y & L., 207, 216 (2001).

30. See, e.g., *Adoption*, CAL. COURTS, [www.courts.ca.gov/selfhelp-adoption.htm](http://www.courts.ca.gov/selfhelp-adoption.htm) (last visited Oct. 14, 2013, 4:17 PM).

31. Polikoff, *A Mother Should Not Have to Adopt*, *supra* note 14.

32. See, e.g., FLA. STAT. § 742.14 (2013), which reads, “The donor of any egg, sperm, or preembryo, other than the commissioning couple or a father who has executed a preplanned adoption agreement under s. 63.212, shall relinquish all maternal or paternal rights and obligations with respect to the donation or the resulting children.” A “commissioning couple” means the intended mother and father of a child who will be conceived by means of assisted reproductive technology using the eggs or sperm of at least one of the intended parents.” FLA. STAT. § 742.13(2) (2013). This Article contends that gender and marital (or other relational) status should be irrelevant in the determination of parentage. More specifically, *lack* of relational status should be irrelevant to the determination of parentage. Presence of relational status may still be a factor supporting a presumption in favor of parentage. The relationship between marriage and the creation of family benefits continues to evolve. See *United States v. Windsor*, 133 S. Ct. 2675 (2013) (partially repealing the Defense of Marriage Act by holding unconstitutional the federal definitions of “marriage” as a legal union between a man and woman and “spouse” as a person of the opposite sex who was a husband or wife). However, such changing legal landscape does not alter the analysis of parentage, as parentage does not depend upon the marriage of the parents or upon the parties’ functioning as a family.

33. Naomi Cahn, *Birthing Relationships*, 17 WIS. WOMEN’S L.J. 163, 163 (2002) (“Adoption requires that one woman [a biological mother] give up a child so that another woman [a nonbiological mother] can mother that same child.”).

34. Some courts have relaxed the literal reading of stepparent adoption statutes to permit a second-parent adoption by the partner of the biological parent. See, e.g., *In re Jacob*, 660 N.E.2d 397, 401 (N.Y. 1995); *Sharon S. v. Superior Court*, 73 P.3d 554, 560 (Cal. 2003); *In re Adoption of K.S.P.*, 804 N.E.2d 1253, 1260 (Ind. Ct. App. 2004).

is required.<sup>35</sup> Acquisition or continuation of traditional parentage based upon consanguinity,<sup>36</sup> by contrast, requires neither satisfying a qualitative standard<sup>37</sup> nor referencing the parental rights of any *other* person or persons.<sup>38</sup> The determination is made as if in a vacuum with the vertical relationship of child to biological parent as the only consideration.<sup>39</sup> The rights of one biological parent are contemporaneous with, equal to, and not mutually exclusive of the rights of another biological parent.<sup>40</sup>

The questions of parentage posed by the introductory hypothetical are more analogous to traditional questions of paternity based upon establishing the biological connection to the child than they are to questions of creating legal parentage in a genetic stranger by adoption.<sup>41</sup> Traditional thinking, namely, that a child can have only one mother,<sup>42</sup> has curtailed the logical extension of establishing paternity

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35. Cahn, *supra* note 33, at 166–67 (examining the strong tie between birth mother and child in the context of relinquishment of parental rights under “the lens of relational feminism”).
36. Establishing the “blood relationship” would, in modern vernacular, be referred to as DNA testing. *Consanguinity*, ENCYCLOPEDIA BRITANNICA, <http://britannica.com/EBchecked/topic/133242/consanguinity> (last visited Jan. 9, 2014).
37. The primary position of a biological parent is not dependent upon that individual being the best parent. Biological parents are shielded from the preliminary scrutiny of fitness, which occurs—statutorily—in the adoption context and—contractually—in the surrogacy context.
38. *See* *Belsito v. Clark*, 644 N.E.2d 760 (Ohio Ct. Com. Pl. 1994) (recognizing only the genetic mother in a case involving a married couple who were the genetic parents of the child and a gestational carrier who supported the genetic parents legal status as parents and their desire to be listed as such on the child’s birth certificate). In finding for the genetic parents, the *Belsito* court framed the initial inquiry for identifying parentage as, “Who are the genetic parents?” *Id.* at 766.
39. The importance of the biological connection of parentage is demonstrated in the failure of the law to embrace the principle of a permanent contractual surrender of parental rights that fall outside of the regulated areas of genetic donation, adoption, and surrogacy contracts. *See* *E.E. v. O.M.G.R.*, 20 A.3d 1171 (N.J. Super. Ct. Ch. Div. 2011) (holding that parental rights of biological father cannot be terminated contractually).
40. *K.M. v. E.G.*, 117 P.3d 673, 682 (Cal. 2005).
41. Professor Melanie B. Jacobs has coined the term “paternity riddle” to identify the complexity of determining legal fatherhood based upon the proper weighing of the puzzle pieces of genetic connection, procreative intent, and function. Melanie B. Jacobs, *Overcoming the Marital Presumption*, 50 FAM. CT. REV. 289, 289 (2012) [hereinafter Jacobs, *Marital Presumption*]. I suggest that the growing practice of oocyte “donation” (also called ovum “sharing”) to a domestic partner has presented a maternity riddle, as well. *See infra* text accompanying notes 107–15. “Donation” is an inaccurate and misleading term for oocyte lending.
42. Some courts have shed this traditional thinking. For a trilogy of cases in which the California Supreme Court acknowledged the parentage of two mothers under California’s version of the Uniform Parentage Act, see *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005); *K.M.*, 117 P.3d 673; *Kristine H. v. Lisa R.*, 117 P.3d 690 (Cal. 2005).

by biology to the establishment of maternity by biology.<sup>43</sup> As will be addressed in Part II, maternity has been understood as a question of fact, that fact being childbirth.<sup>44</sup> Maternity is still a question of fact, but the scientific facts have changed to permit two biologically related females for one child.<sup>45</sup> It has become prescriptive rather than descriptive to limit the label of biological mother to *either* (i) the genetic mother *or* (ii) the gestational mother.<sup>46</sup> If a biological connection to the baby is the starting point for legal parentage,<sup>47</sup> the law must embrace the science supporting the biological connection of not only the

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43. See *In re C.K.G.*, 173 S.W.3d 714 (Tenn. 2005) (Birch, J., dissenting). In rejecting the multifactor test used by the majority to award sole maternal rights to the gestational mother based on intent and the referenced common law rule equating maternity with childbirth, the dissent reasoned that genetics should be the determinative factor. *Id.* at 735. “[Genetics] is the test that our legislature has already ordained by providing that parentage may be established by either biology or adoption.” *Id.*
44. Though there is little support for the proposition, it is said the common law dictates that the birth mother is the legal mother of a child. *In re C.K.G.*, 173 S.W.3d at 721 (citing Kermit Roosevelt III, *The Newest Property: Reproductive Technologies and the Concept of Parenthood*, 39 SANTA CLARA L. REV. 79, 97 (1998)); see also IRA M. ELLMAN ET AL., *FAMILY LAW: CASES, TEXTS, PROBLEMS* 995 (5th ed. 2010) (“Until quite recently, the old saw was still largely true: maternity is a question of fact, while paternity is a matter of opinion. No more.”). *But see* T.M.H. v. D.M.T., 79 So. 3d 787, 794 n.7 (Fla. Dist. Ct. App. 2011), *aff’d in part, rev’d in part*, No. SC12–261, 2013 WL 5942278 (Fla. 2013) (stating “[w]e do not believe that law review articles written by students and professors establish common law”).
45. See Lilit, *supra* note 29, at 208–11 (urging that legal recognition of *both* biological mothers using the ARTs of gamete intrafallopian transfer and zygote intrafallopian transfer is supported by the tests for parentage used by courts in surrogacy disputes); Robert Martone, *Scientists Discover Children’s Cells Living in Mothers’ Brains*, SCI. AM. (Dec. 4 2012), [www.scientificamerican.com/article.cfm?id=scientists-discover-childrens-cells-living-in-mothers-brain](http://www.scientificamerican.com/article.cfm?id=scientists-discover-childrens-cells-living-in-mothers-brain) (providing evidence of the biological connection between the birth mother and baby resulting from gestation). Microchimerism, “the persistent presence of a few genetically distinct cells in an organism,” . . . “most commonly results from the exchange of cells across the placenta during pregnancy, however there is also evidence that cells may be transferred from mother to infant through nursing.” *Id.*; see also Holly M. Dunsworth et al., *Metabolic Hypothesis for Human Atriciality*, 109 PROC. NAT’L ACAD. SCI. 15212 (2012) (claiming that research supports that a gestational mother’s metabolism influences fetal size and length of gestation, two of the many factors that make a person who she is).
46. Ruth Macklin, *Artificial Means of Reproduction and Our Understanding of the Family*, THE HASTINGS CENTER REP., Jan.–Feb. 1991, at 5–6; *c.f.* Lilit, *supra* note 29, at 237.
47. See, e.g., Allison D. v. Virginia M., 572 N.E.2d 27 (N.Y. 1991) (holding that under New York law, parentage is founded upon biology or adoption). *But see* Carvin v. Britain, 122 P.3d 161 (Wash. 2005) (holding that a nonbiological, nonadoptive woman could seek shared parentage with the biological parent based upon the common law doctrine of de facto parentage).

genetic mother but also the gestational mother.<sup>48</sup> ART terminology, which is deemed to waive the biological connection of parentage, must be revised, as the suppliers of sperm and eggs may be intended parents.<sup>49</sup> In addition, parentage statutes that remain gender-specific, with one individual identified as father and the other identified as mother, simply do not contemplate or accommodate parentage by same-sex couples.<sup>50</sup> Consequently, the statutes of many states would fail to acknowledge the parentage of both mothers in the introductory hypothetical. If the titles of parent are gender-limited, once the “position” of mother is filled, the only parental vacancy is for a father.

This Article maintains that an intended parent with a genetic relationship to a child should be entitled to full legal parental rights and obligations with respect to that child irrespective of the genetic parent’s gender. In order to achieve this equality, the law must replace gender-specific biological routes to parentage with a gender-neutral genesis of parentage. The remainder of Part II will discuss two leading parentage cases (one from the state of California<sup>51</sup> and the other from the state of Florida<sup>52</sup>) in which a biological mother is seeking recognition of her parental rights when such rights have been cut off by her former partner who is the child’s gestational mother.<sup>53</sup> Part III of this Article will examine two flaws in current parentage statutes that have fostered this inequality, namely, the false conflict between the gestational and the genetic mother and, secondly, the unintended outcome of gender-specific paternity statutes that provide men, but

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48. Annette R. Appell, *The Endurance of Biological Connection: Heteronormativity, Same-Sex Parenting and the Lessons of Adoption*, 22 *BYU J. PUB. L.* 289 (2008).

49. See *infra* text accompanying note 112.

50. Since the repeal of illegitimacy statutes, parentage has not been derivative of marriage; nevertheless, the gender-specificity of parentage statutes underscores the traditional definition of marriage and, effectively, brings marital status back into the parentage question. Parentage and marriage must be decoupled in both directions—marriage is neither a requirement for nor a benefit of parentage. See Brief of Indiana et al. as Amici Curiae in Support of the Petition at 17, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (No.12-144), 2012 WL 3864338, at \*17 (“Parental rights are an important aspect of traditional marriage, but it does not follow that marriage rights go wherever parental rights lead.”); see also *L.F. v. Breit*, 736 S.E. 2d 711 (Va. 2013) (upholding appellate court’s decision holding that in enacting the assisted conception statute, “the General Assembly did not intend to divest individuals of the ability to establish parentage solely due to marital status, where, as here, the biological mother and sperm donor were known to each other, lived together as a couple, [and] jointly assumed rights and responsibilities.”).

51. *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005).

52. *T.M.H. v. D.M.T.*, 79 So. 3d 787, 794 n.7 (Fla. Dist. Ct. App. 2011), *aff’d in part, rev’d in part*, No. SC12-261, 2013 WL 5942278 (Fla. 2013).

53. This Article focuses on the parentage rights of the biological mother(s). Other scholars have addressed the parentage rights of biological unwed fathers. See Anthony Miller, *The Case for the Genetic Parent: Stanley, Quilloin, Caban, Lehr, and Michael H. Revisited*, 53 *LOY. L. REV.* 395 (2007).

not women, with several means by which to establish parental rights. Part IV suggests that, in light of the steady increase in the number of nontraditional families and the claim to parentage by the adults in these nontraditional relationships with respect to the children they intended to and did raise as their own,<sup>54</sup> current statutory schemes no longer provide a reliable starting point for the determination of parentage. This part will advocate a paradigm shift, namely, that both statutes and courts return to the essence of the parent-child relationship: genetics. By using the genetic relationship as a foundation for the passage of gender-neutral parentage statutes and by embracing advances in ART which extend the biology of parenting to a third gestational parent, biology (limited by the intent to parent) will be the first cornerstone of legal parentage.<sup>55</sup> Part IV will propose a parentage decision tree that incorporates both the intent to parent and the biological bases for parentage without respect for the gender of the parent. Additionally, Part IV will demonstrate that gender-neutral parentage statutes are consistent with other existing parentage concepts and public-policy positions.<sup>56</sup> Part V will discuss the measures that private parties, state agencies, and courts should take to resolve

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54. According to a Pew Research Center 2013 LGBT Survey, twenty-three percent of LGBT men and forty-eight percent of LGBT women are parents. Jocelyn Kiley, *It's Fathers Day for Many American Men, Including 23% of Those Who Are LGBT*, PEW RES. CENTER (June 16, 2013), [www.pewresearch.org/fact-tank//2013/06/16/its-fathers-day-for-many-american-men-including-23-of-those-who-are-lgbt/](http://www.pewresearch.org/fact-tank//2013/06/16/its-fathers-day-for-many-american-men-including-23-of-those-who-are-lgbt/).

55. The law has progressed to embrace the important role in parenting played by parents (both biological and otherwise) and nonparents alike. The author does not contend that a biological link to the child is a logically necessary condition for parentage but rather that it must be a logically sufficient condition for parentage. Nor does the author diminish the importance of so called *de facto*, functional, psychological or intentional parentage but notes that courts are varied in their willingness to assign “*de facto*” parental status on a relative. See *Estrellita A. v. Jennifer D.*, 963 N.Y.S.2d 843 (Fam. Ct. 2013) (judicially estopping a biological parent from arguing that her former registered domestic partner was not a *de facto* parent). Compare *Gill v. Bennett*, 82 So. 3d 383 (La. Ct. App. 2011) (denying *de facto* parental status to grandmother), with *Marie C. v. L.A. Cnty. Dep't of Children and Family Servs.*, 62 Cal. Rptr. 2d 224 (Ct. App. 1997) (awarding *de facto* status to grandmother). While arguably important to confer parentage in some cases, these doctrines are, however, conceptually secondary to biological parentage. The need for legislative reform in the foundational underpinning of parentage is transparent where a paradigmatic parent (under both a genetic- and an intent-based model) like the genetic mother of the introductory hypothetical is neither recognized as a natural—meaning biological—parent nor allowed to gain parentage status based upon her intentions and actions via widely accepted doctrines available to nonbiological would-be parents.

56. The principle of gender-neutrality in the law should be unobjectionable to those on either side of the political spectrum. However, gender-neutrality as applied, for example, to a state's definition of marriage, becomes a political hot potato. By limiting the determination of parentage to the (nonmarital and nonsexual) relationship between parent and child, gender-neutrality in the context of parentage statutes should not be a politically divisive issue.

parentage cases in a gender-neutral manner until state legislatures enact explicit gender-neutral parentage statutes.

### A. Assisted Reproductive Technology Changes the Facts

The state laws of paternity, adoption, and surrogacy were seemingly sufficient to resolve almost all issues that arose in the determination of a child's parentage as long as the courts were dealing with single parentage or traditional family parentage.<sup>57</sup> The adequacy of these laws<sup>58</sup> began to crumble, however, as the ever-evolving capabilities of ART enabled nontraditional<sup>59</sup> couples to conceive and give birth to children.<sup>60</sup>

With the advances in ART, the quest for an all-inclusive legal definition of parentage has proliferated.<sup>61</sup> All too often this quest be-

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57. *But see* L.F. v. Breit, 736 S.E. 2d 711, 716 (Va. 2013) (showing that the state statutory scheme in Virginia proved insufficient to determine parentage of a biological father in a heterosexual relationship in which the literal application of VA. CODE §§ 20-158(A)(3) and 32.1-257(D) barred the intended biological father from establishing legal parentage to his child because (1) he was not married to the birth mother and (2) he was a 'donor' because the child was the result of assisted conception).

58. After examining the parentage and adoption statutes of Tennessee, the Tennessee Supreme Court in *In re C.K.G.* concluded that such statutes were not controlling in a contest over maternal rights because "the parentage statutes generally fail to contemplate dispute over maternity." *In re C.K.G.*, 173 S.W.3d 714, 723 (Tenn. 2005).

59. The author's use of the qualifier "nontraditional" is descriptive, not normative. Some individuals have objected to the use of qualifiers such as "nontraditional" or "same-sex" as implying a deviation from normal. Professor Barbara Cox, California Western School of Law, as a Discussant in the Discussion Group: How the Recognition of Same-Sex Relationships is Transforming Family Law Pedagogy and Scholarship at Southeastern Association of Law Schools Annual Conference (July 31, 2012). *See also* Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 DUKE L.J. 1077, 1155-66 (2003) ("Forcing all families to conform to a single model harms all members of the unit.").

60. The Pennsylvania Superior Court applied the doctrine of *in loco parentis* to acknowledge three parents, namely a same-sex partner of biological mother, the biological mother and the biological father (the biological father allowed his sperm to be used by the mother but did not relinquish his parental rights as a true sperm donor would). *See* Melanie B. Jacobs, *More Parents, More Money: Reflections on the Financial Implications of Multiple Parentage*, 16 CARDOZO J.L. & GENDER 217, 230 (2010) (*citing* Jacob v. Shultz-Jacob, 923 A.2d 473 (Pa. Super. Ct. 2007) [hereinafter Jacobs, *More Parents*]).

61. 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 (2006); Mary Patricia Byrn & Jenni Vainik Ives, *Which Came First the Parent or the Child?*, 62 RUTGERS L. REV. 305 (2010); Kristine S. Knapp, *Children of Assisted Reproduction*, 45 U. MICH. J.L. REFORM, 899 (2012); Olga V. Kotlyarevskaya & Sara B. Poster, *Separation Anxiety Among California Courts: Addressing the Confusion over Same-Sex Partners' Parentage Claims*, 10 U.C. DAVIS J. JUV. L. & POL'Y 153 (2006); John G. New, "Aren't You Lucky You Have Two Mamas?": *Redefining Parenthood in Light of Evolving Re-*

comes muddled in constitutional tangles,<sup>62</sup> in shifting mores,<sup>63</sup> in quagmires of evolving and inconsistent legal parameters on what constitutes a “family,”<sup>64</sup> in political debates over the Uniform Parentage

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*productive Technologies and Social Change*, 81 CHI-KENT L. REV. 773 (2006); Kelly M. O'Bryan, *Mommy or Daddy and Me: A Contract Solution to a Child's Loss of the Lesbian or Transgender Nonbiological Parent*, 60 DEPAUL L. REV. 1115 (2011); Nancy D. Polikoff, *Response: And Baby Makes . . . How Many? Using In Re M.C. to Consider Parentage of a Child Conceived Through Sexual Intercourse and Born to a Lesbian Couple*, 100 GEO. L.J. 2015 (2012); Dara E. Purvis, *Intended Parents and the Problem of Perspective*, 24 YALE J.L. & FEMINISM 210 (2012); Kimberly M. Surratt Esq., *Parenthood Through Technology*, NEV. LAW., Mar. 2007, at 8; Sarah Terman, *Marketing Motherhood: Rights and Responsibilities of Egg Donors in Assisted Reproductive Technology Agreements*, 3 NW. J.L. & SOC. POL'Y 167 (2008); Christen Blackburn, Note, *Who is a Mother? Determining Legal Maternity in Surrogacy Arrangements in Tennessee*, 39 U. MEM. L. REV. 349 (2009); Kira Horstmeyer, Note, *Putting Your Eggs in Someone Else's Basket: Inserting Uniformity into the Uniform Parentage Act's Treatment of Assisted Reproduction*, 64 WASH. & LEE L. REV. 671 (2007); Emmalee M. Miller, Note, *Are You My Mother? Missouri Denies Custodial Rights to Same-Sex Parent*, 75 MO. L. REV. 1377 (2010).

62. When addressing a parentage dispute between a birth mother and biological mother, the Fifth District Court of Appeal in Florida recently held that the biological mother had “constitutionally protected parental rights to the child,” and thus, if FLA. STAT. § 742.14 (which effectively denied parental rights to the biological mother) applied to the situation presented, the statute was unconstitutional. See *T.M.H. v. D.M.T.*, 79 So. 3d 787, 794 n.7 (Fla. Dist. Ct. App. 2011), *aff'd in part, rev'd in part*, No. SC12-261, 2013 WL 5942278 (Fla. 2013). The majority opinion certified the following question to the Supreme Court of Florida as being of great public importance:

Does the application of section 742.14 to deprive parental rights to a lesbian woman who provided her ova to her lesbian partner so both women could have a child to raise together as equal partners and who did parent the child for several years after its birth render the statute unconstitutional under the Equal Protection and Privacy clauses of the Federal and State Constitutions?

*Id.* at 803.

63. Using the Disney Channel as a microcosm of the changing mores in America, it is noteworthy that the 2014 (and final) season of *Good Luck Charlie* will break new ground. Michael Schneider, *Exclusive: Disney Channel Breaks New Ground with Good Luck Charlie Episode*, TV GUIDE (June 20, 2013, 4:30 PM), [www.tvguide.com/news/disney-channel-same-sex-couple-1066972.aspx](http://www.tvguide.com/news/disney-channel-same-sex-couple-1066972.aspx). “In a first for the Disney Channel, next season an episode of *Good Luck Charlie* will feature a family with two moms . . . [b]ut Disney Channel understands the groundbreaking nature of featuring a same-sex couple on one of its sitcoms and took extra care in crafting the episode. ‘This particular storyline was developed under the consultancy of child development experts and community advisors,’ a Disney Channel spokesperson says. ‘Like all Disney Channel programming, it was developed to be relevant to kids and families around the world and to reflect themes of diversity and inclusiveness.’” *Id.*
64. This Article suggests that resolving the definition of family is a distinct inquiry from articulating the primary definition of parent. Many related inquiries, however, in family law, trust law, business succession planning, charitable gifting, and tax and estate planning must grapple with a workable definition of family. See, e.g., Darra L. Hoffman, “*Mama's Baby, Daddy's Maybe.*” *A State-By-State*

Act,<sup>65</sup> and in the perceived need to reconcile conflicting state laws<sup>66</sup> governing marriage, adoption, and surrogacy contracts.<sup>67</sup> To escape this muddle and proceed in a rational, coherent manner, we need a return to the basics.<sup>68</sup> Before reaching the all-inclusive definition of parentage, we must identify the starting point of parentage. Parents are born with the birth of a child. Notwithstanding the scientific breakthroughs in reproductive technology and the more inclusive modern understanding of the family unit,<sup>69</sup> every child begins with two (and only two) suppliers of genetic material and one (and only one) gestational carrier. Thus, the only logically clear starting point for a legal definition of parentage begins with these three claim-holders to parentage. Once the examination of the concept of parentage is disentangled from the complications of related, but logically independent, legal questions,<sup>70</sup> it becomes clear that unless and until the rights and obligations of parentage are either (voluntarily) contractually waived or (involuntarily) judicially terminated, the law must recognize as par-

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*Survey of Surrogacy Laws and Their Disparate Gender Impact*, 35 WM. MITCHELL L. REV. 449, 450 (2009) (“ART . . . forces us to confront deeply held beliefs about what makes a ‘mother’ or a ‘father’ . . . and perhaps most fundamentally, what makes a ‘family’”).

65. See Nicole L. Parness, *Forcing a Square into a Circle: Why Are Courts Straining to Apply the Uniform Parentage Act to Gay Couples and Their Children?*, 27 WHITTIER L. REV. 893 (2006) (addressing the misapplication of the Uniform Parentage Act by the California Supreme Court in *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005)).
66. See James G. Dwyer, *A Taxonomy of Children’s Existing Rights in State Decision Making About Their Relationships*, 11 WM. & MARY BILL RTS. J. 845, 847 (2003) (noting that there exists “significant variation among the states as to just about every aspect of family law at any given time,” a state of affairs unlikely to change as “family law is so infused with social policy and moral belief”).
67. See generally Courtney G. Joslin, *Interstate Recognition of Parentage in a Time of Disharmony: Same-Sex Parent Families and Beyond*, 70 OHIO ST. L.J. 563 (2009).
68. We have lost the proverbial trees in the forest of overarching and difficult constitutional and conflict-of-laws issues. Conceptual clarity is needed in the understanding of the roots of the individual tree.
69. A 2013 article, entitled *Meet the Same-Sex Parents Next Door* by *Parenting Magazine* states, “In fact, a recent survey by the Pew Research Center and commissioned by Time Magazine found that most Americans’ view of what constitutes a family is loosening. Three of five people said they view a same-sex couple with kids as a family too.” *Meet the Same-Sex Parents Next Door*, PARENTING MAG. (Jan. 11, 2013, 12:26 PM), <http://m.parenting.com/entry/view/id/12340>.
70. A cursory review of some of the leading casebooks designed for an introductory class in family law reveals concurrent treatment of the evolving definition of “family,” the debate over same-sex marriage and the ephemeral definition of “parentage.” See, e.g., D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW 449 (4th ed. 2010) (“Given different jurisdictions’ positions on same-sex relationships, conflicting approaches to parentage are inevitable”). While related, the legal definition of parentage should be independent of the legal definition of family. Families are created; at their genesis is intent. Parents are born with the birth of a child. Prior intent is not a necessary condition for biological parentage.

ent any individual (regardless of gender, sexual orientation, or marital status) who is biologically related to a child.

Affirmation of the biological ties of genetics and gestation as the starting point for parentage does not necessitate the converse: namely, that biologically unrelated individuals are not parents. Whether formally by adoption or surrogacy, or simply in fact, an individual may “parent” in spite of the lack of biological tie or legal status as a parent.<sup>71</sup> The fundamental question is not whether parentage should be awarded to those who parent irrespective of biological ties to the child but rather whether parentage should *ever* be denied to one who both acts as parent and is the genetic genesis of the child. While a biological link is not—and should not—be a necessary condition for parentage,<sup>72</sup> the genetic link coupled with the intent to parent should be sufficient.<sup>73</sup>

### B. *K.M. v. E.G.*: California Confronts the Problem

The first case to suggest that current parentage statutes fail to account for the changing family dynamic attributable to ART was *K.M. v. E.G.*<sup>74</sup> In this California case, K.M. and E.G., a lesbian couple, were in a registered domestic partnership.<sup>75</sup> Before and after entering into

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71. Some scholars have lamented the retreat to a definition of fatherhood based solely upon biology as undermining both the best interests of the child and family stability. See generally Murphy, *supra* note 24. This Article does not champion parentage based solely upon biology. Rather, it affirms an understanding of parentage that acknowledges the parentage of any biological parent who intends to parent.

72. For cases where a man who acted as the father was treated as such even though DNA testing showed he was not the biological dad, see *In re Marriage of Buzanca*, 72 Cal. Rptr. 2d 280 (Ct. App. 1998) (a paternity case in which a nonbiological but functioning father who was married to the birth mother was held to have superior rights to the man proven to be the biological father through DNA testing) and *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (upholding by a plurality, in a child custody/visitation case in which the plaintiff was proven to be the biological father through DNA testing, challenged California’s statutory presumption that a child born to a wife cohabiting with her husband is the child of the husband).

73. The high cost of producing a child with reciprocal in vitro fertilization (IVF) in order to give a biological connection to both mothers is further evidence of the intentionality of parentage by both mothers. See Wayne Kuznar, *IVF Often Chosen for Family Building in Same Sex Couples*, THE OB/GYN NURSE-NP/PA, <http://www.theobgynurse.com/content/ivf-often-chosen-family-building-same-sex-couples> (last visited Oct. 15, 2013). “Reciprocal IVF is an option in which partners reciprocate in their roles—1 partner undergoes ovarian stimulation and serves as the oocyte source, and the other is the gestational mother, said Cunningham. The cost per cycle of reciprocal IVF is \$21,000.” *Id.*

74. See *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005).

75. *Id.* at 675. Pursuant to Section 297 of the California Family Code, two single, competent, unrelated, adult women may file a Declaration of Domestic Partnership (Form NP/SF DP-1) with the Secretary of State, Domestic Partners Registry.

the domestic partnership, E.G. underwent repeated unsuccessful attempts at artificial insemination.<sup>76</sup> K.M. was supportive of the procreative attempts, accompanying E.G. to most of her doctor's appointments.<sup>77</sup> Despite attempts to have a child after entering into a domestic partnership with K.M., E.G. insisted that she intended to raise the child as a single parent.<sup>78</sup> K.M. asserted the opposite, maintaining that she and E.G. intended to raise the child together.<sup>79</sup> While there was disagreement as to whether one or both women intended to have parental rights in the child,<sup>80</sup> there was no dispute over the biological connection of each woman to the child. After learning that E.G.'s failure to conceive was the result of her inability to produce sufficient ova, E.G., at the suggestion of a fertility specialist, underwent in vitro fertilization of embryos created from the ova of K.M. and the sperm of an anonymous donor.<sup>81</sup> Before K.M. had the ova extracted, she was required to sign a donor form wherein she relinquished all rights to a child born as a result of the use of her ova.<sup>82</sup> K.M. signed the form, knowing it to be a procedural hurdle<sup>83</sup> and believing that the waiver provision did not apply to her situation because it was clear that she and E.G. intended to raise the child together.<sup>84</sup> The embryos were implanted, and E.G. ultimately gave birth to twins.<sup>85</sup> The children's birth certificate listed E.G. as the only parent,<sup>86</sup> but in many other aspects of the children's lives, both E.G. and K.M. were identified as their mother.<sup>87</sup> Eventually, the relationship between E.G. and K.M. soured, and K.M. filed an action in the Superior Court of Marin County, California, to have the court estab-

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California's regulation of registered domestic partnerships was not altered by *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

76. *K.M.*, 117 P.3d at 675-76.

77. *Id.* at 676.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. K.M. signed the ovum donation consent form approximately one month prior to the procedure. *Id.*

83. Before performing the invasive procedure of removing ova, reproductive clinics, largely for their own protection from liability, require the execution of consent forms. The consent form signed by K.M. was printed on the letterhead of the University of California at San Francisco Medical Center. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* The limitations of fill-in-the-blank forms should not be determinative of parentage. Just as marriage licenses in some states have been modified to remove the gender-specific titles of "husband" and "wife" in favor of the gender-neutral "spouse 1" and "spouse 2," birth certificates could provide for three possible biological parents. Rachel Katz, *Miami Judge Allows 3 Names on Birth Certificate*, ABC NEWS (Feb. 8, 2013, 2:03 PM), <http://abcnews.go.com/blogs/headlines/2013/02/miami-judge-allows-3-names-on-birth-certificate/>.

87. *K.M.*, 117 P.3d at 676-77.

lish her legal parental rights in the children.<sup>88</sup> The trial court concluded that E.G.'s execution of the ovum donation form relegated her to the conceptual equivalent of a sperm donor, thus stripping her of any legal rights to a child born through the use of her ova.<sup>89</sup> The Court of Appeals affirmed the decision, concluding that, at the time of conception, the parties contemplated E.G. as the sole parent of the child.<sup>90</sup> The court noted that any action taken by the parties in bringing the children into their joint home and jointly parenting them was immaterial to establishing a parent-child relationship between K.M. and the children.<sup>91</sup> The court foreclosed reliance upon other legal doctrines to establish K.M.'s rights in the children by declaring that the only path to legal parentage for K.M. was adoption.<sup>92</sup> The California Supreme Court reversed.<sup>93</sup>

The California Supreme Court held that parentage under California law is governed by California's version of the Uniform Parentage Act<sup>94</sup> unless there is an applicable statutory exception that would draw the decision out of the scope of the Act.<sup>95</sup> California Family Code § 7613(b) provides that "a man is not a father if he provides semen to a physician to inseminate a woman who is not his wife."<sup>96</sup> The lower courts expanded the scope of this sperm-donor statute to include a woman who donates her ova and concluded that, in light of the waiver K.M. signed, § 7613(b) applied to place K.M. in the role of a donor.<sup>97</sup> Once categorized as donor, it followed that K.M. possessed no parental rights. The California Supreme Court, without commenting on the lower court's expansion of the sperm-donor statute, simply concluded that § 7613(b) "does not apply under the circumstances of this case in which K.M. supplied ova to impregnate her lesbian partner in order to produce children who would be raised in their joint home."<sup>98</sup> Simply put, the supreme court allowed K.M.'s actions, which negated her being a donor, to trump the waiver form, which labeled K.M. a donor. Having determined that the donor exception was inapplicable and, therefore, did not serve to deprive K.M. of her parental rights in

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88. *K.M.*, 117 P.3d at 677.

89. *Id.*

90. *Id.*

91. *Id.* One who acts as a parent to a child with whom there is no biological connection is referred to as a de facto parent. On the facts, K.M. was a de facto parent. *Id.* at 676-77.

92. *Id.* at 677-78.

93. *Id.* at 682.

94. CAL. FAM. CODE §§ 7600-7720 (West 2013).

95. *K.M.*, 117 P.3d at 678; *see also* *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) (holding donor exception inapplicable and determining maternity under the Uniform Parentage Act).

96. *K.M.*, 117 P.3d at 675 (citing CAL. FAM. CODE § 7613).

97. *Id.* at 677-78.

98. *Id.* at 681.

the children, the supreme court applied the law of the Uniform Parentage Act.<sup>99</sup> In so doing, it held that E.G. had offered sufficient evidence of a parent–child relationship in that she was the gestational mother.<sup>100</sup> Likewise, K.M. offered sufficient evidence of a parent–child relationship as the genetic mother of the children.<sup>101</sup> Thus, given that the children were raised in the parties’ joint home, and were loved and nurtured by both parties, the supreme court found that E.G. and K.M. were both legal mothers of the children.<sup>102</sup> While the existing statutory scheme of California failed to address the parentage question posed by these facts, the California Supreme Court chose to embrace “genetic consanguinity” for the finding of maternity as well as paternity.<sup>103</sup>

The California Supreme Court struggled to reach its conclusion—a correct conclusion—that an egg donor was not, in fact, a donor.<sup>104</sup> The widely accepted ART terminology meant to describe the science of the origin of the genetic material has unnecessarily incorporated the over-inclusive definition of “donor.” The lower court held that K.M. was deemed to have waived her parental rights to her egg once it was removed from her body and used in ART.<sup>105</sup> Colloquially speaking, K.M. donated her egg to her infertile partner E.G. Yet such a characterization is loaded with inapplicable nuances, which should not be determinative of parental rights. Advances in reproductive technologies have antiquated the once-precise terminology of donor. Not all transferors of genetic material are donors within the meaning of the California sperm-donor statute.<sup>106</sup>

The single term “donor” has been rendered ambiguous by the plethora of applications of artificial insemination. The need to clarify legal terminology in light of scientific advances is not without precedent.<sup>107</sup> Clarification of the term donor is urgently needed in order to

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99. *Id.*

100. *Id.* at 680.

101. *Id.*

102. *Id.* at 680–81.

103. *Id.* at 678–79 (citing *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) (finding the sperm-donor statute did not apply to cut off the parental rights accorded under the Uniform Parentage Act to a married couple who acted as the ovum and sperm providers to a gestational surrogate, as the couple “intended to procreate a child genetically related to them by the only available means”).

104. *Id.* at 682.

105. *See id.*

106. CAL. FAM. CODE § 7613 (West 2013).

107. The single term “surrogacy” became inadequate to differentiate between the legal status of an intended mother who was technically a surrogate to someone else’s donated egg and a rented womb. Multiple terms became necessary to differentiate the legal status among those engaged in the scientific procedure of receiving a fertilized egg for gestation whether parentage of the resulting child was intended or not. A birth mother can have one of four different relationships to the unfertilized egg: (1) her egg—which she intends to parent; (2) her egg—to which she

differentiate between the two categories of egg/sperm providers for ART, namely, “true donors” and what I would call “intentional lenders of procreative genetic material.” The duality of meanings for the single term donor has a disparate impact depending upon the gender of the donor. Where the genetic provider is male, retention of the status of father can be achieved (and therefore overcomes the over-inclusive label of donor) either by virtue of the man’s marriage to the woman who bears the child or by virtue of a surrogacy contract.<sup>108</sup> Where the genetic provider is female, however, there is no avenue to motherhood via the relationship to the woman who bears the child. The only way to avoid donor status for a female intentional lender of procreative genetic material is through a surrogacy arrangement, and that is available only if it is permitted by statute.<sup>109</sup>

Broadly speaking, donors and donations are not the concern of family law. The term donor as used in the parentage context is borrowed from the law of gratuitous transfers. Strictly speaking, a donor is one who not only parts with possession of her property, but who also relinquishes to the donee all present and future dominion and control over it.<sup>110</sup> A present interest donation is irrevocable. Once completed as evidenced by delivery and acceptance, the donor’s rights to the donated property are severed. The donor claims no right to possess, enjoy, or exercise dominion and control over the property; nor is the donor financially obligated for its future maintenance. Unfortunately, the terms “egg donor” and “sperm donor” encompass far more than true reproductive donation.

Though labeled as an egg donor by the lower court,<sup>111</sup> K.M. was not engaged in reproductive donation; she was procreating with her life partner.<sup>112</sup> The nuances of donating were absent. K.M. was, instead, an egg lender. K.M.’s interest was not being transferred to and

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surrenders parental rights as a “true” donor; (3) not her egg—she gestates the child she will parent; and (4) not her egg—she performs service of gestation with no intention of parenting.

108. Linguistic clarification of the donor/lender distinction would refine the conversation about parental rights in the context of private sperm donation. *See generally* Lauren Gill, *Who’s Your Daddy? Defining Paternity Rights in the Context of Free, Private Sperm Donation*, 54 WM. & MARY L. REV. 1715 (2013).
109. By statute, surrogacy laws may be limited to a “commissioning couple,” which incorporates the state’s definition of marriage to limit the access to parentage. *See, e.g.*, FLA. STAT. § 742.14 (2013), *supra* note 32 and accompanying text.
110. 38A C.J.S. Gifts § 1 (2013).
111. *K.M. v. E.G.*, 117 P.3d 673, 677 (Cal. 2005).
112. The failure of our limited ART terminology results in K.M. (the biological mother) being pegged as an egg donor. Could not E.G. (her partner and the gestational mother) have been equally pegged as a surrogate for K.M.’s biological child? Neither label is accurate. Each of K.M. and E.G. is, rather simply, a mother, and, more specifically, a biological mother. Each possesses a physical as well as an intentional tie to the child.

replaced by E.G.'s interest. K.M. fully retained her expectation to access, enjoy, and exercise dominion over the resulting child.<sup>113</sup> Additionally, K.M. intended and demonstrated financial responsibility for the child. All consequences of "ownership" of her egg remained with K.M.<sup>114</sup>

In the context of parentage, surrogates, egg donors, and sperm donors are perceived as sometimes necessary building blocks for procreation, but not as the primary architects. They are facilitators of parentage. Though unstated, the status as surrogate or donor comes with the qualifier "merely," and true parentage lies elsewhere. The introduction of the terms "egg lender" and "sperm lender" to our ART language would remove any actual or subliminal prejudice against the lender's claim to parentage.<sup>115</sup>

### C. *T.M.H. v. D.M.T.*: Florida Confronts the Problem with a Different Initial Outcome

In a case of first impression within the state, the courts of Florida<sup>116</sup> have joined the quest for an understanding of parentage in which old statutes can be reconciled with modern reproductive realities. In the case of *T.M.H. v. D.M.T.*, on which the introductory hypothetical is based, D.M.T. and T.M.H. enjoyed a committed same-sex relationship.<sup>117</sup> The couple decided to have a child together, a child that they would jointly parent and raise.<sup>118</sup> When the couple learned that D.M.T. was infertile, her partner provided her ovum to enable D.M.T. to conceive the couple's child.<sup>119</sup> Upon the birth of the child, both women held themselves out as mothers of the child.<sup>120</sup> The child

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113. *K.M.*, 117 P.3d at 681 (noting that "K.M. does not claim to be the twins' mother instead of E.G., but in addition to E.G.," the Supreme Court distinguishes the case from *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) (cited for the proposition that "for any child California law recognizes only one natural mother").

114. Perhaps the best analogy offered by the law of gratuitous transfers is that of a joint interest. Both the grantor and the grantee of a joint interest are equal owners of that property interest, each with full access to the whole of the property and the presumption of equal financial contribution. By analogy, both the originator of the egg (the egg "lender") and the gestational mother recipient should be equal parents of the resulting child.

115. By changing the terminology, we not only remove genetic lenders from the reach of sperm-donor statutes, we also reevaluate preconceived—or perhaps unintentional—legal conclusions. Consider, for example, the following quote that suggests that the common law doctrine of *nullius filius* needed reevaluation: "[T]here are no illegitimate children, only illegitimate parents." *Kaur v. Chawla*, 522 P.2d 1198, 1199 (Wash. Ct. App. 1974).

116. See *T.M.H. v. D.M.T.*, 79 So. 3d 787, 794 n.7 (Fla. Dist. Ct. App. 2011), *aff'd in part, rev'd in part*, No. SC12-261, 2013 WL 5942278 (Fla. 2013).

117. *Id.* at 788.

118. *Id.*

119. *Id.*

120. *Id.* at 788-89.

bore a hyphenated last name, and both women loved and provided for the child in their joint home.<sup>121</sup>

When the relationship between the women deteriorated, the child resided with the gestational mother; the genetic mother paid regular child support and received equal parenting time with the child.<sup>122</sup> Eventually, however, the amicable split turned bitter, and the gestational mother withheld the child from her other mother.<sup>123</sup> The genetic mother ultimately learned that the gestational mother had moved to Australia with the child.<sup>124</sup> The genetic mother filed an action in the circuit court of Brevard County, Florida, requesting the court to establish her legal rights and responsibilities with respect to the child upon finding that she is the child's biological mother.<sup>125</sup> The trial court dismissed the action, holding that the Florida statute addressing the donation of genetic material was applicable to relegate T.M.H. to the status of a donor because the statute precludes a same-sex couple from qualifying as a commissioning couple.<sup>126</sup> Under the Florida statute, only if T.M.H. and D.M.T. met the definition of a commissioning couple, a heterosexual couple, could T.M.H. have donated her genetic material without being involuntarily locked into the role of a donor.<sup>127</sup>

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121. *Id.*

122. *Id.* at 789.

123. *Id.*

124. *Id.*

125. *Id.*

126. The use of gender-specific terms throughout Florida's Determination of Parentage statutes precludes the State of Florida from recognizing more than, at most, one man and one woman as parents of a child. Had T.M.H. been a male domestic partner of D.M.T. whose sperm was used in the insemination, he would have been recognized as the father under Florida law. Had T.M.H. been an infertile male domestic partner of D.M.T., he could have adopted the child under a preplanned adoption agreement under FLA. STAT. § 63.212 (2011). While the law of all fifty states permits LGBT individual adoptions, only twenty-two states clearly permit second-parent adoption by a lesbian partner of the birth mother (Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Indiana, Iowa, Maine, Massachusetts, Montana, Nevada, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington). Five states prohibit second-parent adoption (Kentucky, Nebraska, Ohio, Utah and Wisconsin). In the remaining states, the law is unclear.

127. "The Final Order Granting Summary Judgment [to the gestational mother D.M.T.] found, among other things, that 'the law [of Florida] does not recognize the rights of the biological mother versus a birth mother;' that 'an agreement or contract between the parties, and/or previous course of conduct, does not create any rights in the [biological mother] to the minor child;' and that 'Florida law does not provide any protection' for a party in the biological mother's position, [namely, a mother who is vying for parental rights when another mother, the birth mother, already has such rights]. (R 303-04)." Appellee's Answer Brief at 3 n.2, D.M.T. v. T.M.H., No. SC12-261 (Fla. May 14, 2012), available at <http://www>.

The trial judge, who openly expressed displeasure with his ruling, noted, “I do not agree with the current state of the law, but I must uphold it. I believe the law is not caught up with science nor the state of same-sex marriages. I do think that is on the horizon.”<sup>128</sup> On appeal, the concerns of the trial court were addressed. The district court of appeal reversed, finding that Florida’s egg-donor statute did not anticipate and was not intended to apply to the unique situation where a woman, in a committed lesbian relationship, allows her eggs to be combined with sperm from an anonymous donor to create embryos to be implanted in her lesbian partner so the couple can bear a child with whom both women have a maternal link and who will be parented jointly by both women in the same home.<sup>129</sup> The court held that, under the extraordinary facts of this case, “we can discern no legally valid reason to deprive either woman of parental rights to this child.”<sup>130</sup>

It is noteworthy that the opinion of the District Court of Appeal of the State of Florida identified the child in the opening sentence of the majority opinion as being “born out of [the] relationship [between the biological mother T.M.H. and the birth mother D.M.T.]”<sup>131</sup> While it is traditional for us to think of children as being born out of relationships (whether legalized or not, long-term, casual, or singular), it expands the traditional usage of the phrase to so reference the child of a same-sex couple. Until the advancement of ART, a same-sex couple could bring a child “into” their relationship (in actuality, if not legally), but it was not possible for a child to be born “out of” that relationship.<sup>132</sup>

In arriving at its decision, the court of appeal reasoned that the egg-donor statute, as applied to the couple, was unconstitutional because it violated the woman’s fundamental rights to procreate and to parent one’s child as protected by the Florida and United States Constitutions.<sup>133</sup> The court went on to say that interpretation of the statute in a manner that deprived the appellant of these rights because she was in a same-sex rather than a heterosexual relationship vio-

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[floridasupremecourt.org/pub\\_info/summaries/briefs/12/12-261/Filed\\_05-14-2012\\_Answer\\_Brief.pdf](http://floridasupremecourt.org/pub_info/summaries/briefs/12/12-261/Filed_05-14-2012_Answer_Brief.pdf).

128. *T.M.H.*, 79 So. 3d at 789–90.

129. *Id.* at 790.

130. *Id.*

131. *Id.* at 787.

132. The linguistic connotations of “into” parallels the mechanism of adoption. The parent or parents bring an external child into the family. The linguistic connotations of “out of” parallels traditional parentage through birth. The child originates from within the existing relationship of the parents.

133. *T.M.H.*, 79 So. 3d at 792–93, 800.

lated equal protection and privacy protections under the state and federal constitutions.<sup>134</sup>

The gestational mother has appealed the decision of the intermediate court to the Supreme Court of the State of Florida.<sup>135</sup> The parties and the amici continue to couch the determination of parental rights in constitutional terms. The appellant/gestational mother maintains her position that the Florida egg-donor statute is determinative.<sup>136</sup> As the two women could not be a “commissioning couple,” the appellee/genetic mother could not legally assume any role other than the donor.<sup>137</sup> The appellant argues that, as the birth mother of the couple’s child, she is the child’s biological parent. Thus, forcing her to share parental rights with her lesbian partner would violate her privacy rights as well as her constitutional rights to the “love and companionship of a birth child.”<sup>138</sup> The appellant cloaks the parentage question in the state’s public policy against same-sex relationships. Noting Florida’s prohibition against same-sex marriage and joint same-sex adoptions, the appellant argues that it would be inconsistent with Florida’s stance on same-sex relationships to grant parental rights to both women in this case.<sup>139</sup>

The factual scenarios presented in *K.M. v. E.G.* and *T.M.H. v. D.M.T.* highlight that the current statutory law of California and Florida, respectively, fails to anticipate and cannot accommodate the unique parentage questions presented by modern families. The laws of Florida and California recognized the gestational mother as a natural parent of the child born to the relationship<sup>140</sup> and acknowledged the sperm donor’s waiver of rights and responsibilities with respect to the child,<sup>141</sup> but there was no statutory basis for vesting rights and responsibilities to the child with the biological mother who nurtured, loved, and raised the child. Had the question of parentage arisen in

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134. *Id.* at 800.

135. Notice of Appeal, *D.M.T. v. T.M.H.*, No. SC12-261 (Fla. Feb. 10, 2012), available at [http://www.floridasupremecourt.org/pub\\_info/summaries/briefs/12/12-261/Filed\\_02-10-2012\\_Notice\\_Of\\_Appeal.pdf](http://www.floridasupremecourt.org/pub_info/summaries/briefs/12/12-261/Filed_02-10-2012_Notice_Of_Appeal.pdf). The state high court affirmed the part of the appellate court decision relevant to this Article. No. SC12-261, 2013 WL 5942278 (Fla. 2013).

136. Brief for Appellant at 7-8, *T.M.H. v. D.M.T.*, 79 So. 3d 787 (Apr. 17, 2012) (No. SC12-261).

137. *Id.*

138. *Id.* at 11.

139. *See generally id.*

140. *See* Elizabeth E. Swire Falker, *The Disposition of Cryopreserved Embryos: Why Embryo Adoption Is an Inappropriate Model for Application to Third-Party Assisted Reproduction*, 35 WM. MITCHELL L. REV. 489, 501 (2009) (“In most states, well established common law presumptions provide that a woman who gives birth to a child will be deemed the legal and natural mother of that child.”).

141. *See* CAL. FAM. CODE § 7613 (West 2013); FLA. STAT. ANN. § 742.14 (West 2011), *invalidated by* *T.M.H. v. D.M.T.*, 79 So. 3d 787, 794 n.7 (Fla. Dist. Ct. App. 2011), *aff’d in part, rev’d in part*, No. SC12-261, 2013 WL 5942278 (Fla. 2013).

the more traditional use of ART, in which one parent was both the gestational mother and the genetic mother and the other parent was the biological father who had intent to parent, state parentage statutes would acknowledge the parent-child relationship between the child and the genetic father.<sup>142</sup> However, because the other intended parent was a woman who was not the gestational mother, the parentage statutes applied literally relegated her to the status of a donor, irrespective of her intent to parent her genetic child.

The absurdity of the statutory scheme that results in a genetic mother's possessing no legal rights as parent is demonstrated by the following unique, but logically possible, set of facts. Assume that Katy and Kim are domestic partners. They decide to have children together. In order to maximize each mother's closeness to the children, they decide to engage in ART. An egg removed from Katy will be fertilized by an anonymous sperm donor and implanted into Kim who will gestate and give birth to the child. Concurrently, an egg will be removed from Kim, fertilized by sperm *from the same donor* and implanted into Katy. Based upon the lower court's holding in *T.M.H. v. D.M.T.*,<sup>143</sup> only Katy would be a parent to Kim's genetic child; only Kim would be a parent to Katy's genetic child. And presumably, the two children would possess no legal relationship to each other, in spite of the fact that they are biologically related to the same three "parents": two as genetic suppliers and one as a gestational carrier. Furthermore, their lack of a legal sibling relationship would be in spite of the fact that predating their respective conceptions, the children were intended by the two functional parents to be siblings.<sup>144</sup> As a mere donor, the genetic mother is denied the legal parent-child relationship with her child. Thus, while an intended, genetic father can gain status as a legal parent, an intended, genetic, nongestational mother cannot.<sup>145</sup> In both *K.M. v. E.G.* and *T.M.H. v. D.M.T.*, the courts ultimately vested parental rights in the genetic mother.<sup>146</sup> However, the courts reached these results in spite of the law by extending statutory schemes that were designed to permit such outcomes only when the genetic parent seeking parental rights is the father of the child to

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142. Paternity could be established by the marital parentage presumption or through the biological link preserved in a parenting agreement negating donor status. UNIF. PARENTAGE ACT § 204 (amended 2002).

143. *T.M.H.*, 79 So. 3d at 789-90.

144. See Natalie Amato, Essay, *Black v. Simms: A Lost Opportunity to Benefit Children by Preserving Sibling Relationships When Same-Sex Families Dissolve*, 45 FAM. L.Q. 377, 378-79 (2011) (arguing that children have a right to continued contact with half-siblings following the demise of their parents' relationship).

145. In effect, the standard for legal parentage for an egg provider depends not on the affirmative fact of biological connection but rather on the negative fact of not being the gestational carrier. For a man, not being the gestational carrier is irrelevant.

146. *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005); *T.M.H.*, 79 So. 3d at 802-03.

include the parallel scenario when the genetic parent seeking parental rights is the child's other mother.<sup>147</sup>

Different standards for parentage have led to gender-based differences among genetic parents. Intended parents who have a genetic, but not gestational, connection to the child are in different legal positions depending on whether the genetic parent is a man or a woman. Current parentage statutes provide several means by which an intended father can establish parentage; however, these statutes are often gender-specific and, consequently, not equally applicable to women as a means of establishing parental rights.<sup>148</sup> Thus, for a court to vest parental rights in a genetic mother, it must resort to constitutional or statutory interpretation arguments.

It is the position of this author that the starting point of parentage can be determined without ever reaching the constitutional arguments being made to support the parentage of genetic nongestational mothers in same-sex relationships. These constitutional arguments are clouding the real legal question, namely: who are the initial claimants to parentage? It is well-settled that there is a fundamental right to procreate<sup>149</sup> and to raise one's children as the parents deem appropriate.<sup>150</sup> However, these principles do not resolve the underlying question of who qualifies as a parent. As paternity statutes were originally developed to resolve questions of child legitimacy and lack any discriminatory intent, constitutional gender-based equal protection

147. The Supreme Court of New York has also extended the reliance upon genetics to maternity. See *T.V. v. N.Y. State Dep't of Health*, 929 N.Y.S.2d 139 (App. Div. 2011).

148. For an exhaustive critique of the presumption of parentage for the partner of the birth mother, see Polikoff, *A Mother Should Not Have to Adopt*, *supra* note 14, at 215. In the states of Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, California, Oregon, Washington, Nevada, New Jersey, and the District of Columbia, "a female spouse or domestic/civil union partner of a woman who bears a child receives the same presumption of parentage that a husband receives." *Id.* The paternity presumption in favor of the husband of the gestational mother establishes the probability of biological connection to the child. *Id.* at 216. While an extension of the paternity presumption to a same-sex partner like T.M.H. or the other mother in the introductory hypothetical is an improvement to the state of the law that denies her parentage, the position of T.M.H. is biological and certain, not mere probability. "Parentage based on presumption requires no court involvement; that is its strength." *Id.* Because the presumption of paternity is tied to the legal status of the partner to birth mother, its extension to same-sex partners is dependent upon the state's recognition of same-sex couples. See, e.g., *id.* at 215 (quoting the Vermont statute as an example of how the states tie the presumption to a legal marital or partnership status). Parentage does not and should not need to be tied to a state's definition of marriage.

149. *Eisentadt v. Baird*, 405 U.S. 438, 453 (1972); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

150. *Lawrence v. Texas*, 539 U.S. 558, 574 (2003); *Pierce v. Soc'y of the Sisters*, 268 U.S. 510 (1925).

arguments would fail before the courts.<sup>151</sup> The argument that the determination of parentage should be different if a child is born of a same-sex relationship versus a heterosexual relationship improperly shifts the focus from the parent–child relationship to the nature of the adult relationship. Rather, when parentage is evaluated through the lens of the adult’s relationship with the child, it becomes clear that parentage can be determined without reference to the relationship between the adults out of whom the child was born.<sup>152</sup>

The absurdity of denying parentage to the genetic mother of our introductory hypothetical is even more evident if we assume for a moment that she was not trying to *establish* her legal parental rights, but rather was trying to *avoid* a parental support obligation. Further, assume she argues that despite her biological connection to the child and her intent to parent, she should not be compelled to provide financial support for the child whom she co-parented (for almost four years) simply because she is a woman and state law relegates her to the status of a donor. Certainly the courts would frown on such an attempt to avoid parental responsibilities, as it would undoubtedly hold a man who shares a genetic relationship with a child to a support obligation, regardless of intent.<sup>153</sup> However, the literal application of the parentage statutes of Florida as of 2013 would result in a woman who shares a genetic relationship with a child, possesses the actual intent to parent the child, and engages in the invasive, costly, and lengthy process to conceive such child owing no support obligation to the resulting child simply because (1) she is not the gestational mother and (2) she is not married to the gestational mother.

The rights and obligations of parents are gender-neutral;<sup>154</sup> our legislators and judges must rectify statutory rules resulting in inconsistent outcomes based on gender. Adherence to the law as it stands both denies an egg lender parental rights and would foreclose a court from imposing on a genetic mother in the position of K.M. or T.M.H. a support obligation without first overturning (or ignoring) the law

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151. Similarly, a criticism of the Parentage Decision Tree proposed in Part III, *infra*, using a gender-based equal protection argument is not persuasive. While the Parentage Decision Tree may establish parentage for two women but not two men, it remains scientifically impossible for a child to be born out of the relationship between two men. “The fact that a male is unable to be a gestational carrier of the fertilized ovum is the result of biology, not discrimination[ ]” under the law. *L.F. v. Breit*, 736 S.E.2d 711, 721 (Va. 2013).

152. As noted by the Florida District Court of Appeal in *T.M.H. v. D.M.T.*, “[t]heir separation does not dissolve the parental rights of either woman to the child, nor does it dissolve the love and affection either has for the child.” *T.M.H. v. D.M.T.*, 79 So. 3d 787, 803 (Fla. Dist. Ct. App. 2011), *aff’d in part, rev’d in part*, No. SC12–261, 2013 WL 5942278 (Fla. 2013).

153. *See, e.g.*, FLA. STAT. § 61.13 (2011).

154. *See generally* ABBEY G. HAIRSTON, 2 CHILDREN & THE LAW: RIGHTS AND OBLIGATIONS § 7:5 (2013).

which labels her a donor.<sup>155</sup> While not inconceivable, it would be unfortunate that a court would compel a genetic parent such as K.M. or T.M.H. to pay parental support obligations while simultaneously denying parental rights of visitation or joint custody. The legal analysis must be the same whether recognizing parental rights or enforcing parental obligations, regardless of the gender of the parent.

### III. THE UNINTENTIONAL GENESIS OF THE PROBLEM

Two glaring flaws present in the parentage statutes of most states have created, albeit unintentionally, a statutory structure that may deny an intended, genetic parent parental rights if that intended parent is female but is not the child's gestational mother. The first defect is the false conflict artificially created between gestational mother and genetic mother. A fit birth mother's superior rights "vis-à-vis a complete stranger are one thing; her rights vis-à-vis *another*" mother demand different scrutiny.<sup>156</sup> The second defect is the unequal legal status of male and female genetic parents created by gender-specific paternity statutes that present only male genetic parents with several statutorily created means to establish parental rights in a child.<sup>157</sup> Together, these two imperfections have mounted difficult legal obstacles for an intended, genetic mother to secure her legal rights as parent of a child she nurtures and supports unless she also gave birth to the child.

#### A. The False Conflict Between the Genetic and the Gestational Mother

Over time, a legal conflict between gestational and genetic mothers appears to have been accepted without critical analysis. In reality, such a conflict does not exist. Today, in the absence of surrogacy ar-

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155. A donor is not required to support a child conceived through the use of her genetic material. Currently unfolding in the state of Kansas is a case involving William Marotta, a man who supplied sperm to a lesbian couple pursuant to a private contract that he thought waived his rights and obligations as parent to any child conceived. *Kansas Sperm Donor Asks for Judgment Without Trial*, FOX NEWS (July 25, 2013), [www.foxnews.com/us/2013/07/25/kansas-sperm-donor-asks-for-judgment-without-trial](http://www.foxnews.com/us/2013/07/25/kansas-sperm-donor-asks-for-judgment-without-trial). The state contends that the contract is invalid, making Marotta (as the biological father) responsible for child support. *Id.*

156. The legal recognition of parentage must depend upon who is vying for the status. *Troxel v. Granville*, 530 U.S. 57, 100–01 (2000) (Kennedy, J., dissenting) (emphasis added) (“[A] fit parent’s right vis-à-vis a complete stranger is one thing; her right vis-à-vis another parent . . . may be another.”).

157. It is commonly regarded that the biological parents of a child “consist of the male who sired the child and the female who gave birth to the child.” *Parent*, WIKIPEDIA, <http://en.wikipedia.org/wiki/Parent> (last visited Oct. 11, 2013).

rangements,<sup>158</sup> the parentage statutes of all states identify the gestational mother as the natural mother of a child born to her.<sup>159</sup> This presumption, like others related to the notion of parentage, arose at a time when there were no scientific capabilities available to affirm or disavow parentage. Thus, courts' interpretations of parentage reflected the traditional family structure, including the presumption that a gestational mother will bear her own biological child.<sup>160</sup> As the Tennessee Supreme Court noted in *In re C.K.G.*, “[h]istorically, gestation proved genetic parentage beyond doubt, so it was unnecessary to distinguish between gestational and genetic mothers.”<sup>161</sup> These presumptions proved beneficial in resolving issues of parentage until societal values began to change, the image of the traditional family began to yield to a more nontraditional composition, and ART enabled the creation of children by means inconsistent with the traditional notions of conception and parentage. Despite these changes, courts have continued to apply the presumption of maternity in favor of the gestational mother,<sup>162</sup> absent the existence of a surrogacy arrangement, without due consideration of when and why the presumption arose or the proper context for its application. The end result is that the presumption continues to be afforded significance inconsistent with its original intent.

The presumption that the gestational mother is the natural mother of a child born to her was never intended to represent the legal definition of maternity. In fact, it is nothing more than an evidentiary presumption designed to *describe* the genetic relationship between the

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158. See, e.g., ARK. CODE ANN. § 9-10-201 (West 2013) (excluding surrogate mothers from the presumption that the woman who gives birth is the mother).

159. See, e.g., CAL. FAM. CODE § 7610 (West 2013); see also ME. REV. STAT. tit. 22, § 2761 (2013) (providing in part that “the mother is deemed to be the woman who gives birth to the child . . .”).

160. However, as noted by the majority in *T.M.H. v. D.M.T.*, it is overbroad to assert a common law rule that the gestational mother is the sole legal mother. *T.M.H. v. D.M.T.*, 79 So. 3d 787, 787, 795 (Fla. Dist. Ct. App. 2011), *aff'd in part, rev'd in part*, No. SC12-261, 2013 WL 5942278 (Fla. 2013).

161. *In re C.K.G.*, 173 S.W.3d 714, 721 (Tenn. 2005) (quoting Kermit Roosevelt III, *The Newest Property: Reproductive Technologies and the Concept of Parenthood*, 39 SANTA CLARA L. REV. 79, 97 (1998) (internal quotation marks omitted). Here, the Tennessee Supreme Court limited its holding to the facts of the case when it held that the birth mother's rights prevailed over the biological or egg donor's rights. *Id.* at 733. It is important to note that this case did not involve “a controversy between a gestational and a female genetic progenitor where the genetic and gestative roles have been separated and distributed among two women . . .” *Id.*

162. Professor James Dwyer comments, “Perhaps the closest thing to a globally uniform rule in family law is that the woman who gives birth to a child is the child's first legal mother . . .” JAMES DWYER, *FAMILY LAW: THEORETICAL, COMPARATIVE, AND SOCIAL SCIENCE PERSPECTIVES* 25 (Vicki Been et al. eds., 6th ed. 2012).

adult and child.<sup>163</sup> The preference for defining a child's gestational mother as its natural mother was intended to assign significance to the genetic relationship between the mother and child.<sup>164</sup> State parentage statutes that, as a matter of course, give preference to the gestational mother over a genetic mother ignore the origin of the presumption and the importance of the genetic relationship, thereby creating a false conflict rooted in the flawed interpretation that the gestational mother has a status superior to that of the genetic mother.<sup>165</sup> As long as the presumption is applied within the context of the traditional family and traditional means of conception, it is sufficient to establish the maternal relationship between a woman and a child. However, the presumption proves problematic when it is applied to scenarios involving ART where the genetic mother and the gestational mother are not the same person.<sup>166</sup> The presumption was never intended to nor is it sufficient to answer questions of maternity that arise outside of traditional ideas of conception. However, if the presumption is abandoned and the law returns to a point where emphasis is placed on the genetic relationship as a starting point for determining parentage, such a shift can accommodate and resolve questions of parentage in the face of nontraditional families and modern advances in reproductive technology.<sup>167</sup>

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163. See Christen Blackburn, Note, *Family Law—Who Is a Mother? Determining Legal Maternity in Surrogacy Arrangements in Tennessee*, 39 U. MEM. L. REV. 349, 353 (2009).
164. See Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 316 (1990).
165. The jurisprudence of biological feminism emphasizes as the basis of maternity the biological tie of mother and child in utero. Professor Robin West wrote that a pregnant woman's "biological life embraces the embryonic life of another." See Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 WIS. WOMEN'S L.J. 149, 210 (2000) (stating that a pregnant woman's "biological life embraces the embryonic life of another"); see also Cahn, *supra* note 33, at 194–95 (quoting Barbara Katz Rothman, *Daddy Plants a Seed: Personhood Under Patriarchy*, 47 HASTINGS L.J. 1241, 1245 (1996)) ("The maternal tie is based on the growing of children; the patriarchal tie is based on genetics, the seed connection.").
166. See, e.g., *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) (This case presented a custody battle between a gestational carrier and the genetic parents in which the trial and appellate courts favored the genetic mother over the gestational mother, defining legal parentage on the facts presented in terms of genetics. The Supreme Court of California upheld the ruling but based its decision upon the pre-conception intent of the genetic parents to create a child, giving them priority over the gestational carrier who was only a facilitator of the birth.).
167. A preference for the gestational mother can be seen in feminist scholarship. See, e.g., Tracey Higgins, Note, *Rethinking (M)otherhood: Feminist Theory and State Regulation of Pregnancy*, 103 HARV. L. REV. 1325, 1331–33 (1990) (noting a preference for the gestational mother but not necessarily addressing a choice between the gestational mother and the genetic mother).

## B. The Disparate Legal Avenues to Parentage Based upon Gender-Specific Paternity Statutes

Just as the law created a presumption of maternity in the birth mother, the law created a presumption of paternity in her husband with respect to any child she bears during the marriage.<sup>168</sup> This presumption was even more limited in applicability than the presumption of maternity because traditionally it was applied only in situations where the birth mother was married.<sup>169</sup> As out-of-wedlock births became a more common occurrence,<sup>170</sup> states came to realize that this narrow presumption was useless in determining many issues of paternity.<sup>171</sup> With only this presumption to apply to questions of paternity, a child born out of wedlock had no legal father.<sup>172</sup> Additionally, if a married woman bore a child during the marriage but the woman's husband was not the father, there was no legal mechanism by which the husband could challenge the paternity if he believed that he was not the father.

In an effort to afford children born out of wedlock the opportunity to be supported by two legal parents, states began to enact statutory measures that would allow men who had fathered children out of wedlock to establish legal parental rights in these children.<sup>173</sup> The presumption that the husband of a married woman is the father of a child born to the marriage became rebuttable, both allowing a husband to challenge paternity and allowing the actual father to assert paternity.<sup>174</sup> Now, all states have some means of establishing paternity for children born out of wedlock, such as a parentage petition filed in the

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168. UNIFORM PARENTAGE ACT § 204 (amended 2002).

169. *See, e.g.*, *Vetten v. Wallace*, 39 Ill. App. 390 (App. Ct. 1890); *Easley v. Gordon*, 51 Mo. App. 637 (Ct. App. 1892); *Kessler v. Anonymous*, 18 N.Y.S.2d 278 (Just. Ct. 1940); *Allen v. Hunnicutt*, 52 S.E.2d 18 (N.C. 1949); *see also* *Home of Holy Infancy v. Kaska*, 397 S.W.2d 208, 210 (Tex. 1965) (noting that in the states of Illinois, Missouri, New York, and Texas, respectively, there was no common law duty on a putative father as legal parent to support a child born out of wedlock).

170. According to data compiled by the National Center for Health Statistics, in 2011, 40 percent of all births in America were to unwed women, an increase from 33 percent in 2000 and 18 percent in 1980. Joyce A. Martin et al., *Births Final Data for 2011*, 62 NATIONAL VITAL STATISTICS REPORTS 1 (2013), available at [http://www.cdc.gov/nchs/data/nvsr/nvsr62/nvsr62\\_01\\_tables.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr62/nvsr62_01_tables.pdf).

171. *See generally* Jeffrey A. Parness & Zachary Townsend, *Legal Paternity (and Other Parenthood) After Lehr and Michael H.*, 43 U. TOL. L. REV. 225, 225–26 (2012) (discussing the clash that results when the marital paternity presumption and blood tests assign legal paternity to two different men).

172. Such a child was termed *nullius filius*. *State v. Chavez*, 82 P.2d 900 (N.M. 1938).

173. *See, e.g.*, *In re Bernard T.*, 319 S.W.3d 586, 598–99 (Tenn. 2010).

174. UNIFORM PARENTAGE ACT § 204 (amended 2002); TENN. CODE ANN § 36-2-304 (West 2010).

appropriate court.<sup>175</sup> Many states have also established a putative father registry, which entitles a properly registered “presumed” father to notification of and the right to intervene in many court proceedings related to the child, such as the termination of parental rights or adoption actions.<sup>176</sup>

For the purpose of this Article, the critical point is that state legislatures corrected the shortcomings in the law by enacting legislation that addressed issues of paternity arising outside of the traditional marital relationship and provided legal avenues allowing intended fathers to establish legal, parental rights.<sup>177</sup> While undoubtedly necessary to establish dual parentage for children born out-of-wedlock, the legislation was limited in its focus and application. As the family structure continues to evolve and ART has produced a variety of new ways of conception, these gender-specific paternity statutes fall short. The end result is that, in many states, there are no statutorily created mechanisms that allow women to establish parentage.<sup>178</sup> Thus, while men can establish parentage either through an evidentiary presumption or through remedial legislation, legal maternal rights are vested either by the evidentiary presumption of birth (which yields only one biological mother to the exclusion of all other claimants) or by a surrogacy contract (which overcomes the evidentiary presumption of maternity and awards maternity according to the contract).<sup>179</sup> Paternity statutes, while well intentioned, have placed genetic parents in very different legal positions.

#### IV. THE PARENTAGE DECISION TREE: A CONCEPTUAL MODEL FOR STATE PARENTAGE STATUTES

For the majority of the children born in this country, neither the false conflict between the gestational mother and the genetic mother nor the inapplicability to women of biologically based paternity stat-

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175. UNIFORM PARENTING ACT § 301 (amended 2002). A child’s birth mother and a man claiming to be the genetic father may sign an acknowledgment of paternity. *Id.*

176. *E.g.*, TENN. CODE ANN. § 36-2-318 (West 2010).

177. UNIFORM PARENTING ACT § 301 (amended 2002).

178. Some courts have judicially extended the paternity statutes to cases of maternity. *See, e.g.*, *Elisa B. v. Superior Court*, 117 P.3d 660, 666–67 (Cal. 2005) (establishing that a child’s two parents can both be women and applying state statutes regarding father–child relationships to mother–child relationships). Can the wording here be changed to say, “apply to mother–child relationships state statutes regarding father–child relationships”?

179. The logically necessary corollary to same-sex marriage is the extension of the marital presumption of paternity to a marital presumption of parentage for the birth mother’s spouse, irrespective of gender. *See Susan Frelich Appleton, Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227 (2006).

utes is of any consequence because these flaws in the law do not impact traditional family cases. However, there has been a steady increase in the number of nontraditional families in recent years,<sup>180</sup> and the law cannot continue to ignore the efforts of adults in these families to gain status as a legal parent. In these situations, the unfortunate consequence of imperfect parentage models is that states no longer have a reliable starting point for determining parentage. States can overcome many of the shortcomings of current parentage statutes and presumptions by developing a more inclusive parentage model that places intended, genetic parents on the same playing field, regardless of gender. This can be achieved by returning to the essence of the parent–child relationship—genetics. As Professor Nancy Polikoff once noted, “genetic connection is neither necessary or sufficient for legal parentage.”<sup>181</sup> However, a parentage decision tree<sup>182</sup> based on biology offers conceptual clarity to the diverse pool of claimants to parentage. Using the genetic relationship as a foundation for parentage, states should adopt gender-neutral parentage statutes that assess parentage in terms of both biology and intent to parent.<sup>183</sup>

Adoption by the states of a properly ordered gender-neutral parentage decision tree would be more inclusive of the ever-changing family dynamic and of the scientific, reproductive advances. It would be sufficient to resolve almost all initial determinations of parentage while doing so in a manner that treats all genetic parents equally, irrespective of gender. The basic structure of the parentage decision tree begins with the child and assigns parentage in the following hierarchy: Genetic Parent #1; Genetic Parent #2; Gestational Parent.<sup>184</sup> From this starting point, Genetic Parent #1 or Genetic Parent #2 may waive rights to the child or opt out of parentage. This would be done

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180. Doris Nhan, *Census: More in U.S. Report Nontraditional Households*, NAT'L J. (May 1, 2012), <http://www.nationaljournal.com/thenextamerica/demographics/census-more-in-u-s-report-nontraditional-households-20120430>.

181. Polikoff, *A Mother Should Not Have to Adopt*, *supra* note 14, at 202 (noting that ART, adoption, and statutory and common law presumptions all assign parentage to individuals possessing no biological tie to the child).

182. The proposed decision tree would determine “formal” as opposed to “functional” parenthood. For a discussion of the difference, see Pamela Laufer-Ukeles & Ayelet Blecher-Prigat, *Between Function and Form: Towards a Differentiated Model of Functional Parenthood*, 20 GEO. MASON L. REV. 419 (2013).

183. The intent to parent is, arguably, stronger in the case of two biological mothers using ART than in the case of the biological father and mother of a child conceived the old-fashioned way where imperfect contraception and impaired judgment sometimes trump the nonreproductive intent behind the sex act.

184. The biological connection for the father may be established with scientific proof or via the parentage presumption. In *Dawn D. v. Superior Court*, 952 P.2d 1139, 1140 (Cal. 1998), a temporary sexual partner of a married woman who reunited with her husband was denied standing to challenge the paternity of married woman’s husband who was serving as father to the child, *cited in* Polikoff, *supra* note 61, at 2027–28.

by embracing the true donor status as a mere supplier of genetic material to others who intend to parent. Likewise, the Gestational Parent may, through an enforceable surrogacy arrangement, waive her status as parent. If the biological parentage decision tree fails to supply fewer than two parents for a child,<sup>185</sup> the determination of parentage may then be supplemented by various legal constructs such as adoption, *de facto* parentage, and intent-based models of parentage. Each parentage position is filled or eliminated without reference to the gender of the individual occupying the position. Moreover, biological parents should not have to prove their intent to parent; such intent is presumed under the proposed parentage decision tree.<sup>186</sup>

This proposed parentage decision tree poses no problem for the traditional family—the genetic mother (also the gestational mother) and the genetic father would simply fill the first two positions as Genetic Parent #1 and Genetic Parent #2. The real value in this parentage decision tree, however, is that it resolves the parentage question in the more nontraditional situations by taking into account both genetics and intent to parent. More specifically, this paradigm recognizes a gender-neutral distinction between a donor and a lender of genetic material. Under most current parentage statutes, a man can donate his genetic material without incurring obligations to any resulting child, and a man whose wife receives the donated sperm will be considered the natural father of the child as long as he consented to the insemination process.<sup>187</sup> However, current laws do not permit a female to serve as anything other than an egg donor, which becomes an issue when the couple intending to parent a child is a lesbian couple.

This was the exact situation before the trial court in *T.M.H. v. D.M.T.*<sup>188</sup> When D.M.T. allowed her egg to be used in the creation of an embryo to be implanted in her partner, the law recognized no status for her other than that of a donor, despite her intent to parent the

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185. For a discussion supporting the removal of a quantitative limit on the number of individuals the law deems to be a parent, see Jacobs, *More Parents*, *supra* note 60. Professor Jacobs argues that, in light of the changing family structure and an increasing departure from the two-parent paradigm, there is no reason the law should limit a child to only two legal parents. Professor Jacob states, “I previously argued that courts should not be bound by the number ‘two’; rather, courts should allocate full legal parentage to more than two parents if the circumstances warrant allocation.” *Id.* at 222; see also Susan Frelich Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11, 25–26 (2008) (advocating for the recognition of multiple parents and demonstrating how family law already acknowledges the divisibility of parental roles among a variety of qualified persons).

186. See Knaplund, *supra* note 61, at 902 n.22.

187. See CAL. FAM. CODE § 7613 (West 2010) (amended in 2013 to reflect gender-neutral “spouse” term).

188. *T.M.H. v. D.M.T.*, 79 So. 3d 787, 794 n.7 (Fla. Dist. Ct. App. 2011), *aff’d in part, rev’d in part*, No. SC12–261, 2013 WL 5942278 (Fla. 2013).

child.<sup>189</sup> By removing the gender descriptor from the positions in the proposed parentage decision tree, the law will recognize donors and lenders of genetic material, regardless of gender. In turn, this will allow a woman who has the intent to parent a child with her partner to use her genetic material in the creation of the child while the other partner serves as the gestational mother. Considering this situation in the context of the parentage decision tree, the biological mother would fill the position of “Genetic Parent #1.” “Genetic Parent #2” would be eliminated because of the couple’s use of the sperm of a true donor. The gestational mother would then fill the “Gestational Parent” position as the second parent.

The use of the term “lender” to refer to an individual who, with intent to parent, permits their genetic material to be used in the creation of a child is calculated and deliberate. The term is significant because it implies that the person permitting the use of genetic material is not surrendering parental rights.<sup>190</sup> “Lender” suggests that the person whose genetic material is used to create an embryo expects to get something in return. The term represents the biological connection and the intent to parent, thereby distinguishing this individual from a true donor, who has no intent to parent. In practice, a lender would authorize the use of genetic material in the conception of a child with the expectation that the lender would retain legal parental rights and legal obligations in the child.

The adoption of the parentage decision tree as the starting point of parentage does not negate the legitimacy of other avenues to parentage, but it relegates these other avenues to a logically secondary position.<sup>191</sup> Application of the proposed parentage decision tree would guarantee primary parentage, as opposed to derivative parentage,<sup>192</sup> to all claim holders for parentage who bear a biological relation to the child.<sup>193</sup> The parentage decision tree will necessarily yield two or

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189. *Id.* at 789.

190. Some statutes recognize that not all egg donors are donors but have failed to offer an affirmative label such as lender. *See, e.g.*, N.D. CENT. CODE ANN. § 14-19-01(3) (West 2011) (defining “donor” as “a woman whose body produces an egg for the purposes of assisted conception but does not include a woman whose body produces an egg used for the purpose of conceiving a child for that woman”).

191. *See In re M.C.*, 195 Cal. App. 4th 197, 222–23 (Ct. App. 2011) (recognizing that a child may have three presumed parents, namely, a biological mother, a presumed mother, and a biological father).

192. For the purposes of this Article, the term “derivative” is limited to describe only a *chronological* secondary position, not a moral or de facto secondary position. This term is borrowed from the usage of “derivative” in the theory of derivative citizenship and the derivative domicile rule, which was used to link a woman’s domicile to that of her husband’s. *See* Kerry Abrams, *Citizen Spouse*, 101 CAL. L. REV. 407, 413–15 (2013).

193. The perception of the secondary nature of the de facto parent label (which is, by definition, nonbiological) can be seen in *Nolan v. LaBree*, 52 A.3d 923 (Me. 2012).

three biological parents,<sup>194</sup> some or all of whom may have voluntarily waived parental rights to the child or had such rights terminated by a judicial proceeding. Compliance with traditional adoption laws and surrogacy arrangements, as well as the reliance on legal presumptions of parentage, are available to fill any parenting voids.<sup>195</sup> States must then determine whether the rights and responsibilities of legal parentage should be conveyed to additional individuals under doctrines of de facto parenting,<sup>196</sup> intentional parenting,<sup>197</sup> presumed parentage,<sup>198</sup> “gestational fathering,”<sup>199</sup> co-parenting,<sup>200</sup> psychological parenting,<sup>201</sup> or voluntary acknowledgements of parentage (VAPs).<sup>202</sup>

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194. See Polikoff, *A Mother Should Not Have to Adopt*, *supra* note 14, at 243–44 (setting forth the “unusual, but not unheard of” cases in which the states of Alaska, Massachusetts, Washington, California, Delaware, and Pennsylvania have embraced the possibility of three parents); see also Appleton, *supra* note 179, at 17–18 (discussing cases from Pennsylvania and Ontario that recognized more than two legal parents for a child).
195. In 2011, the Supreme Court of Connecticut affirmed the Superior Court’s holding enforcing a gestational agreement against the gestational carrier and declaring the biological father and his same-sex partner as the intended, and, therefore, legal parents of the child conceived by ART using the father’s sperm and eggs donated by a third party (“true”) egg donor. See *Raftopol v. Ramey*, 12 A.3d 783 (Conn. 2011). Applying my parentage decision tree to these facts, the position of Genetic Parent #1 would be unfilled, as the genetic mother was a “true” donor. Genetic Parent #2 would be the biological father, who, though he used artificial insemination, was a lender of genetic material. The gestational carrier would be the gestational mother; however, a properly executed surrogacy agreement would be sufficient to exclude her as legal parent. With only one of the three possible claimants to biological parenthood being recognized as legal parent, the analysis would shift to evaluating the nonbiological claimants to parentage by first applying legal presumptions. Under Connecticut law, the marital presumption of parentage does not extend to unmarried partners. The court, however, held that the father’s same-sex partner did acquire the status of legal parent pursuant to the enforceable gestation agreement.
196. See, e.g., *In re Parentage of L.B.*, 22 P.3d 161, 176 (Wash. 2005) (noting that common law in the state of Washington recognizes the status of de facto parentage).
197. See Perri Koll, Note, *The Use of the Intent Doctrine to Expand the Rights of Intended Homosexual Male Parents in Surrogacy or Custody Disputes*, 18 *CARDOZO J. L. & GENDER* 199 (2011).
198. See Byrn and Ives, *supra* note 61, at 337 (critiquing the marital presumption of paternity as not being in the best interest of the child).
199. See Woodhouse, *supra* note 11, at 1757–58 (coining the term “gestational fathering” and defining it as the parent who “supports and nurtures” the mother during pregnancy).
200. See *Wakeman v. Dixon*, 921 So. 2d 669, 672–73 (Fla. Dist. Ct. App. 2006) (denying parentage by declaring a co-parenting agreement between lesbian partners unenforceable and according no weight to the nonbiological partner’s status as de facto parent for several years).
201. Robin Cheryl Miller, Annotation, *Child Custody and Visitation Rights Arising from Same-Sex Relationship*, 80 A.L.R.5TH 1 (2000).
202. See Jeffrey A. Parness & Zachary Townsend, *For Those Not John Edwards: More and Better Paternity Acknowledgments at Birth*, 40 U. BALT. L. REV. 53, 72 (2010) (noting that some states, like Alaska and Nevada, do not address whether ge-

States must also decide whether to restrict the status of parent to maximum possible number of individuals for any given child.<sup>203</sup> While an in-depth discussion is beyond the scope of this Article, it is important to note that increasing the number of legal parents would require corresponding modifications to the state's custody laws, to adoption laws, and to inheritance laws.<sup>204</sup>

Almost immediately, it is evident that this new view of parentage does not resolve all issues that may arise. For example, this paradigm would allow two women to be termed the legal parents of a child, without the utilization of adoption, but it would not permit the same for two men.<sup>205</sup> However, this is a limitation imposed by science, not by the view of parentage proposed here. If science ever advanced to the point where two men could both have biological ties to the same child,<sup>206</sup> then the gender-neutral view of parentage proposed by this Article would recognize the parent-child relationship between each man and the child born out of their relationship.

### A. A Gender-Neutral Parentage Decision Tree Does Not Disrupt Other Concepts in the Parentage Framework

It is important to note that the adoption of a gender-neutral definition of parentage does not disrupt other existing state policies concerning parentage or marriage. The presumption of paternity and

netic ties to the child are required for a VAP to be valid); *See also* Jeffrey Parness, *Federal Constitutional Childcare Interests and Superior Parental Rights in Illinois*, 33 N. ILL. U. L. REV. 305, 337 (2013) (noting that VAPs are most often used to acknowledge the believed biological parents of a child born out of wedlock).

203. *See, e.g., In re M.C.*, 195 Cal. App. 4th 197 (Ct. App. 2011) (This case addresses the parentage of a child conceived naturally through a sexual relationship between a man and a woman, the woman being married to another woman under the laws of the state of California, giving rise to three claimants for parentage, namely, the two biological parents and the "spouse" of the mother under an extension of the parentage presumption, which assigns parentage to a married woman's husband. The appeals court determined that this child could *not* have three legal parents.); *See also* Polikoff, *supra* note 61, at 2015 (using *In re M.C.* to consider parentage of a child conceived through sexual intercourse and born to a lesbian couple).

204. *See generally* Jacobs, *More Parents*, *supra* note 60.

205. *See* *Smith v. Cole*, 553 So. 2d 847, 849-54 (La. 1989) (acknowledging dual paternity of a biological father and a legal father in Louisiana through statutory presumption and proven filiation); *see also* *Slowinsky v. Sweeney*, 117 So. 3d 73, 78-79 (Fla. Dist. Ct. App. 2013) (holding that Florida does not recognize dual fatherhood). As these cases suggest, dual fatherhood would also be outside the scope of the proposed parentage decision tree because it requires a nonbiological based analysis of parentage.

206. It is already scientifically possible for female-to-male transgender people to bear children because, although they identify as men, they may possess a functional uterus. *Male Pregnancy*, WIKIPEDIA, [http://en.wikipedia.org/wiki/male\\_pregnancy](http://en.wikipedia.org/wiki/male_pregnancy) (last visited Oct. 20, 2013).

state policies pertaining to intent-based parentage and de facto parentage remain unaffected by the removal of gender-based parentage definitions. Perhaps more importantly, the adoption of a gender-neutral definition of parentage has no effect on a state's policy regarding same-sex marriage or second-parent adoption. The biological parentage model is independent of evolving and conflicting state definitions of marriage,<sup>207</sup> as the model weighs neither marital status nor gender as a disqualifying factor in determining parentage. Because this proposed view of parentage is centered on the relationship between the adult and the child, not the relationship between the adults, states can prohibit same-sex marriage and yet implement a statutory scheme of gender-neutral parentage without compromising that social policy. Likewise, the proposed parentage decision tree would operate within the confines of existing second-parent adoption statutes; it would not force a state to recognize as a parent one who is barred from such status and had no part in the biological creation of the child.

## B. Gender-Neutral Parentage Is Consistent with Other Advances in the Law

Modifications to the Uniform Probate Code (UPC) made in 2008 address the parentage of children of ART as it impacts the laws of inheritance.<sup>208</sup> The UPC could serve as a precedent for gender-neutral changes to the Uniform Parentage Act (UPA).<sup>209</sup> For example, the UPC included in its 2008 revisions a more precise definition of “donor,” referencing both a man who supplies sperm and a woman who provides an egg for the purpose of assisted reproduction.<sup>210</sup> The UPA excludes from its definition of donor only *sperm* donors who “intend to be the parent.”<sup>211</sup> By contrast, in the vernacular proposed by

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207. Same-sex marriage has caused states to define marriage differently. *See generally Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, NAT'L CONFERENCE OF STATE LEG., <http://www.ncsl.org/research/human-services/same-sex-marriage-overview.aspx> (last updated Oct. 16, 2013); *see also* Barbara Cox, California Western School of Law, as a Discussant in the Discussion Group: How the Recognition of Same-Sex Relationships is Transforming Family Law Pedagogy and Scholarship at Southeastern Association of Law Schools Annual Conference (July 31, 2012) (referring to the mixed state of the law on same-sex marriages as “a bizzare patchwork”). As of October 2013, same-sex marriage is available in fourteen states. *Couples Wed, N.J. Becomes 14th State to OK Gay Marriage*, USA TODAY (Oct. 21, 2013, 12:25 AM), <http://www.usatoday.com/story/news/nation/2013/10/21/gay-couples-wed-as-nj-recognizes-nuptials/3141655/>.

208. *See* Knaplund, *supra* note 61, at 905–10 (supporting the call for legislative reform and noting the superiority of the 2008 Uniform Probate Code (still largely unadopted by states) over the 2002 Uniform Parentage Act in addressing legal issues surrounding children of ART).

209. *Id.*

210. UNIFORM PROBATE CODE § 2-120(a)(3)(C) (amended 2010).

211. UNIFORM PARENTAGE ACT §§ 702–03 (amended 2002).

this Article, those so excluded from the term donor would include both men and women, labeled as “lenders.”

Furthermore, the UPC provides that “[a] parent-child relationship exists between a child of assisted reproduction and an individual other than the birth mother who consented to assisted reproduction by the birth mother with intent to be treated as the other parent of the child.”<sup>212</sup> The gender-neutrality of the word “individual” eradicates the heterosexual bias found in other parentage statutes. The move to a gender-neutral definition of parentage is consistent with the trend toward gender-neutral statutes in other areas of law, such as child custody determinations.<sup>213</sup> Additionally, many state penal codes have substituted gender-neutral language in previously gendered crimes, such as rape, and defenses, such as the heat-of-passion defense.<sup>214</sup>

### **C. Gender-Neutral Parentage Is Consistent with the Best-Interest-of-the-Child Standard Used in Family Law**

In child custody determinations, gender-specific doctrines, such as the tender-years doctrine,<sup>215</sup> have been replaced with multifactor tests that are gender-neutral in form, if not always in application.<sup>216</sup> The issue of parentage is the conceptual predecessor to the issue of custody. The gender neutrality that pervades the statutory grounds for a judicial determination of custody must now infuse our thinking on parentage.<sup>217</sup>

Parentage is solely about the relationship between adult and child, and genetics and intent to parent have traditionally been at the heart of that relationship. This Article contends that they should remain central in determining that relationship, even if the composition of the family unit is not as predictable as it once was. The standard for resolving issues that pertain to children is most often the best-interest-of-the-child standard, and such standard should be applied in the

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212. UNIFORM PROBATE CODE § 2-120(f).

213. TENN. CODE ANN. § 36-6-101 (West 2010).

214. See Rana Lehr-Lehnardt, *Treat Your Women Well: Comparisons and Lessons from an Imperfect Example Across the Waters*, 26 SO. ILL. U. L. J. 403 (2002).

215. The tender-years doctrine is a common law preference for awarding disputed custody of very young children to the mother. BLACK'S LAW DICTIONARY, tender-years doctrine (9th ed. 2009).

216. A mother may still be favored in a custody determination if she is the primary caregiver, but the preference is based upon each parent's actions, not upon the parent's gender. *Id.*

217. See Knaplund, *supra* note 61, at 928 (noting the policy incongruence in states which, on the one hand, permit gay and lesbian couples to adopt or foster parent children but, on the other, limit parentage in the ART context to heterosexual couples).

determination of parentage.<sup>218</sup> While it may violate some states' public policy to acknowledge that a child *can* have two parents of the same sex,<sup>219</sup> to deny this is to improperly shift the focus of parentage determinations to the relationship between the parents. Such a shift in focus violates a proper conceptual understanding of parentage. Parentage is separate from and not dependent upon a state's view of same-sex relationships or its laws defining the legal status of such relationships.

The best interest of the child requires that courts prioritize the vertical relationship between parent and child, rather than the horizontal relationship with the other parent.<sup>220</sup> When courts narrow their focus to the proper vertical relationship, it should become clear that parentage can no longer be cloaked in gender-specific language that may not serve the best interests of the child. Just as the courts of most states recognize that the involvement of one parent in a same-sex relationship following a divorce is not a sufficient basis to alter that parent's legal status as a parent,<sup>221</sup> courts must likewise conclude that it is not a sufficient basis to deny parentage at the time the child is born.<sup>222</sup>

The proposed biological parentage decision tree is child-centric and consistent with the best interest of the child legal standard. It supplies the correct starting point for parentage, guaranteeing what some

218. *See, e.g.*, *Miller-Jenkins v. Miller-Jenkins*, 12 A.3d 768, 774 (Vt. 2010) (using the best-interests-of-the-child standard to transfer custody of a minor child from the biological mother to the former civil-union partner of the biological mother).

219. For purposes of this application, the verb "can" is used in its traditional sense, meaning "to be able" instead of "may," meaning "to be permitted."

220. Professor Barbara Bennett Woodhouse has written prolifically on protecting the interest of the child and preserving the child's perspective in law and policy decisions. *See, e.g.*, Barbara Bennett Woodhouse, Foreward, *Defending Childhood: Developing a Child-Centered Law and Policy Agenda*, 14 U. FLA. J.L. & PUB. POL'Y vii (2003); *see also* Barbara Bennett Woodhouse, *Enhancing Children's Participation in Policy Formation*, 45 ARIZ. L. REV. 751 (2003) (noting that "[i]n order to build a system that will be responsive to children's needs, we must learn to listen to children's voices. We must do this in the academy, in the courts and in political life.")

Recently, there has been a movement towards a more "child-centered" approach to defining laws and policies. A child-centered approach has a number of key components: (1) it approaches problems from the child's perspective, focusing on the child's own lived experience; (2) it incorporates children's voices and children's leadership; (3) it treats children as presumptively capable of participation rather than presumptively lacking in capacity; (4) it is inclusive, embracing all children and their families as our own; (5) it is developmentally sound, taking into account children's unique needs, and respecting their cognitive and physical development; (6) it is interdisciplinary, bringing all relevant expertise to bear on problems of children and youth.

*Id.*

221. *See generally* *P.W. v. D.W.*, No. CK10-01535, 2010 WL 7884673 (Del. Fam. Ct. Oct. 5, 2010).

222. Parentage is chronologically earlier and the conceptual precursor to custody.

have called “a child’s fundamental right to legal parents at birth.”<sup>223</sup> Hard cases, nevertheless, remain. Where both biological parents and a functional parent all have claims to parentage, the law should acknowledge all three parents.<sup>224</sup> The determination of parentage begins with one individual, the child. It is relational only with respect to the child. Conceptual parallels in the law are abundant.<sup>225</sup> Consider, for example, the laws of descent and distribution in which the default rules of inheritance measure heirs in relation to the decedent, not in relation to each other.<sup>226</sup> Likewise, under the default rules of parentage, the parents should be determined in relation to the child.<sup>227</sup>

#### V. THE TEMPORARY FIX: WHAT THE PRIVATE SECTOR, STATE AGENCIES, AND THE COURTS CAN DO

The disjunction between current statutory language delineating parentage<sup>228</sup> and the previously unimaginable procreative fact patterns to which these statutes are being applied has prompted several courts to implore their state legislatures to act.<sup>229</sup> Until state legisla-

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223. Byrn & Ives, *supra* note 61, at 308.

224. See June Carbone & Naomi Cahn, *Which Tie Binds? Redefining the Parent-Child Relationship in an Age of Genetic Certainty*, 11 WM. & MARY BILL RTS. J. 1011, 1044–47 (2003) (discussing the hard case presented by the facts of *Michael H.* from a child-centric perspective).

225. For an interesting discussion of the history of the nuances of early adoption laws and practices, including the paradigm shift from the best interest of the mother to the best interest of the child, see Cahn, *supra* note 33, at 173.

226. UNIFORM PROBATE CODE § 2-103 (amended 2010).

227. Although outside the scope of this Article—which is limited to advocating the parentage of those biologically connected to the child—there is an emerging body of case law and scholarship evaluating the propriety of awarding custodial or visitation rights to a former same-sex partner of the biological parent where such partner has no biological connection to the child. See *generally* Black v. Simms, 12 So. 3d 1140 (La. Ct. App. 2008) (evaluating whether the same-sex partner of the biological mother of the child has custodial or visitation rights and holding that, under these specific facts, she does not); Miller, *supra* note 201; Polikoff, *supra* note 61.

228. Parentage is not a single definition under most state statutory schemes. Rather, parentage is addressed under the custody statutes, under the adoption statutes, and under the inheritance statutes. See, e.g., UNIFORM PARENTAGE ACT § 102 (amended 2002); 755 ILL. COMP. STAT. ANN. 5/2–2 (West 2006).

229. Writing for the majority, Chief Justice Drowota of the Tennessee Supreme Court stated “In our view, given the far-reaching, profoundly complex, and competing public policy considerations necessarily implicated by the present controversy, crafting a broadly applicable rule for the establishment of maternity where techniques for assisted human reproduction are involved is more appropriately addressed by the Tennessee General Assembly.” *In re C.K.G.*, 173 S.W.3d 714, 733 (Tenn. 2005). See also Raftopol v. Ramey, 12 A.3d 783, 801 (Conn. 2011) (noting that existing statutes do not adequately address modern concerns involving reproductive technology and that the legislature, “with the ability to hold public hearings and seek out expert assistance, is the appropriate one to make such public policy determinations”); see also Parness, *Federal Constitution of Child-*

tures take the steps to adopt gender-neutral definitions of parentage, which unambiguously award parental status to all three claim-holders to biological parentage, progress can be made toward gender-neutrality through other avenues, including the private sector, state agencies, and the courts.<sup>230</sup>

Reproductive clinics should re-evaluate their preprinted forms to determine if they are specifically tailored to effectuate the proper consent. Often such forms are over-inclusive, containing boilerplate language that far exceeds the medical consent to have eggs removed from one's ovaries for the purpose of ART.<sup>231</sup> Such forms are intended for true donation of genetic material and, as a result, are intended to protect both the fertility clinic and the intended parents by serving as a waiver of parental rights that under state law might otherwise belong to a biological parent. The inapplicability of such a standard form to an intended parent is obvious. Reproductive clinics should offer two versions of informed consent forms, the first being a "True Donor Form" with a waiver of parental rights and the second being an "Informed Consent of Genetic Lender Form" allowing the removal and use of genetic material for the procreation of a child with no waiver of parental rights or responsibilities by the genetic lender.

Until such dual forms are widely available, courts should follow the lead of the California Supreme Court<sup>232</sup> and the New York Surrogate's Court<sup>233</sup> in denying determinative value to such forms. Medical clinics can revise informed consent forms to better recognize and enforce the distinction between donors and lenders when it comes to the use of one's genetic material. This rather simple reformation would clearly define the role of the owner of the genetic material and would not unilaterally compel an individual into the role of a donor when the intent to parent is also present. However, providing the supplier of

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*care Interests and Superior Parental Rights in Illinois*, *supra* note 202, at 323 (noting the need in Illinois for a comprehensive legislative solution to parental rights).

230. Justice Scalia has already called for "a judicially crafted definition of parents" to vindicate parental rights. *Troxel v. Granville*, 530 U.S. 57, 92–91 (2000) (Scalia, J., dissenting).
231. *See, e.g., K.M. v. E.G.*, 117 P.3d 673, 676 (Cal. 2005) (highlighting the language in the consent form, which read: "It is understood that I waive any right and relinquish any claim to the donated eggs or any pregnancy or offspring that might result from them . . . [and] I agree that the recipient may regard the donated eggs and any offspring resulting therefrom as her own children.") (internal quotation marks omitted); *see also T.M.H. v. D.M.T.*, 79 So. 3d 787, 794 n.7 (Fla. Dist. Ct. App. 2011), *aff'd in part, rev'd in part*, No. SC12–261, 2013 WL 5942278 (Fla. 2013) (describing the strict language of the preprinted form signed by T.M.H. at the reproductive doctor's office).
232. *K.M.*, 117 P.3d at 679 (using an "intent test" to determine parentage and override the language of the consent form).
233. *In re Sebastian*, 879 N.Y.S. 2d 677 (Surr. Ct. 2009).

procreative material the option of defining herself as either a genetic lender with a continuing parental role or as a genetic donor retaining no such rights falls short of establishing a legal basis for parenthood.<sup>234</sup> Nevertheless, such forms would greatly inform the medical clinic, the recipient of procreative material, and a court charged with allocating parental rights.

Additionally, courts could engage in “dynamic statutory interpretation.”<sup>235</sup> If, current parentage statutes are interpreted “in light of their present societal, political, and legal context” rather than purely through the backward focused lens of legislative intent,<sup>236</sup> then courts could presently justify a gender-neutral approach to parentage in the absence of specific statutory language to that effect.<sup>237</sup> A word, like parent, may evolve over time to encompass more than the word originally meant. Most parentage statutes are historically limited.<sup>238</sup> As science has changed the possible routes to parentage, the law must correspondingly acknowledge all such routes.<sup>239</sup> Some courts, such as those in California, are leading the way.<sup>240</sup>

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234. The value of differentiating between true donor forms and genetic lender forms is diminished by the possibility of extending parental rights and obligations to true donors. For example, California legislation SB 115, approved by the California Senate in April 2013, would expand the parental rights of sperm donors in limited cases by allowing them to seek paternal rights upon a showing of a relationship with the child. S.B. 115, 2013–2013 Reg. Sess. (Cal. 2013). The “godfather” of the bill, so to speak, is actor Jason Patric, whose child custody battle has received national attention. See Sydney Lupkin, *Jason Patric Bill May Boost Sperm Donor Rights*, ABC NEWS (July 9, 2013, 1:21 PM), <http://abcnews.go.com/blogs/health/2013/07/09/jason-patric-bill-boosts-sperm-donor-rights/>.

235. See generally William N. Eskridge Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479 (1987).

236. *Id.* at 1479.

237. Many courts are imploring the legislation to modify the state statutory definition of parentage. See, e.g., *T.M.H. v. D.M.T.*, 79 So. 3d 787, 794 n.7 (Fla. Dist. Ct. App. 2011), *aff'd in part, rev'd in part*, No. SC12–261, 2013 WL 5942278 (Fla. 2013); see also *In re T.J.S.*, 16 A.3d 386, 396 n.12 (N.J. Super. Ct. App. Div. 2011) (noting “need for [statutory] revision in light of technological advances”); *In re Roberto d.B.*, 923 A.2d 115, 136–37 (Md. 2007) (Cathell, J., dissenting) (noting that, “the resolution of this issue does not lie within the Judicial Branch of government but with the Legislative Branch”). Additionally, in the absence of legislative action, some courts are filling the definitional void on their own. See, e.g., *Nolan v. La Bree*, 52 A.3d 923, 924–26 (Me. 2012).

238. Sheldon, *supra* note 12, at 144 (commending the *Nolan* court for being an “activist on family law issues” and for “social change when there’s no reason not to”).

239. Noting the tension between applying the current state statute and arriving at the correct result, the trial judge in *T.M.H. v. D.M.T.* stated, “I do not agree with the current state of the law, but I must uphold it. I believe the law is not caught up with science nor the state of same-sex marriages. I do think that is on the horizon.” *T.M.H.*, 79 So. 3d at 789.

240. *Johnson v. Calvert*, 851 P.2d 776, 779 (Cal. 1993) (stating “courts must construe statutes in factual settings not contemplated by the enacting legislature”).

Finally, birth certificates must be modified. This will require the cooperation of the Division of Vital Records. Statutes regulating birth certificates are properly understood as administratively and ministerially enacted to provide a framework for properly reflecting the intended parent-child relationship.<sup>241</sup> There are ample precedents for modifying administrative forms that have become outdated.<sup>242</sup>

## VI. CONCLUSION

What once was attributable to exactly two individuals, scientifically required to be one male and one female, parentage has evolved both scientifically and legally to encompass a possible plethora of individuals claiming the title of parent. *Are You My Mother?* has become more than a clever story.<sup>243</sup>

The distinction between lender and donor for providers of genetic material in ART would clarify both the sword of seeking parental rights and the shield of avoiding parental support obligations. Once the distinction becomes clear, parental rights and obligations can be recognized as two sides of the same coin. A lender would both maintain parental rights and be responsible for providing child support, while a donor would neither have parental rights nor be obligated for support.

The modern definition of parentage has arisen within a legal framework that embraces distinct tests of maternity and paternity, attributes parentage through presumptions limited by a state's definition of marriage, and resorts to intent-based constructive tests of parentage that can trump a biological parent's role. While historically valuable, these gender-specific and relationship-based tracks to parenthood are no longer necessary and, in fact, may deprive an individual of the legal status of parent solely because of her gender. Intent remains an important litmus test for the hard cases, but biological ties are the appropriate starting point.<sup>244</sup>

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241. L.F.v. Breit, 736 S.E. 2d 711, 724 (Va. 2013).

242. See, e.g., *In re Roberto d.B.*, 923 A.2d at 117 (holding that, with developments in ART, it is no longer necessary to list the name of a gestational mother on a child's birth certificate). The Free Application for Federal Student Aid (FAFSA), used by colleges to assess financial need, will be modified in April 2014 to provide for the disclosure of the income of both parents in a same-sex marriage by removing gender-specific references to mother and father; however, there are already instructions asking students to provide information for both parents, regardless of gender. See FED. STUDENT AID, DEP'T OF EDUC., REPORTING SAME-SEX MARRIAGE ON THE FAFSA (2013), <http://studentaid.ed.gov/sites/default/files/reporting-same-sex-marriage-on-fafsa.pdf>.

243. For a delightful analysis of parental rights drawn from yet another clever children's story, see Woodhouse, *supra* note 11.

244. Hard cases will remain, but the facts of *K.M. v. E.G.* and *T.M.H. v. D.M.T.* are not hard cases. *K.M. v. E.G.*, 117 P.3d 673, 675-77 (Cal. 2005); *T.M.H.*, 79 So.3d at

Parents are born with the birth of a child. Notwithstanding the scientific breakthroughs in reproductive technology and the more inclusive modern understanding of the family unit, every child begins with two—and only two—suppliers of genetic material and one—and only one—gestational carrier. Thus, the only logically clear starting point for a legal definition of parentage begins with these three claim-holders to parentage. Once the concept of parentage is disentangled from the complications of related, but logically independent, legal questions, it becomes clear that unless and until the rights and obligations of parentage are either (voluntarily) contractually waived or (involuntarily) judicially or statutorily terminated, the law must recognize as parent any individual who is biologically related to a child, regardless of gender, sexual orientation, or marital status.

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788–90. A child *can* have two biological mothers, and our understanding of parentage must acknowledge all biological parents.