DEFINING PARENTHOOD: EVOLUTION OR PENDULUM SWING?

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BY: RUFINA D. BEEM
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“At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.” – Justice O’Connor¹

**INTRODUCTION**

There are some things in life that everyone should have the freedom to do. One of these such things is to create a family, experience the joy of being a parent, and raise children in a manner based upon personal choices and preferences. Indeed, this right has been recognized as fundamental. The Fourteenth Amendment's Due Process Clause has a substantive component that “provides heightened protection against government interference with certain fundamental rights and liberty interests,” including parents' fundamental right to make decisions concerning the care, custody, and control of their children.”² It has been soundly determined that the Constitution protects parents’ rights. What the Constitution does not do, however, is define what a parent is.

Today’s parents are a virtual kaleidoscope of combinations as a result of the cultural explosion of alternative methods of family formation such as surrogacy and assisted reproductive technologies (“ART”). People who desire to be parents are no longer bound by the natural course of sexual reproduction, and instead have seized control of biology through science and are wielding its power, creating beautiful families everyday. In 2006, 41,000 children were born through ART,⁴ many to same sex

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couples.\textsuperscript{5} In 2009, the number of infants born through ART rose to 60,190.\textsuperscript{6} It is likely that this number is continuing to grow today.

As usage of alternative methods of family formation have become arguably "mainstream," novel issues regarding how to define a parent under the law have arisen and courts and legislatures have struggled to keep up. The legal definition of a parent has experienced an unprecedented evolution in the last four decades, particularly in the context of how genetic ties and marriage are weighed as determining factors. Parts I and II of this paper tell the story of the way the legal definition of a parent has evolved from its traditional roots, analyzes the way that courts have weighed the importance of the biological connection and marriage in defining parenthood, and argues that the evolution has inevitably resulted in a totality of the circumstances test. As we look toward the future and as societal views with respect to issues such as same sex marriage, polyamory, and polygamy continue to evolve, Part III attempts to predict where the legal definition of a parent may be heading in the future. As such, this paper questions how far the liberty interests of parents will take us in terms of defining parentage, and argues that expanding views towards who can marry may actually be causing the legal definition of a parent to revert back to times past, much like a pendulum swing.

\textsuperscript{5} Id. at 247; citing The Williams Institute, Census Snapshot: United States (Dec. 2007), available at http://www.law.ucla.edu/williamsinstitute/publications/USCensusSnapshot.pdf. ("Of the 770,000 same-sex couples, more than twenty percent are raising children.") See also Courtney G. Joslin, Interstate Recognition of Parentage in a Time of Disharmony: Same-Sex Parent Families and Beyond, 70 Ohio St. L. J. 563, 591 n. 153-55 (2009).

\textsuperscript{6} Centers for Disease Control, Assisted Reproductive Technology (ART) Success Rates: National Summary and Fertility Clinic Reports: 2009 ART Report (indicating there were 146,244 ART cycles performed at 441 fertility clinics in 2009, resulting in 45,870 live births); located at http://www.cdc.gov/art/ART2009/index.htm (last accessed on April 5, 2012).
I. The Parents of Yesterday

In the past, there were three traditional ways to become a parent: giving birth (mater sempe certe est), being married to the mother of the child (pater est quem nuptiae demonstrant) or adopting a child.\(^7\) Families were created through biological and contractual relationships. The cultural conception of family followed as “husband, wife, and their children who live together as a natural unit. The family is formed according to the laws of nature and it lives by rules which are regarded by Americans as self-evidently natural.”\(^8\) Families were conceived in terms of a status system based largely on differences in age and gender. Authority in families belonged to fathers. Women in families were expected to “bear children, nurse them, and care for them.”\(^9\)

The marital presumption that a man married to the mother is the father has existed for centuries. One of the policy reasons for the presumption was to assign responsibilities for the care of children. “The main end and design of marriage [was] to ascertain and fix upon some certain person, to whom the care, the protection, the maintenance, and the education of the children should belong.”\(^10\) This marital presumption was strong, and only overcome if the man had “no access” to the wife.\(^11\)

There was a social stigma for “illegitimate children,” a cultural notion which U.S. Supreme Court decisions and the Uniform Parentage Act of 1973 (“UPA”) have since

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\(^7\) Elrod, supra at note 4, 247; citing Nguyen v. I.N.S., 533 U.S. 53, 62 (2001) (stating that the [parentage of a mother] “is verifiable from the birth itself.”); William Blackstone, 1 Commentaries 455 (1765); U.S. Bureau of the Census, Households by Type: 2000, Table 1, fn 2 (noting that for computational purposes “family members include only people related to the family householder by birth, marriage or adoption.”).


\(^9\) Id. at 353.

\(^10\) Elrod, supra at note 4, 246; citing William Blackstone, 1 Commentaries 455 (1765).

sought to diffuse. One of the major purposes of the first version of the UPA was to ensure full equality for all children in their legal relationship with both parents, whatever their parents’ marital status.

Another way to become a parent was through adoption. Adoption is a method to become a parent through legal process pursuant to state statutes and is characterized by the necessity of biological parents relinquishing and terminating their parental rights and adoptive parents via adoption obtaining parental rights and responsibilities. Traditionally adoption was viewed as a “substitute relation designed to replicate as closely as possible the biological original.” Infertile couples in the post World War II years turned to adoption to erase the “stigma of childlessness in an era of ‘compulsory parenthood.’” However, many people were barred from adopting because of their sexual orientation, age, or marital status.

These traditional methods of family formation formed the legal framework for determining parentage for at least a century before alternative methods of family formation entered the scene. Sperm donation was legitimized as a cure for infertility in 1950-1960’s. The first “test tube” baby was born in 1978 in England. Egg donation

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13 Elrod, supra at note 4, 259.
and gestational surrogacy, where the surrogate serves as a carrier for another’s genetic child, were legalized in the early 1990’s.\textsuperscript{20} There was a thirty-seven percent increase in the number of in vitro procedures performed in the United States between the years of 1995-1998.\textsuperscript{21}

As the usage of assisted reproductive technologies and surrogacy were becoming widespread, the traditional ideal of a “nuclear family” was also evolving in parallel. Families made up of a married couple raising their children fell from 40 percent of all households in 1970 to less than a quarter by 2000.\textsuperscript{22} During the last decade of the twentieth century, the number of gay and lesbian families with children more than tripled.\textsuperscript{23} The birth rate increased for women aged 35 and over, doubled for women aged 40-44, and tripled for women aged 44-49.\textsuperscript{24} As family law scholar David Meyers remarked, “The domestic unit in early 21st century America [has become] a crazy quilt of one-parent households, blended families, singles, unmarried partnerships and same-sex unions.”\textsuperscript{25} By 2000, the landscape of what constituted a family in the United States had evolved so much that Justice Sandra Day O’Connor noted, “The demographic changes of the past century make it difficult to speak of an average American family.”\textsuperscript{26}

As the concept of family evolved, the definitions of legal parentage presented unique challenges in U.S. courts. Apart from the Uniform Parentage Act, which was

\textsuperscript{19}Id. at 1900; citing Debora L. Spar, The Baby Business 35, 28 (2006).
\textsuperscript{20}Id. at 1888.
\textsuperscript{21}Id. at 1900; citing Debora L. Spar, The Baby Business 35, 29 (2006).
\textsuperscript{22}Meyer, supra at note 11, 133; citing Jason Fields, America’s Families and Living Arrangements: 2003, at 12-13 (U.S. Census Bureau 2003).
\textsuperscript{24}Id.
\textsuperscript{26}Troxel, 530 U.S. 57 at 63-64.
revised in 2000 and again in 2002,\textsuperscript{27} there were few statutes for courts to leverage when deciding these new issues. Therefore, courts were frequently fashioning equitable solutions in light of the “best interest of the child” standard, and often times coming down with decisions in opposite directions. The use of the “best interest of the child” standard did not provide clear direction for the courts. In \textit{Troxel v. Granville},\textsuperscript{28} the Supreme Court overruled the best interest standard to strike down visitation proceedings by grandparents or any third party because it violated the constitutional rights of the parents to make decisions about raising their children. Here, the Supreme Court declared that a parent’s constitutional right to have autonomy in parenting decisions was to be protected over interests of the child to have a relationship with grandparents or other third parties. As David Meyer observed, “If the Court in \textit{Troxel} was distressed over the breadth and novelty of a law that permitted best interests over a parent’s objections, how much more shocking would it find a scheme that allowed the reassignment of parenthood on the same basis?”\textsuperscript{29} In other words, it would offend fundamental rights of parents if parenthood could be defined on the basis of a best interest of the child standard. Therefore, as society pushed forward into the era of alternative family formation and technologies raced ahead of the legislatures, the law and the courts struggled, with no clear standards, to deal with the conflicts these new arrangements created.

\section*{II. The Parents of Today}

\textbf{A. Parenting and the Biological Tie}

America celebrated the birth of its first baby conceived by in vitro fertilization (“IVF”) in 1981. Twenty-five years later at least 54,656 babies were born in the United

\begin{footnotesize}
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\item \textsuperscript{27} Elrod, supra at note 4, 257.
\item \textsuperscript{28} \textit{Troxel}, supra at note 2.
\item \textsuperscript{29} Meyer, supra at note 11, 865.
\end{footnotes}
\end{footnotesize}
States using IVF and IVF-related procedures.\textsuperscript{30} In parallel with the growth of IVF, desiring parents also began entering into surrogacy arrangements and today an estimated 1,000 surrogacy agreements are entered into each year.\textsuperscript{31} There are two kinds of surrogacy arrangements. In gestational surrogacy, an embryo is created \textit{in vitro}, using the ova of another woman, and in full surrogacy the surrogate is impregnated using her own ova.\textsuperscript{32} Today, 95% of surrogates carry embryos created by genetic material other than their own.\textsuperscript{33} The parenting issues that arose as a result of these arrangements challenged the courts, particularly in the context of determining parentage through biological ties. Defining parenthood through biological ties historically had been a clear method. If a mother gave birth to a baby originating from her own ovum, it was easy to determine she was the mother. Similarly, the man who contributed the sperm that fertilized the ovum of the mother was the father. Defining motherhood was not so clear when a gestational surrogate gave birth to child created by another woman’s genetic materials or when a full surrogate gave birth to a child genetically related to her pursuant to a contractual relationship with another woman.

Without a doubt, the case of \textit{In the Matter of Baby M},\textsuperscript{34} decided by the New Jersey Supreme Court in 1988, was one of the most notorious cases dealing with the determination of parentage in the context of surrogacy arrangements. Here, William Stern contracted with a surrogate, Mary Beth Whitehead, to be artificially inseminated

\textsuperscript{32} Ben-Asher, supra at note 18, 1887.
\textsuperscript{34} 109 N.J. 396 (1988).
with his sperm and to carry a child for him and his wife Elizabeth. The contract specified that Whitehead would surrender the child to the Sterns for adoption. However, when the baby girl was born, named Melissa by the Sterns, Mary Beth suffered an emotional crisis and refused to relinquish the child. A dramatic story unfolded, with Mary Beth actually fleeing to Florida with her husband and the baby and only returning the baby to the Sterns after arrest and a court order. The New Jersey courts had to face the question, who are the parents of Baby M? Is it the genetically-related surrogate who also carried the baby and her husband, or the intended genetically-related father and wife who contracted with the surrogate to adopt the baby? The genetic factor alone could not determine which parties would raise Baby M as their own. The trial court upheld the surrogacy contract under “best interest of the child” analysis, ordered that Mrs. Whitehead’s parental rights be terminated and that sole custody of the child be granted to Mr. Stern and entered an order allowing the adoption of Melissa by Mrs. Stern.

The New Jersey Supreme Court reversed on the basis that the surrogacy contract was not only invalid, but it was evil:

It guarantees the separation of a child from its mother; it looks to adoption, regardless of suitability; it totally ignores the child; it takes the child from the mother regardless of her wishes and her maternal fitness; and it does all of this, it accomplishes all of its goals, through the use of money.

The aftermath of the decision in Baby M was widespread, as the news media covered the story extensively, and resulted in a “moral panic” about selling babies that had the effect of demonizing commercial surrogacy arrangements. The effects of this social mark are still being felt today, as many states still outlaw commercial surrogacy. The

35 Id. at 414-416.
36 Id. at 417.
case of Baby M could not be decided solely based upon who was genetically related to the child since both sides could claim a genetic relationship, and so the court relied on the “evil” nature of the contract to tip the scales in favor of the genetic-mother surrogate.

The case of Johnson v. Calvert,\(^\text{39}\) was also a monumental case in the evolution of the legal definition of a parent. The question the California courts faced here was who is the mother, the genetic mother or the gestational mother? On January 15, 1990, Mark and Crispina Calvert, a married couple, signed a contract with Anna Johnson providing that an embryo created by the sperm of Mark and the egg of Crispina would be implanted in Anna and the child born would be the Calverts’ child. Relations deteriorated between the parties and they resorted to litigation to resolve the dispute over parentage. The trial court ruled that Mark and Crispina were the child’s “genetic, biological and natural” parents, Anna had no parental rights, and the surrogacy contract was legal and enforceable against Anna’s claims.\(^\text{40}\) Although both the genetic mother (Crispina) and the birth mother (Anna) could potentially be considered mothers to the child under California law which was modeled after the UPA, the court concluded that legal parentage should be assigned to the Crispina and Mark based upon their \textit{intention} to bring about the birth of the child. The court wrote,

\begin{quote}
We conclude that although the Act recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child – that is, she who intended to bring about the birth of the child that she intended to raise as her own – is the natural mother under California law.\(^\text{41}\)
\end{quote}

Thus, the traditional means of establishing parentage through biology, marriage, or adoption were expanded into the nebulous world of intent. Although the court was

\(^{39}\) 5 Cal.4th 84 (1993).
\(^{40}\) Id. at 88.
\(^{41}\) Id. at 93.
careful to limit the holding to the particular facts of the case, the precedent to consider
intent in parenting disputes was born.

This intent-based decisioning was not accepted by every court, as seen in *Belsito v. Clark,*\(^{42}\) decided in Ohio a year after *Johnson v. Calvert.* An embryo comprised of
genetic material from a married couple was implanted into the wife’s younger sister who
had agreed to act as the surrogate. When they were told that only the birth mother
(surrogate) could be listed on the child’s birth certificate, and the child would be
considered illegitimate under Ohio law because the surrogate and the biological father
were not married, the Belsitos filed a complaint for a declaratory judgment that it was
unnecessary for them to adopt the child. The Belsitos contended that they were the
 genetic and natural parents of the child and were therefore entitled to be recognized as
having the legal status of parents.\(^{43}\) Since both the wife and the sister could be
considered the natural mother under Ohio law, the court was faced with a similar issue as
in *Johnson.* The court rejected the intent standard, stating that it was difficult to prove
and posing the question, “who is the natural parent if both a nongenetic-providing
surrogate and the female genetic provider agree that they both intend to procreate and
raise the child?”\(^{44}\) The court instead relied on the traditional biological connection to
determine parentage, separating birth from the equation, in its reasoning to pronounce the
Belsitos as the natural parents of the child being carried by the surrogate sister.\(^{45}\) The

\(^{42}\) 67 Ohio Misc. 2d 54, 64 (Ohio Ct. Comm. Pl. 1994).
\(^{43}\) *Id.* at 762.
\(^{44}\) *Id.* at 764.
\(^{45}\) It should also be noted that the court held that adoption of the child by the Belsitos was unnecessary. *Id.*
at 767.
Court stated, “The test to identify who the natural parents should be, ‘Who are the genetic parents?’”

The tension between genetic tests and intent tests to determine parental rights and responsibilities became apparent in In Re Marriage of Buzzanca. Here, Luanne and John Buzzanca, a husband and wife unable to conceive naturally, obtained egg and sperm donors and hired a surrogate to give birth to the child. There was no genetic relationship between the intended parents and the resulting child. When the Buzzancas decided to get divorced, John sought to disclaim any responsibility for the child, financial or otherwise. Luanne filed a petition, seeking to establish herself as the mother of the child and John as the father, which would presumably obligate John to pay her child support. The trial court astonishingly reached the conclusion that the child had no lawful parents, relying on a stipulation by the surrogate and her husband that they were not the biological parents and the fact that Luanne neither contributed an egg nor gave birth to the child. The Court of Appeal found this result to be unacceptable, extended the intent-based reasoning from Johnson to find that John and Luanne were the natural parents of the child, and thus were responsible for supporting the child notwithstanding the fact they were getting divorced. The court also relied on the decision in People v. Sorensen, which held that when a husband consents to allowing his wife to be artificially inseminated, he is presumed to be the “lawful father” because he consented to the procreation of the child. The court reasoned that since fatherhood can be established apart from giving birth or being genetically-related to a child, and “but-for” the Buzzancas intending on creating the child the child would not exist, the seemingly only “right” solution was that they were the

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46 Id. at 766.
47 72 Cal. Rptr. 2d 280 (Cal Ct. App. 1998).
48 Id.; citing 68 Cal.2d 280, 284-286 (1968).
natural parents of the child. In this case, a genetic relationship could not establish parentage to the resulting child since neither John nor Luanne contributed genetic materials, and the court leaned partly on the marital presumption to establish John’s fatherhood and corresponding responsibilities and obligations to support the child. The intent of the Buzzancas to parent the child also weighed heavily in the court’s decision to declare the divorcing parties as parents.

This string of early cases illustrates how the courts wrestled with the concept of genetic ties and what this meant for determining parentage when faced with the complicated facts of surrogacy cases. The results show that deference to the biological tie remains, but that it is often inadequate to be the only factor when determining parentage. The novel issues that IVF and surrogacy arrangements brought out during this time began the dramatic evolution of the legal definition of a parent, and showed that other factors, such as intent and often marriage, should also be weighed. These early cases exhibited the necessity of considering a variety of factors when determining parenthood, and so the evolution continued.

B. Parenting and the Marital Presumption

The other major factor besides the genetic tie that was historically held to be dispositive in determining parentage is marriage. Decisions during the explosion of ART and surrogacy were consistent in showing deference to marriage as a determinative factor. For example, in Culliton v. Beth Israel Deaconess Med. Ctr., an unmarried surrogate carried twins consisting of genetic materials from Marla and Steven Culliton, wife and husband. The Cullitons filed a verified complaint seeking a declaration of paternity and maternity, as well as a prebirth order directing the hospital at which the

gestational carrier was expected to designate the Cullitons as the father and mother of the children on their birth certificates. The court found the governing statutes for determining parentage for children born “out of wedlock” and for adoption to be inapplicable, and instead ruled that the twins were the children of the Cullitons because they were married and had conceived the twins. The court reasoned,

While the twins technically were born out of wedlock, because the gestational carrier was not married when she gave birth to them, it is undisputed that the twins were conceived by a married couple. In these circumstances the children should be presumed to be the children of marriage.

The court also acknowledged that if the surrogate had been married, it would have caused a problem in declaring the Cullitons as the parents because of the marital presumption under Massachusetts law.

Another case where marriage played a determinative role is In re Jesusa V. In this case, the husband of the child's mother and the biological father were both seeking to be declared the father of the child after the child was taken into protective custody after the biological father raped and beat the mother. The husband, Paul, had been married to the mother at the time the child was born and held the child out to be his. Here, the marital presumption and the biological presumption were in direct competition with each other in determining parentage. The court weighed the competing interests of the biological father and the husband and ruled that it was in the best interest of the child that the husband be declared the father of the child. This decision was supported by the strength of the marital presumption and the conduct the husband displayed in caring for the child and treating her as his own.

50 Id. at 1136.
51 Id. at 1137.
[T]he court must look to the state interests in rendering its decision. The state interests rest on the policy to preserve and protect developing parent/child relationships which give young children social and emotional strength and stability. This is more important than establishing biological ties. In other words, there is so much more to being a father than merely planting the biological seed. The man who provides the stability, nurturance, family ties, permanence, is more important to a child than the man who has mere biological ties. By finding [Paul] is the presumed father, this court is protecting and preserving a family unit, the integrity of the family unit.⁵³

This case weighed the conduct of the husband in holding the child out to be his own as a major factor in his favor. The court also considered the state interest in promoting stability in the family unit in rendering its decision, and favored the marriage over the biological father. However, without the marital presumption to bolster this decision, it is likely the biological father would have won.

In C.M. v. P.R.,⁵⁴ a man not married to the mother tried to assert conduct as a basis to be declared the father of a child. The mother was living with the plaintiff when she gave birth to the child, but the two were never married and plaintiff was not the biological father of the child. The plaintiff attended birthing classes with the mother, was with her in the delivery room when the child was born, and his name appeared on the birth certificate. The parties chose the name of the child together and the child had the plaintiff's last name. They lived as a family for three years, and the plaintiff was often the primary caretaker of the child while the mother worked. The couple split up, but the mother allowed a continued relationship with between the plaintiff and the child, and the plaintiff even voluntarily paid child support. When the mother ended the visits with the plaintiff, he filed a complaint to establish paternity and sought visitation rights. The court denied both claims on the basis that, “When a man is neither the biological or adoptive

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⁵³ Id. at 609.
father nor married to the mother, there is little authority that supports a claim of a right to visitation or custody.”55 The court rejected the plaintiff’s argument to recognize the “equitable parent” doctrine, which “provides that the husband of the biological mother of a child born or conceived during marriage, who is not the biological father of the child, may be treated as the father if a parental relationship is acknowledged by the father and child or is developed in cooperation with the mother.”56 Thus, a man not biologically-related to the child who acted like a father was denied the rights of parenthood. This was because the plaintiff was never married to the mother. This case showed the unwillingness of the court to grant parental rights to a man who acted like a father but did not have a biological relationship with the child and did not have the benefit of the marital presumption.

An opposite result with similar facts occurred in Wade v. Wade, 57 the distinguishing factor being marriage. Here, the court looked to a former husband’s behavior, holding himself out as the father, claiming the child as a dependent, signing the birth certificate, as well as “the benefits of his representation as the child’s father, including the child’s love and affection, his status as father…and the community’s recognition of him as the father”58 to preclude him from denying parental responsibilities of child support upon dissolution of the marriage. Because he was formerly married to the mother and acted like a father, he could not escape paying child support notwithstanding the fact he was not the child's biological father.

55 Id. at 224.
56 Id.
58 Id. at 1160.
Perhaps the most illustrative case that exhibits the strong deference to marriage when determining parental rights is the *Michael H. v. Gerald D.* case. A child, Victoria D. was born to Carole D. who was married to Gerald D. However, blood tests showed with a 98.07% probability that Michael H., which whom Carole had an adulterous affair, was the biological father of Victoria. To make matters even more complicated, Carole and Victoria at times resided with Gerald and at times with Michael, and both men held Victoria out to be their daughter. Under California law, a child born to a married woman living with her husband is presumed to be a child of the marriage. Michael brought an action to establish paternity and visitation, and the Supreme Court ruled, *inter alia*, that Michael did not have a constitutionally-protected liberty interest in a relationship with Victoria, notwithstanding his biological relationship and conduct in holding her out as his daughter. The majority opinion, written by Justice Scalia, spoke about the “unitary family,” defined by traditional notions of husband, wife, and children living together as a family, and the need to protect it. The dissent, written by Justice Brennan, discussed the fact that Carole and Gerald were married was a dispositive factor in the decision.

The evidence is undisputed that Michael, Victoria, and Carole did live together as a family; that is, they shared the same household, Victoria called Michael “Daddy,” Michael contributed to Victoria's support, and he is eager to continue his relationship with her. Yet they are not, in the plurality's view, a “unitary family,” whereas Gerald, Carole, and Victoria do compose such a family. The only difference between these two sets of relationships, however, is the fact of marriage. The plurality, indeed, expressly recognizes that marriage is the critical fact in denying Michael a constitutionally protected stake in his relationship with Victoria…

The result in *Michael H.* is even more significant, and perhaps surprising, when one considers the history of recognition of putative fathers’ rights by the Supreme Court in a

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60 *Id.* at 2335.
61 *Id.* at 2353.
string of cases dating back to 1972.\textsuperscript{62} Here, the court weighed biology, marriage, and conduct, and seemingly declared the most important factor was the marriage of the non-biological father to the mother. With this, the court strongly affirmed the state interest in promoting marriage, which is viewed as leading to a stable and nurturing “unitary family.”

The evolution of the legal definition of a parent was one of expansion in terms of what factors courts leveraged when deciding disputes. The traditional factors of determining parentage through a genetic connection and through marriage remained, but necessarily included the factors of intent to parent and conduct of acting like a parent in order to achieve a just result in many of these cases.

C. Parenting and "ART Mixups"

As discussed, traditional legal frameworks of determining parentage through biology or marriage or adoption were ill-equipped to address the myriad of issues that assisted reproductive technologies produced. The UPA addressed many of the issues and has been adopted by several states,\textsuperscript{63} but gaps still remain. For instance, it is well established that a sperm or egg donor is not a parent, whether the gamete is donated to a single or married woman who conceives through ART, with intent to parent alone or with

\begin{itemize}
  \item See \textit{Stanley v. Illinois}, 405 US 645, 647 n 9, 31 L Ed 2d 55, 92 S Ct 1208 (1972) (held that a statutory presumption of unfitness which burdens all unwed fathers is violative of the Constitution on both equal protection and due process grounds; \textit{Quilloin v. Walcott}, 434 US 246, 54 L Ed 2d 511, 98 S Ct 549 (1978)(held that governmental intrusion which focuses on the breakup of a relationship between a child and a biological parent violates the Due Process Clause where there is no proof of parental unfitness, but merely a showing that the disruption of the parental relationship serves the child’s best interest.; \textit{Caban v. Mohammed}, 441 US 380, 60 L Ed 2d 297, 99 S Ct 1760 (1979) (held that the New York statute which gave unwed mothers, but not unwed fathers, the right to consent or to withhold consent, violated the Equal Protection Clause of the Fourteenth Amendment.); \textit{but see Lehr v. Robinson}, 463 US 248, 77 L Ed 2d 614, 103 S Ct 2985 (1983) (held that an unmarried father who had failed to establish “any significant custodial, personal, or financial relationship” with his child was not entitled to notice of the adoption proceedings.)
  \item As of 2000, nineteen states had adopted the full text of the UPA and many others had adopted significant portions of the Act. See \textit{Unif. Parentage Act} (2000), 9B U.L.A. 296.
\end{itemize}
a man.\textsuperscript{64} If the woman conceiving through ART is married, her husband will be presumed to be the father if he gave consent to the insemination, unless he revokes his consent before the insemination or he proves his lack of consent within two years of learning of the birth.\textsuperscript{65} The intended parents in a gestational surrogacy agreement become the parents of the resulting child, and the gestational surrogate and husband, if any, are not the parents.\textsuperscript{66} However, the UPA fails to address the legal disposition of embryos that are frozen and stored for later use by a couple.\textsuperscript{67} Current law is also not able to definitively solve issues that arise in the context of what has been termed “ART mix-ups.”\textsuperscript{68}

An ART mix-up is what occurs when mistakes are made in the process of insemination, usually where ova are mixed with sperm from the wrong man/donor, the wrong donated ova are mixed with the right sperm, or where one couple’s embryos are transferred or implanted into a wrong woman’s womb.\textsuperscript{69} It should be noted that very few of these mistakes happen, but are obviously devastating and perplexing in terms of who becomes the legal parent. As Leslie Bender wrote,

\begin{quote}
ART-related mix-ups or mistakes ultimately ask us to consider what the relevant prerequisite(s) for assigning legally recognized parenthood are and what they should be--genetic contribution of gametes, gestational contribution, consent and contract, intent to create a child, intent to rear a child as its parent, existing or pre-existing relationships with the baby/child, the labor of rearing, the parents’ needs, the child’s best interests, social and emotional parenting, economic support, legal adoption, or something else. They require us to examine this question from a justice, equality, relational, and humanist perspective. They also ask us to
\end{quote}

\textsuperscript{64} Unif. Parentage Act §§ 703-704 (amended 2002); located at http://www.lawlibrary.state.mn.us/archive/urlarchive/a050438.pdf. (last visited April 5, 2012).
\textsuperscript{65} Id. at § 705.
\textsuperscript{66} Id. at § 801.
\textsuperscript{67} Molly Miller, Embryo Adoption: The Solution to an Ambiguous Intent Standard, 94 Minn. L. Rev. 869, 882 (2010).
\textsuperscript{69} Id. at 444.
examine the roles race and sex biases (and even economic privilege) play in distorting our legal conclusions about who is a parent.\textsuperscript{70}

Interestingly, many of the cases involve instances of Caucasian women giving birth unexpectedly to mixed-race babies, usually of African-American descent. Practically speaking, it can be presumed these mistakes resulting from ART mix-ups become immediately apparent at birth, and so perhaps this contributes to more of these cases being reported or even discovered. Leslie Bender, writing in 2005, observed that ironically all the ART mix-up cases were presented in black and white. She remarked, “I wish it would be that the answers were as legally and ethically ‘black and white,’ but instead we find ourselves enveloped in shades of gray, or more appropriately, pinks and browns.”\textsuperscript{71}

The first known case of an ART mix-up was the 1987 case of Lisa Skolnick, a white woman, who wanted to conceive a child with her deceased white husband’s sperm. When she gave birth to a “dark skinned” child, it was clearly the result of a sperm mix-up.\textsuperscript{72} In 1998, Deborah Perry–Rogers and Robert Rogers began an in vitro fertilization and embryo transfer program with the In Vitro Fertility Center of New York. However, in the process, embryos consisting entirely of the Rogers’ genetic material were mistakenly implanted into the uterus of Donna Fasano, along with embryos from Ms. Fasano’s and her husband's genetic material. On December 29, 1998, Donna Fasano gave birth to two male infants, of two different races. One, a white child, was the Fasanos' biological child, named Vincent Fasano. The other was a black child, who subsequent tests confirmed to be the biological son of the Rogers’. The Fasanos took no action regarding

\textsuperscript{70} Id. at 445.
\textsuperscript{71} Id. at 447.
\textsuperscript{72} Id.; citing Cynthia R. Mabry, “Who Is My Real Father?” -The Delicate Task of Identifying a Father and Parenting Children Created From an In Vitro Mix-Up, 18 Nat'l Black L.J. 1, 60 (2004-05).
the clinic's apparent error. However, the Rogers, upon discovering that Ms. Fasano had given birth to a child who could be theirs, located and commenced an action against the Fasanos.\textsuperscript{73} The court analyzed the situation in the context of Ms. Fasano as the gestational mother and Ms. Rogers as the genetic and intended mother. Ultimately, the court held that the Rogers were the parents of the black baby because they were the biological parents and also the intended parents. The Fasanos were the parents of the white baby by the same reasoning. Therefore, the genetic tie was a major determining factor. Since the Fasanos were “legal and biological strangers” to the black child, the Rogers were pronounced the parents, notwithstanding there was no gestational agreement wherein Ms. Fasano agreed to relinquish her maternal rights.\textsuperscript{74}

The resolution was not as simple in \textit{Prato-Morrison v. Doe},\textsuperscript{75} decided in California in 2002. In this case, a married couple, Donna Prato-Morrison and Robert Morrison attempted unsuccessfully to bear a child through IVF and eventually gave up, assuming their embryos were destroyed by the clinic. When the clinic was later sued for medical improprieties, they learned through the discovery process that their genetic materials may not have been destroyed and that another woman, Judith Doe, may have been implanted with their embryos and conceived twin girls. The Morrisons filed a complaint to establish a parental relationship, naming the Does as defendants, alleging that they were the “biological and legal parents” of the twins.\textsuperscript{76} The court denied genetic testing of the twins, who were fourteen years old at that time, on the basis that it was not

\textsuperscript{74} It should be noted that the resolution of this case may have been easier in part because the parties’ stipulated that the Rogers were the legal and genetic parents of the black child. However, the court did note that had the Fasanos contested custody, the intent standard as seen in \textit{Johnson v. Calvert} (supra at note 39) and New York case \textit{McDonald v. McDonald}, 196 A.D.2d 7, 608 N.Y.S.2d 477 (1994) would likely have produced the same result.
\textsuperscript{75} 103 Cal. App. 4th 222, 126 Cal. Rptr. 2d 509 (2002).
\textsuperscript{76} \textit{Id.} at 226.
in the twins’ best interest to disrupt their lives in this manner. The court wrote, “Simply put, the social relationship established by the Does and their daughters is more important to the children than a genetic relationship with a stranger.”\textsuperscript{77} The possibility of the genetic relationship between the Morrison and the twins was not enough to threaten the stability of the Doe family, and the Morrison were left with no children and the belief that the Does were raising the twins that were genetically their children. The best interest of the child and public policies for protecting the sanctity of the family trumped the alleged biological connection.

An opposite result occurred just a year later in \textit{Robert B. v. Susan B.}\textsuperscript{78} Robert and Denise B., a married couple, had obtained an egg from an anonymous donor to be fertilized with Robert’s sperm. Meanwhile, Susan B., a single woman, went to the same fertility clinic with the intent to purchase genetic materials from “two strangers who would contractually sign away their rights” so “there would be no paternity case against her, ever.”\textsuperscript{79} Three of the embryos from the donor and Robert’s sperm were accidentally implanted in Susan and she gave birth to Daniel. Denise gave birth to Daniel’s genetic sister, Madeline. When the fertility doctor informed Robert and Denise about the mistake, Robert and Denise brought a parentage action against Susan. The court ruled that the husband was the child's father, the single woman was the child's mother, and dismissed the wife from the parentage action with prejudice for lack of standing. Robert could not be considered a “mere” donor because his intent for his sperm was only to fertilize an egg to be implanted into his wife. The single woman was the gestational

\textsuperscript{77} Id. at 231-232; citing \textit{Dawn D. v. Superior Court (Jerry K.)}, 17 Cal. 4th 932, 941, 952 P.2d 1139 (1998) (absent some prior social relationship with a child, an alleged biological link is insufficient to support a demand for an opportunity to establish a parental relationship with the child.)

\textsuperscript{78} 109 Cal. App. 4th 1109, 135 Cal. Rptr. 2d 785 (2003).

\textsuperscript{79} Id. at 1112.
mother and the wife had no genetic connection with the child, and therefore had no standing to claim maternity.\textsuperscript{80} The court also noted that the intent test could only be applied as a tie-breaker when two women had equal claims of genetic consanguinity and birth, but that regardless it would not be helpful here,

Moreover, even if we were to invoke the concept of intended mother here, which party would qualify? Both-and neither. Susan intended to be the mother of the child created from an embryo implanted in her uterus that day at the clinic-but not \textit{that} embryo, not one belonging to someone else. Indeed, her intent was to obtain an embryo created entirely from the egg and sperm of anonymous donors. Denise intended to be the mother of the child created from this very embryo-but not at that time, and she did not intend for another woman to bear the child.\textsuperscript{81}

As these ART mix-up cases illustrate, the law determining parentage that was evolving often resulted in unsatisfactory and conflicting results. The biological tie was weighed heavily in some cases, and dismissed in others. The marital presumption, as seen in Robert B., is gender-specific to males and does not work in the reverse; that is, a woman married to the father is not presumed to be the mother. These inconsistencies illuminate the murky state of the legal definition of a parent. Courts were still struggling to leverage the well settled law of determining parentage through biology and marriage, but were looking to factors of intent and conduct when faced with the complicated facts of parenting disputes caused by ART and surrogacy arrangements. These new parenting disputes were the proverbial square peg in the round hole of the traditional legal definition of a parent. Faced with the inadequacy of the traditional legal definition, the rigid historical standard of determining parentage through biology and marriage was morphing by necessity into a totality of the circumstances test.

\textsuperscript{80} \textit{Id.} at 1111.
\textsuperscript{81} \textit{Id.} at 1116; while the result here seems practically impossible, the families were at least theoretically able to remain intact. Robert ended up only seeking visitation with Daniel, which Denise was amenable to. \textit{Id.} at 1118.
D. Parenting and Same Sex Relationships

The necessity of the emerging totality of the circumstances test in deciding parenting disputes became even more apparent when considering the complex interplay between genetic ties and marriage in same sex couple families. Same sex couples were disadvantaged in determining parentage by the inherent design of their relationship. Procreation through sexual reproduction was never an option for same sex couples, and external assistance was needed in order for two same sex partners to build a family. Therefore, at least one partner would not be able to achieve parenthood through the genetic relationship. Marriage was simply not an option for same sex couples, particularly during the latter part of the twentieth century, and so same sex couples could not benefit from the marital presumption.

During the early 1990’s, California courts began hearing more cases involving same sex parents who had children during the course of their relationship but where one of the parents was not biologically related to the children. The early case of Curiale v. Reagan held that a “nonparent in a same sex bilateral relationship, [did not have] any right of custody or visitation upon the termination of the relationship [with the biological parent].” The court found that de facto parent status did not give custody rights to a non-parent over the objections of the biological parent. As a result, a non-biological mother who had raised and developed a relationship with the child did not have any rights. The same year, a California court of appeal addressed the same issue in Nancy

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83 272 Cal. Rptr. 520 (Ct. App. 1990).
84 Id. at 522.
Although the court acknowledged that both partners in a lesbian relationship intended to raise their children together, it explicitly declined to expand the definition of presumed parent to the non-biological mother.

As the years progressed, however, and as more courts were faced with same sex parenting issues, the decisions began to evolve. In 1995, a case out of Wisconsin, *In re Custody of H.S.H.-K.*, produced a standard for determining when a non-biological mother should have continued access to a child born to a lesbian couple,

To demonstrate the existence of the petitioner's parent-like relationship with the child, the petitioner must prove four elements: (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.

In this decision, the conduct and parental relationship between the non-biological parent and child were grounds for granting parental status. Along the same reasoning as the Wisconsin case, in 2005 the California Supreme Court handed down three decisions that changed the landscape of same sex parenting rights.

The lead case was *Elisa B. v. Superior Court*. Here, a same sex couple became inseminated together using sperm from the same donor so that the children would be biological siblings. Elisa gave birth to Chance and Emily gave birth to Kaia and Ry, who had Down’s Syndrome and other medical problems. Emily took on the role of “stay at

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86 Id. at 219.
88 Id. at 421.
home mother” and Elisa was the “primary breadwinner” because she earned more than twice as much money as Emily. They consulted an attorney to discuss adopting each other’s children, but never did so. When the two separated, Elisa sought to escape paying child support for the children born to Emily on the grounds that she was not genetically related to them. The court disagreed and held that a child could have two parents who were women under the UPA, and that Elisa was the parent of Emily’s children because she participated in causing the children to be born and held the twins out to be her own children. Therefore, Elisa was obligated to pay child support.\(^{90}\)

The two other companion cases similarly established parentage in the context of same sex relationships. *Kristine H. v. Lisa R.*\(^ {91}\) held that a biological mother in a lesbian relationship could not challenge the validity of a stipulation she made with her former partner declaring that both the biological mother and partner were parents of the child.\(^ {92}\) *K.M. v. E.G.*\(^ {93}\) held that when lesbian partners decide to have a child, where one partner provides her ova and the other partner bears the child, both are the child’s parents.\(^ {94}\)

Courts are still being faced with issues with regard to same sex couples. A case decided in the District Court of Appeal in Florida in December 2011, *T.M.H. v. D.M.T.*,\(^ {95}\) held as a matter of first impression that the statute that required egg donors to relinquish all maternal rights to a resulting child violated the biological mother’s constitutionally protected parental rights to the child and thus the form she signed in the reproductive doctor’s office did not act as a waiver to her parental rights.\(^ {96}\)

\(^{90}\) Id. at 666-667, 670.

\(^{91}\) 37 Cal. 4th 156, 117 P.3d 690 (2005).

\(^{92}\) Id.

\(^{93}\) 37 Cal. 4th 130, 117 P.3d 673 (2005).

\(^{94}\) Id.

\(^{95}\) 2011 WL 6437247 (2011).

\(^{96}\) Id.
Thus, the legal definition of a parent evolved from solely traditional factors of biology and marriage to essentially a totality of the circumstances test. ART, surrogacy arrangements, and same sex couple families challenged and expanded the way that courts determine parental status and this trend is likely to continue as our society continues to grow and change. Shifting views towards who can marry will undoubtedly influence the next step in the evolution. For example, views toward same sex marriage are in flux. *Elisa B.* is cited for the proposition that for partners in same sex marriages, domestic partnerships or civil unions, spouses can avail themselves of the presumption of parentage based upon the traditional marital presumption.\(^{97}\)

Giving same sex couples who are married, or in a civil union, the benefit of the marital presumption when determining parentage signals another significant change in the evolution of the legal definition of a parent.

### III. The Parents of Tomorrow

#### A. Parenting and Same Sex Marriage

Currently, married same sex couples in California, Connecticut, Iowa, Massachusetts, New Hampshire, New York, Vermont, or the District of Columbia should be entitled to the same marital presumption as different sex couples. States that permit same sex couples to enter into civil unions or comprehensive domestic partnerships, and essentially grant these couples the same rights to parentage as married couples, include California, Connecticut, Illinois, New Jersey, New Hampshire, Nevada, Oregon, Vermont, Washington, and the District of Columbia.\(^{98}\) However, the picture is not so clear when these couples travel to states where same sex marriage is not yet legalized.

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\(^{97}\) Meyer, supra at note 11, 135.

and/or civil unions are not granted the same rights as married couples. These couples are getting caught in somewhat of a legal paradox. For instance, on one side of the border in New York, a married same sex couple receives the benefits and obligations of the marital presumption and are considered parents. If the couple were to move to a nearby state, for instance Pennsylvania, probably only the biological parent would be considered a legal parent. The federal Defense of Marriage Act (“DOMA”) was enacted in 1996 and purports to allow states to deny recognition to marriages between same sex couples in other states.99 Forty-two states have also enacted “mini-DOMA’s” which proclaim that the state will not recognize a marriage or equivalent relationship between same sex couples from other states.100 The DOMA analysis results in Pennsylvania being able to deny parental rights to the non-biological parent who was a legal parent in New York. From a practical perspective, how can someone be a parent in one state but not another? The idea is rather ludicrous. DOMA was enacted in part as a response to Hawaii’s high court’s decision in 1993 that suggested that same sex unions may be protected under Hawaii’s Equal Protection Clause.101 There was concern at the time that same sex couples would only need visit Hawaii, get married, and then return to their home states and receive the benefits of marriage.102 In other words, some of the reasoning behind the enactment of DOMA was to avoid forum shopping. It is obvious to a practical mind that this restrictive view of marriage, presumably intending to respect family and promote values of stability and security, actually results in forum shopping. Same sex couples who want to be married may move to states that recognize same sex marriage. Once

100 Moulding, supra at note 98.
102 Id.
there, however, any potential decisions to move out of that state may be effectively blocked because of a desire to have both partners recognized as parents to any children. In this regard, it can be argued that the effects of DOMA may limit same sex couples’ right to move freely from state to state in violation of the Privileges and Immunities Clause of the Fourteenth Amendment. Bans on same sex marriage also affect the children of these families, essentially creating a “second-class citizenship” for them.  

To disallow two partners from being married and forming the “unitary family” is contrary to the public policy of promoting stable and nurturing families. As more states legalize same sex marriage, it is clear that DOMA and its progeny of mini-DOMA’s become obsolete. Trends in society seem to be moving away from prohibitions on same sex marriage. The Obama Administration issued a brief in July 2011 which condemned DOMA as being unconstitutional,

The official legislative record makes plain that DOMA Section 3 was motivated in large part by animus toward gay and lesbian individuals and their intimate relationships, and Congress identified no other interest that is materially advanced by Section 3 (referring to the section in the act that defines marriage as being between a man and a woman). 

President Barack Obama also became the first sitting U.S. President to publicly support same sex marriage on May 9, 2012, stating,

I've been going through an evolution on this issue. I've always been adamant that gay and lesbian Americans should be treated fairly and equally. At a certain point I've just concluded that, for me personally, it is important for me to go ahead and affirm that I think same-sex couples should be able to get married.

103 Abramowicz, supra at note 98; citing In re Marriage Cases, 43 Cal. 4th 757, 183 P.3d 384, 452 (2008).
This announcement is particularly revolutionary because it was made merely six months before the 2012 presidential election. At least as of now, however, the President reportedly has no plans to pursue new U.S. policy on gay marriage because he believes states should decide the issue.\(^{106}\) Polls and surveys currently show that roughly 50% of Americans support gay marriage.\(^{107}\)

Furthermore, the notorious case of *Perry v. Brown*,\(^ {108}\) originating out of California is positioning to be heard on appeal at the U.S. Supreme Court. The Ninth Circuit announced its decision that the California law known as Proposition 8 prohibiting same sex marriage is unconstitutional on equal protection and due process grounds on February 7, 2012. On June 5, 2012, the full Ninth Circuit denied Proponents’ request for an eleven-judge panel to rehear the case, known as rehearing *en banc*. The Proponents subsequently filed a petition for a writ of *certiorari* to request review of the U.S. Supreme Court.\(^ {109}\)

If the Supreme Court were to rule that prohibitions on same sex marriage are unconstitutional at the federal level, then same sex couples everywhere could enjoy parental status under the marital presumption. If and when that occurs, the law of determining parentage will revert back, at least in part, to a more traditional state. In other words, the added factors of conduct and intent would no longer be necessary tools for married same sex couples when fighting for parental rights. They would be considered legal parents simply because they were married.

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\(^{106}\) *Id.*

\(^{107}\) *Id.*


B. Parenting and the Number Two

Another possibility for parentage law in the future is that the law’s obsession with having two parents could be a thing of the past. The debate over same sex marriage overlaps in many respects with the debate over polygamy or even polyamory. Since the Supreme Court decision in Lawrence v. Texas, which declared state laws banning sodomy as unconstitutional, both proponents and opponents of polygamy have utilized the “slippery slope” argument when advocating for their cause. The logic goes something like this. If homosexuals have a constitutionally protected right to engage in “alternative” intimate relationships, then on what grounds may we ban polygamists’ alternative intimate relationships? One law professor observed,

Gay activists champion autonomy in intimate relationships and charge that traditionalists simply fear what is different and mindlessly mouth religious prejudice. On these grounds polygamy is even easier to support because, unlike gay marriage, it has been and still is condoned by many religions and societies. The Equal Protection argument for same sex marriage also applies to polygamy.

Interestingly, even fundamentalist polygamists (those who base their belief on religious grounds), are “‘coming out of the closet’ to join the fight for rights recognition for ‘sexual minorities.’”112 If same sex marriage is legalized at the federal level, or even if a majority of the states eventually recognize same sex marriage, how long will the slope stick and not slip? Hypothetically speaking, if everyone could marry regardless of sexual orientation or numbers arrangement, the marital presumption would cover everyone who was married. The law of determining parentage as applied would essentially become

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112 Id. at 1983.
what it used to be; that is, through birth, marriage or adoption. Intent and conduct would still be available, as well, to determine appropriate parentage for those who were not married, but would likely be invoked to a much lesser degree. Marriage would essentially become the dominant legal means of defining parenthood and would be available to everyone regardless of lifestyle choices.

There is also an argument to be made that the families we have today are already "polygamous" or "polyamorous" to a certain extent. Adrienne Davis points out that in 2006, 38.5% of children were born to unmarried women, some of whom will eventually marry. The unmarried fathers of these children may also eventually marry and have offspring, resulting in multiple nonmarital families, or de facto polygamy.\textsuperscript{113} Also, a significant percentage of married couples divorce and remarry and start new families, which adds to the multiplicity of parents in a family.

This notion of de facto polygamy or de facto polyamory is easily expanded into the context of families formed by surrogacy and ART arrangements, as multiple players in a variety of scenarios may agree to declare themselves "parents" and form their families in non-traditional ways. There are already glimpses of this in courtrooms today. Select trial courts in California have allowed “third parent adoptions” in circumstances where a lesbian couple conceive a child with a known sperm donor who remains in the picture and acts as a father to the child, on the condition that the child is at least five years of age and the parties can show full bonding of the child with all three parents plus a good co-parenting arrangement among the adults.\textsuperscript{114} In addition, a trial court in

\textsuperscript{113} Id. at 2028.
Pennsylvania recently granted de facto parent status and the accompanying rights to visitation and shared custody to the lesbian ex-partner of a woman who married after leaving the partnership and whose husband had adopted the child. This provided the child with a legally protected relationship with her biological mother, her biological mother's husband, and her biological mother's ex-partner, with whom the child had a substantial, well established parent-child relationship.\(^{115}\) Thus, the legitimacy of multiple parents in modern families could be positioning to be the next evolutionary step in defining parenthood.

**CONCLUSION**

We have seen the traditional ways of becoming a legal parent through birth, marriage, and adoption evolve into a combination of factors based also upon intent and conduct. The test for parental status has essentially become a totality of the circumstances test, and appropriately so. There is no other test that could adequately encompass all the possible combinations of players vying for parental status in today's modern families formed through divorces, remarriages, ART, and surrogacy arrangements.

With an eye toward the future, the question arises whether the evolution of the legal definition of a parent is becoming more modern or more traditional? As anthropologist Marilyn Strathern opined over a decade ago, “It would seem we cannot be at both ends of the continuum at the same time. I want to suggest that is exactly where

\(^{115}\) *Id.* at 406-407; citing e.g., KDP v. TPW, Court of Common Pleas of Montour County, Pennsylvania, No. 192 of 2004, Opinion of June 25, 2004 (finding that lesbian ex-partner of a child’s biological mother—who had not been given notice or an opportunity to be heard at the proceeding where the mother’s new husband adopted the child—had standing to proceed with a custody action for the child with whom she had resided in a parent-child relationship for over four years based on her in loco parentis relationship with the child.)
we might be….Would it follow that one might have both more tradition and more modernity at the same time?”

With the possibility of same sex marriage becoming legalized on a federal level or through a majority of the states, it appears that a significantly greater section of the population will be recognized as a parent through the traditional marital presumption. The fledgling movement towards the recognition of multiple parents may end up providing support for polyamorous or polygamous family arrangements. If more "alternative intimate relationships" are given the freedom to marry, then they, too, will benefit from the marital presumption. If this occurs, the traditional way of defining parenthood through marriage will benefit a substantial portion of the population, and will signal a pendulum swing back to our past. In essence, the legal definition of a parent will be both modern and traditional at the same time.

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