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**CRYOPRESERVED EMBRYOS: A RESPONSE TO “FORCED PARENTHOOD”
AND THE ROLE OF INTENT**

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Introduction

Assisted reproductive technologies (ART) are changing the legal definitions of parenthood. The severing of genetic ties from gestational ones and from the social aspect of parenting has resulted in courts having to revise traditional definitions of mother and father. This has led to a legal construct known as “intended parenthood,” in which biological ties are sometimes subordinated in determining the relative parental rights and obligations of the parties. In the case of cryopreserved embryos, courts have used this “intended parenthood” doctrine in a different context, as they search for principles to guide them in making disposition of embryos upon divorce. In these cases, the courts are using the intended parenthood doctrine not to form parent-child relationships, but to deny them. Pertinent provisions of the The Uniform Parentage Act also employ this intentional parenthood doctrine, using it to deprive children born of gametes or embryos of a legal father after a divorce, unless he has expressly consented to his own parental status. Among the consequences to these children who have no legal father will be the inability of the child to look to the father for financial support and other economic benefits.

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It is the position of this author that this is a misuse of the intended parent doctrine and is against both the grain of existing law and of sound social policy.

Background

Women and their partners are increasingly making use of new reproductive technologies. Those technologies that combine sperm and egg to form embryos in vitro often result in the creation of more embryos than can be reasonably transferred to a woman's womb for gestation. Couples therefore choose to freeze these supernumerary embryos for use at a later time. It is estimated that there are almost 400,000 cryogenically-preserved embryos in fertility clinics in the United States.² Sources indicate that their numbers are being augmented by tens of thousands each year.³

At the same time, the American divorce rate remains at approximately forty to fifty percent.⁴ Couples seeking help with fertility problems are as divorce-prone as the rest of the

²Nicholas Wade, *Clinics Hold More Embryos Than Had Been Thought*, N.Y. TIMES, May 9, 2003, at A24; David I. Hoffman et al., *Cryopreserved Embryos in the United States and Their Availability for Research*, FERTILITY & STERILITY, May 2003, Vol. 79, No. 5, p. 1063.

³Helene S. Shapo, *Frozen Pre-Embryos and the Right to Change One's Mind*, 12 DUKE J. COMP. & INT'L L. 75, 76 (2002), citing N.Y. Task Force on Life and The Law, *Assisted Reproductive Technologies* 289 (1998).

⁴Ellen A. Waldman, *Disputing Over Embryos: Of Contracts and Consents*, 32 ARIZ. ST. L.J., 897, 906 n.43 (2000) (stating that over one-half of all marriages end in divorce). Some experts claim that the true rate is closer to forty percent. U.S. Bureau of the Census, *Current Population Report*, pp. 23–180, *Marriage, Divorce, and Remarriage in the 1990's*, U.S. Gov't. Printing Office, Washington, D.C. (1992); see also, Dan Hurley, *Divorce Rate: It's Not as High as You Think*, N.Y. TIMES, Apr. 19, 2005, at F7 (explaining the vagaries of divorce statistics).

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population.⁵ As the estimates of the time period lengthen during which embryos can be cryogenically preserved and still remain viable,⁶ it is evident that divorces have and will occur among many couples whose embryos are in storage.

As a part of the divorce process, courts have been called upon to determine the disposition of these embryos and in so doing, to establish the parental rights and obligations of each of the parties toward their incipient offspring. Courts who have dealt with this issue are few, and have proceeded with little if any legislative guidance. The earliest decision on disposition of these embryos was *Davis v. Davis*,⁷ in which the court, after employing its own newly created balancing test, decided that the interest of the father who did not wish to procreate deserved protection over the interest of the mother in donating the embryos. In dicta, the court also stated that it would have been useful had the parties themselves contracted about this issue, leading many to read *Davis* as sympathetic to the enforcement of these kinds of contracts between the parties. The next case, *Kass v. Kass*,⁸ came several years after *Davis*. In that case,

⁵One commentator has suggested that the stress of fertility treatment may actually raise the risk of divorce in these couples. Mark C. Haut, *Divorce and Disposition of Frozen Embryos*, 28 HOFSTRA L. REV. 493 (1999).

⁶Current estimates range from between five to ten years to “unlimited potential for viability.” Elizabeth Ann Pitrolo, *The Birds, the Bees, and the Deep Freeze: Is There International Consensus in the Debate Over Assisted Reproductive Technologies*, 19 HOUS. J. INT’L L. 147, 154 (1996); A. Revel, et al., *Twin Delivery Following 12 Years of Human Embryo Cryopreservation: Case Report*, *Hum. Reprod.*, 2004 Feb.; 19(2) pp. 328–29, at http://www.infertilitydoctor.com/fertilityflash/vol2_issue3.htm (last visited June 23, 2005).

⁷*Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992), *reh’g granted*, 1992 WL 341632, *cert. denied*, *Stowe v. Davis*, 507 U.S. 911 (1993).

⁸*Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998).

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parties had entered into a contract of the kind envisioned in Davis. The court, citing the dicta in Davis, upheld the contract.

Cases following Kass in relatively rapid succession took a decidedly different view on the issue of contract enforceability; in failing to uphold the contracts, the courts became the arbiters of disputes over what should happen to the embryos. The courts articulated the “no forced parenthood” argument as a primary principle of resolving these disputes. In *A.Z v. B.Z*,⁹ the couple had entered into a contract that would have permitted the woman to continue with the infertility process by having the embryos implanted. Upon divorce, however, her husband stated that the terms of the contract notwithstanding, he no longer wanted to become a parent. As a matter of public policy, the Massachusetts Supreme Court refused to uphold the contract, stating that “we [will] not enforce an agreement that would compel one donor to become a parent against his or her will.”¹⁰ The New Jersey Supreme Court soon faced a similar issue in *J.B. v. M.B.*,¹¹ although in this case it was the woman who opted out of parenthood and a contract that would have resulted in post-divorce procreation by her husband. The New Jersey court stated that “contracts to enter into familial relationships,” marriage or parenthood, should not be enforced against individuals who subsequently reconsider their decisions.¹²

⁹*A.Z v. B.Z*, 725 N.E.2d 1051 (Mass. 2000).

¹⁰*Id.* at 1057.

¹¹*J.B. v. M.B.*, 783 A.2d 707 (N.J. 2001).

¹²*Id.* at 717.

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In point of fact, these latter cases, while diverging on the issue of enforceability of contracts, were not so different in result. The unifying theme of the case law thus far has been that with or without a contract, an interest in avoiding procreation should prevail and thereby allow an individual to opt out of legal parenthood upon divorce.

There is a related issue raised by a provision of the Uniform Parentage Act (UPA).¹³ The Act is purposefully silent on the precise issue raised by the above case law, i.e, how courts ought to go about resolving the disposition of frozen embryos. It states that “[t]he new UPA does not deal with many of the complex and serious legal problems raised by the practice of assisted reproduction. Issues such as ownership and dispositions of embryos . . . are left to other statutes or to the common law.”¹⁴ The Act does, however, construct definitions of parenthood should an embryo be brought to term post-divorce. The relevant provision of the Uniform Parentage Act reads as follows:

Section 706. Effect of Dissolution of Marriage or Withdrawal of Consent

(a) If a marriage is dissolved before placement of eggs, sperm, or embryos, the former spouse is not a parent of the resulting child unless the former spouse consented in a record that if assisted reproduction were to occur after a divorce, the former spouse would be a parent of the child.

(b) The consent of a woman or a man to assisted reproduction may be withdrawn by that individual in a record at any time before placement of eggs, sperm, or

¹³Uniform Parentage Act § 702 (2000).

¹⁴*Id.* § 702 cmt.

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embryos. An individual who withdraws consent under this section is not a parent of the resulting child.

This provision requires the specific consent of an individual to be the parent of a child; without this clearly articulated and documented consent, the obligations of parenthood will not attach. In the comments to this section, the drafters acknowledge that “a child born through assisted reproduction accomplished after consent has been voided by divorce or withdrawn in a record will have a legal mother However, the child will have a genetic father, but not a legal father.”¹⁵ In short, and assuming traditional gender roles, the child will have no father upon whom he or she may make claims for financial support nor inheritance rights.¹⁶

This denial of legal parenthood begs for further analysis. A first step is to determine under what circumstances, if any, divorce in and of itself cancels incipient fatherhood. Second, under what circumstances, if any, is a lack of consent a defense to establishment of paternity? What do the comments to Section 706 add to an understanding of the rationale for the Act’s position? And finally, how has the “intended parenthood” concept been (mis)used in this context?

The Law As It Exists Apart from ART

¹⁵*Id.* § 706.

¹⁶While this article focuses on the Uniform Parentage Act, it should be noted that the American Bar Association’s Proposed Model Act Governing Assisted Reproduction has taken a similar position in Article 5, Section 501(3)(d), which states that “in the event of a future disagreement between intended parents, where in one intended parent no longer wishes to transfer stored embryos as agreed, that intended parent will not be the parent of a resulting child.”

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The first question is the easiest to answer. In the world of traditional conception and birth, divorce has no effect on paternal status. In fact, modern divorce law confirms that the disruption of the marital relationship does not annul the status, rights and duties of parents toward their children.¹⁷ Every state in the union has laws which provide for custody and visitation of children following a divorce. Federal and state law have codified an existing duty of a non-custodial parent to support his or her child. While fathers' rights groups (and others) are quick to note that the reality of divorce sometimes weakens or even breaks down social parental relationships, the legal status of fatherhood remains unchanged after marital dissolution.

Are there instances when a lack of consent by a father will suffice to prevent his being declared a legal father? Traditionally, it has been a genetic tie—real or presumed¹⁸—that resulted in a finding of paternity. There was little, if any, requirement that there be a stated intent to procreate to support a determination of paternity. Challenges to paternity have been brought by men who claim to have been defrauded or tricked by their partner,¹⁹ by married men who believed a child to have been the result of a wife's extramarital affair, and by men who simply claimed that they had not intended to create a child. In the vast majority of these cases,

¹⁷SANFORD N. KATZ, FAMILY LAW IN AMERICA 102 (2003). Especially with regard to child support obligations toward one or more families, "the father divorced the children's mother; he did not divorce them." *Id.*

¹⁸A.L.I., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 3.03. "Historically, the law conclusively presumed that a husband was the father of a child born to his wife so long as the husband and wife were living together at the time of the child's conception or birth." *Id.* See also, HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 191 (1988).

¹⁹Laura Wish Morgan, *It's Ten O'Clock: Do You Know Where Your Sperm Are? Toward a Strict Liability Theory of Parentage*, 11 DIVORCE LITIG. 1, 7 (1999), available at <http://www.childsupportguidelines.com/articles/art199903.html> (last visited June 23, 2005).

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lack of specific intent has been found to be an ineffective defense to a paternity action.²⁰ Current abortion jurisprudence, admittedly ever frail and fraught with challenge, has consistently held that men may not veto a woman's desire to proceed with a pregnancy,²¹ nor will a man's wish for an abortion allow him to opt out of a paternal relationship to the child. And lest we speak only of fathers, abortion law makes mothers of women who do not consent as well. States may pass laws that prohibit late-term abortions and the vast majority of states—thirty-nine—have done so.²² Parenthood for women in this instance occurs not only without her consent but comes at an even higher cost in that it also violates her bodily integrity.

There are some egregious examples in which at least one author²³ has taken exception to what another has described as this "strict liability theory of parentage."²⁴ These are cases in which men have been raped, i.e., engaged in sexual activity while incapable of consent. One case involved a man with whom a woman engaged in sexual activity while he was unconscious from drinking alcohol.²⁵ Facts appeared to indicate that the sexual activity was engaged in by the woman for the purpose of conceiving a child. The court held this individual to be the legal

²⁰ See *id.* and, for another up-to-date and concise treatment, Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL'Y 1, 5 *et seq.* (2004).

²¹ *Planned Parenthood of S.E. Pa. v. Casey*, 112 S. Ct. 2791 (1992).

²² NATIONAL ABORTION RIGHTS ACTION LEAGUE, WHO DECIDES?, *available at* <http://nara.org/yourstate/whodecides/index.cfm> (last visited June 27, 2005).

²³ Ellen London, *A Critique of the Strict Liability Standard for Determining Child Support in Cases of Male Victims of Sexual Assault and Statutory Rape*, 152 U. PA. L. REV. 1957 (2004).

²⁴ Morgan, *supra* note 18, at 7; *see also* Baker, *supra* note 19, at 5 ("[P]aternity law seems to be based on a strict liability theory for genetic contribution.").

²⁵ *S.F. v. State ex rel. T.M.*, 695 So. 2d 1186 (Ala. Civ. App. 1996).

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father of the child and ordered him to pay child support. A second case involved a minor.²⁶

Despite his claims that he was a statutory rape victim, and that his thirty-four year old partner was convicted of unlawful sexual intercourse with a minor, the court held him to be the resulting child's father. In both of these cases, the courts decided that the interest of the child in having a legal father and access to child support were more important than those claims of non-consent by the fathers.²⁷

There is a final category of men who despite genetic ties to an offspring are held almost universally NOT to be the legal fathers. These men are sperm donors. These are individuals who donate their gametes without any intention of ever claiming or being subject to a determination of paternity. Since being designated a "sperm donor" carries with it almost total insulation from any claims of paternity,²⁸ it comes as no surprise that many ingenious arguments have been made by men whose defense in paternity actions is that they have been mischaracterized as potential fathers when in fact their role was merely that of sperm donor.

In one case, *Straub v. Todd*,²⁹ a man and a woman had entered into a contract in which they agreed that the man would function only as sperm donor with no obligations of parenthood, including financial support. The case was viewed as an unusual one by the court since Mr.

²⁶County of San Luis Obispo v. Nathaniel J., 57 Cal. Rptr. 2d 843 (Cal. Ct. App. 1996).

²⁷Morgan, *supra* note 18, at 7; *see also* L.M.E. v. A.R.S., 680 N.W.2d 902 (Mich. Ct. App. 2004) (describing how a fourteen year-old father was held responsible for child support despite his minor status and even though mother was an adult; needs of the child is the purpose of child support, not to penalize a parent).

²⁸There are exceptions even for sperm donors. In *McKiernan v. Ferguson*, 855 A.2d 121 (Pa. Super. Ct. 2004), a sperm donor who had specifically disavowed any intent to parent was declared the child's legal father.

²⁹*Straub v. B.M.T. by Todd*, 645 N.E.2d 597 (Ind. 1994).

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Straub’s “donations” were made by sexual intercourse rather than in the more technically-advanced methods of the medical establishment. The court held the agreement void for public policy, citing the welfare of the child and the inability of the parent to waive what was in fact the child’s right to support. Straub was thus declared the legal father.³⁰ While it is generally true that sperm donors are exempt from paternity, the Straub case makes clear that unless sperm donor is carefully defined, it could insulate men who voluntarily engage in intercourse while claiming to be simply sperm donors with no intent to assume parental status. Thus, a sperm donor is usually precisely defined as a provider of gametes for use in assisted reproductive technology. The Uniform Parentage Act, for example, provides that the exemption of a donor from paternal status does not apply to children born of sexual intercourse,³¹ “irrespective of the alleged intent of the parties.”³²

With the exception of sperm donors, carefully defined, there appears to be little precedent for the notion that lack of consent to parenthood can protect a man from legal parenthood. If this is the case, what is the possible rationale for the Uniform Parentage Act’s position on this issue?

Comments to Section 706

³⁰ See also, *Estes v. Albers*, 504 N.W.2d 607 (S.D. 1993); *Budnick v. Silverman*, 805 So. 2d. 1112 (Fla. Dist. Ct. App. 2002) (stating that children produced by means of sexual intercourse cannot be held to have been fathered by sperm donors, even if there was prior agreement to the contrary).

³¹UPA, § 701.

³²*Id.* § 701 cmt.

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Returning to the language and comments of Section 706, which now requires that a man affirmatively consent to parenthood post-divorce of any embryos that may be brought to term, one questions how in light of the “strict liability” theory of paternity, such a provision would come to be.

What is the rationale for this provision? The history of this section is sparse. In the comments, three reasons are given. The first is that Section 706 simply incorporates the provision of an existing piece of model legislation, the Uniform Status of Children of Assisted Conception Act (USCACA).³³ The second reason is for consistency with the following section of the UPA, Section 707, which provides that any children implanted and born of cryopreserved embryos after the *death* of their genetic father shall not be considered his children, unless the father has specifically consented to include such children as his heirs. A final reason is that of intent. The act says “[i]n this instance, intention, rather than biology, is the controlling factor.” An ancillary reason to the third follows: “[t]his section is intended to encourage careful drafting of assisted reproduction agreements. The attorney and the parties themselves should discuss the issue and clarify their intent before a problem arises.”³⁴

The first two reasons are less than persuasive and may be dealt with in relatively summary fashion. The first reason, that Section 706 incorporates the provisions of prior legislation (the USCACA), is factually correct but otherwise insignificant. This would be a more

³³Uniform Status of Children of Assisted Conception Act (1988).

³⁴While the drafters may have hoped that this section would provide incentives for individuals undergoing assisted reproductive technologies to contract as to their intentions, including disposition of frozen embryos upon divorce, the latest court decisions have not been kind toward those who have sought to enforce those contracts. *See, e.g., J.B.*, 783 A.2d at 707; *A.Z.*, 725 N.E.2d at 1051.

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meaningful argument if the prior legislation had actually taken hold and become a part of the fabric of the law on this issue. If that were the case, an argument could be made that the Uniform Parentage Act did not desire to change existing law for any number of reasons, including the potential political realities in having this newer Act adopted. But the USCACA had no such hold; rather, despite its many years of existence, only two states have adopted it.³⁵ Therefore, any reliance on this pre-existing model legislation is misplaced.

The second rationale seeks harmony with the Act's following provision, Section 707, which provides that:

If an individual who consented in a record to be a parent by assisted reproduction dies before placement of eggs, sperm, or embryos, the deceased individual is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.

This section treats death as the prior section treats divorce, each event serving to cut off legal parenthood claims absent specific consent of the father.

Naomi Cahn, in arguing for the separation of biological and legal paternity, also draws a connection between death and divorce. She states that regarding Section 707 of the UPA, “[i]f legal and genetic parenthood can be separated for a dead partner, then such a separation should

³⁵UPA, at Prefatory Note. The two states are Virginia, Code 150, §§ 20-156 to 20-165 (1991), and North Dakota, NDCC 14-18-01 to 14-18-07 (1989), but it appears that the UPA has superseded the USCACA in North Dakota as of April, 2005.

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be possible as well while the partner is still living.”³⁶ The comments to Section 707 point out, however, that divorce and death involve different interests. The drafters note that “[t]his section [707] is designed primarily to avoid the problems of intestate succession which could arise if the posthumous use of a person’s genetic material leads to the deceased being determined to be a parent.” These problems include the inability of the state to settle the estate of a deceased individual when all of the potential heirs cannot be identified because one or more of them are not yet in being (similar problems have arisen with a posthumous child’s right to Social Security benefits).³⁷ This same consideration of how to account for children not yet born does not apply to divorced individuals in the same way. While it is true that orders entered in divorce cases take into account the circumstances as they exist at the time of divorce, these orders are also able to be modified should circumstances warrant. Changes in financial circumstances and the addition of dependents into either of the parties’ households can result in a court revisiting an existing order. This is not true of intestate succession laws, which provide for distribution of an estate at a fixed point in time after the decedent’s death with (absent fraud or the like) no revisiting of the issues. Whether or not Section 707 should bar legal parenthood upon death is not the point here, and may be beyond the scope of this article.³⁸ What is clear is that the peculiar nature of

³⁶Naomi R. Cahn, *Parenthood, Genes, and Gametes: The Family Law and Trusts and Estates Perspectives*, 32 U. MEM. L. REV. 563, 605 (2002).

³⁷Law in this area is not always congruent. In *Woodward v. Comm’r of Soc. Sec.*, 435 Mass. 536, 760 N.E.2d 257 (2002), a child born after the father’s death was not entitled to Social Security benefits due to lack of specific consent by the father. *But see* *Gillett-Netting v. Barnhart*, 371 F.3d 593 (9th Cir. 2004) (holding that posthumously-born children are entitled to Social Security benefits under the Act).

³⁸While not referred to in the comments to § 707, there is a separate issue that arises in some posthumous reproduction cases concerning the harvesting of sperm from a deceased individual’s body which further dilutes any similarities between parenthood post-divorce and post-death. This issue, apart from the donor’s consent to

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intestacy laws may provide for an arguable rationale for the Act's treatment of death cutting off parenthood claims. The same considerations do not apply to divorce.

The final rationale given for Section 706 is that "intention, rather than biology, is the controlling factor." We have already looked at instances in which lack of consent was not a defense in actions to establish paternity. From where, then, did this notion of "intention" and its significance arise?

The Issue of Intent in Parenthood: From Whence It Came:

"Intended parenthood" is a relatively new concept that was drafted into being out of necessity, when the development of artificial reproductive technologies caused questions to be raised about parental identity. Before such technologies, parenthood was easier to define. Mothers contributed ova, gestated and raised the child. Fathers contributed sperm, were married to the mothers, and raised the child. In relatively modern times, financial support of the child rested solely with the father, although sexual equality has shifted that burden onto the shoulders of both parents. Even in these times of easier definition, there were always exceptions. For example, legal parenthood could be bestowed upon persons who had no genetic connection to the child through the process of adoption. Out-of-wedlock births did not fit the traditional paradigm, and so a separate jurisprudence grew up around these instances; even in these cases, however, the law bestowed legal paternity upon those men whose actions, rather than their

parenthood, is whether or not the deceased would have consented to the physically invasive procedure of sperm retrieval, and whether, pre-death consent to such a procedure is necessary. See Ohl et al., *Procreation After Death or Mental Incompetence: Medical Advance or Technology Gone Awry?*, FERTILITY & STERILITY, Dec. 1996, Vol. 66, No. 6, p. 889; Lori B. Andrews, *The Sperminator*, N.Y. TIMES, Mar. 28, 1999, sec. 6, p. 62; Carson Strong, *Ethical and Legal Aspects of Sperm Retrieval After Death or Persistent Vegetative State*, 27 J.L. MED. & ETHICS 347 (1999) (arguing the need for at least inferred consent).

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marital status, most resembled the fathers in a traditional heterosexual couple.³⁹ Same-sex couples who parented children who were or were not genetically related to them provided other challenges for the law, which heretofore recognized that a child could have two parents, but only one of each gender (hence the terms father and mother as descriptions of the two different roles). Even as many actual child-rearing arrangements simultaneously resembled and did not resemble the traditional couple with whom the law was familiar, there grew the idea that parenthood was defined by either a genetic or legal tie to the child, or in some cases, by a person who acted as a parent.

Assisted reproductive technology (ART) presented the same issues but in more complex form. Inherent in many ART processes is the splitting of the previously unified role of parent into several different roles. Thus, motherhood, originally thought to be easy to define, became fractured into genetic motherhood, gestational motherhood, and social motherhood (raising the child). Paternity likewise was divided into genetic paternity and social paternity. Suddenly the law, with its creaky simplistic definitions, saw what had been thought to be impossible—more than one individual who claimed the title of mother, or of father, each with a creditable claim. As real cases crying out for adjudication, and often with little or no guidance from the legislature, courts tried to fashion not just an answer—this “parent” or that—but a rationale that would support its decision and provide guidance to courts in future disputes of this kind.

³⁹For a cogent discussion of this area of the law from *Stanley v. Illinois*, 405 U.S. 645 (1972) through *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), see Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637, 647–72 (1993).

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Johnson v. Calvert⁴⁰ is credited with originating the “intended parenthood” doctrine. In Johnson, a couple (Mark and Crispina Calvert) each contributed gametes to form an embryo, which was then implanted into a surrogate mother (Anna Johnson) to gestate. The parties’ surrogacy agreement relinquished any parental claims of Ms. Johnson and stated that the Calverts would be the parents of the child. During the pregnancy the surrogate claimed that she, not Ms. Calvert, was the mother of the child Johnson bore. The court was asked to decide these competing claims of maternity, and decided in favor of Ms. Calvert. The court stated:

Because two women each have presented acceptable proof of maternity, we do not believe this case can be decided without inquiring into the parties’ intentions as manifested in the surrogacy agreement. . . . 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 a child that she intended to raise as her own—is the natural mother under California law.⁴¹

In another California case, *In re Marriage of Buzzanca*, facts were more complicated.⁴² A married couple desiring a child had an embryo that was not genetically related to either of them implanted in a surrogate. During the pregnancy the couple separated and the husband filed

⁴⁰Johnson v. Calvert, 19 Cal. Rptr. 2d 494, 851 P.2d 776 (Cal. 1993).

⁴¹*Id.* at 782.

⁴²*In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280 (4th Dist. 1998).

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for divorce, alleging there were no children of the marriage. The wife responded that the couple were expecting a child via a surrogate contract. According to this contract, the surrogate and her husband were not the legal parents of the resulting child. The trial court accepted this contractual provision and then went on to hold that the married couple could not be considered parents either, since they had no genetic tie to the child. Therefore, the trial court reasoned, the husband could not be held liable for child support. On appeal, the appellate court held that parenthood can be established by other than genetic relationship, and in this case, recognized that the married couple had initiated the chain of events that culminated in the child's birth. Having so found, the court declared them to be the intended and therefore legal parents of the child.⁴³

A Tennessee court recently considered a similar case.⁴⁴ An unmarried couple sought to create a child by using an egg from a donor and the man's sperm to form an embryo that was implanted into and gestated by the woman. The pregnancy resulted in the birth of triplets. The couple separated and the woman filed for custody. In support of his claim for custody, the man responded that his partner was not the mother due to her lack of genetic connection to the child. He also avowed that the egg donor had waived her parental rights, and therefore, the child had no legal mother; consequently, he argued that the only possible custodial parent was himself—

⁴³ It is interesting to note that while never proven, the husband in this case had an additional argument besides his lack of biological connection to the child. This was that his wife and he had entered into an agreement in which she would assume all financial responsibility for the child and hold him harmless. The court declined to remand for resolution of this issue stating that "it could make no difference as to John's lawful paternity. It is well established that parents cannot, by agreement, limit or abrogate a child's right to support. *Buzanca*, 72 Cal. Rptr. 2d at 291.

⁴⁴ *In re C.K.G., C.A.G., C.L.G.*, 2004 WL 1402560 (Tenn. Ct. App.).

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the legal father. The court, citing both *Johnson* and *Buzzanca*, looked to the intent of the parties. Since abundant evidence⁴⁵ existed of both parties' intent to recognize the woman as the legal mother, the court held her to be so, and awarded joint custody with primary custody to the mother.

There appears to be, then, two instances in which the courts have looked at parental intent in disputes concerning the parenthood of a child. One, as demonstrated by *Johnson v. Calvert*, is where there are competing claims, i.e., two individuals claim that each is the mother of the child. It is clear from the court's rationale that the presence of the conflicting claims was crucial. The court so stated when it said that looking to intent was necessary "because two women have presented acceptable proof of maternity."⁴⁶ The second category of cases involves situations in which absent a consideration of the parties' intent, a child could be determined to have no legal parents (*Buzzanca*) or no legal mother (*In re C.K.G.*). The *Buzzanca* court was particularly clear about the undesirability of finding that a child was legally parentless, taking the trial court to task by saying:

The legal paradigm adopted by the trial court . . . is one where all forms of artificial reproduction in which intended parents have no biological relationship with the child result in legal parentlessness [sic]. It means that, absent adoption, such children will be dependents of the state.

⁴⁵The evidence included the agreement signed by the parties with the fertility clinic which stated that "regardless of the outcome, I [Pepper] will be the mother of any child(ren) born to me as a result of egg donation and hereby accept all the legal responsibilities required of such a parent." She was also listed as the mother on the child's birth certificate. *In re C.K.G.*, 2004 WL 1402560._____

⁴⁶*Buzzanca*, 72 Cal. Rptr. 2d at 289.

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[T]he Legislature has already made it clear that public policy (and, we might add, common sense) favors, whenever possible, the establishment of legal parenthood with the concomitant responsibility. Family Code section 7570, subdivision (a) states that “There is a compelling state interest in establishing paternity for all children.” The statute goes on to elaborate why establishing paternity is a good thing: It means that someone else besides the taxpayers will be responsible for the child.⁴⁷

The *Buzzanca* court then went on to say that “it would be lunatic” for the legislature not to extend this public policy of establishing paternity to establishing maternity as well. Intent to parent, therefore, became a device for courts to use to resolve dilemmas of two particular sorts: competing claims to parenthood, or potential “parentlessness” of the child. Put another way, courts have used the intentional parent doctrine to make sure that a child has no more than one mother or father, and equally as important, no fewer.

What Does It All Mean:

It is this author’s view that the idea of parenthood by intent, while a viable concept in some situations, has been ripped from its moorings and applied unsuitably in the instances of post-divorce disposition of frozen embryos and most particularly the UPA provision concerning legal fatherhood. There is a difference in recognizing a positive intent when one must choose

⁴⁷ *Buzzanca*, 72 Cal. Rptr. 2d at 289.

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from among competing claims to parenthood, and the opposite, which is using a *lack* of intent to defeat a claim of paternity and the child's interest in having a legal father.

First, I think it imperative that we acknowledge that this is new. While we have seen the definition of legal parenthood *expand*—as it should—to encompass other than a simple genetic tie, this is an instance in which a genetic tie minus expressed intent to parent *contracts* the definition of parenthood, and results in a lack of a father, with all that that implies, for the child. The closest analogy in existing law is that which applies to a sperm donor. But even this analogy is an imperfect one. The sperm donor is most often anonymous, has had no relationship with the child's mother, and has had no intent to parent from the beginning of the process. The genetic father of the frozen embryo has likely been a close participant in the infertility process, to have had a relationship with the woman, and to have intended for some period of time to produce a child that he would parent. Moreover, while it is true that single women can and do make use of sperm donation in ART procedures, originally sperm donation and ART were the province of infertile *couples*. Thus the insulation of the sperm donor from paternity may have been established more in the tradition of “tie-breaking” where there would have been two competing claims to fatherhood—the donor and the husband.

Second, it is important simply to note that the intentional parent doctrine, which had been used to make sure that a child had parents, has morphed into something else. It carries the same name but is applied in different circumstances—to deny a child legal parenthood. Consistency—that is, allowing consent to be the defining element in the parent-child bond in all cases—may not be a good thing. Thus it would be possible to take the position that the intended parent

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doctrine could be confined to those cases in which the establishment of parent ties is at issue, and not in those cases in which a parent seeks to disestablish parental obligations.

One senses that the provisions of Section 706 might be seen as some sort of compromise regarding the vexing issue of how to deal with cryopreserved embryos upon divorce. The compromise is that if, absent contemporaneous consent, one partner is permitted the right to bring an embryo to term, it is only fair that the other, who disagreed, not be held liable for any obligations that this “forced parenthood” brings. The compromise has some inherent appeal, and could result in fewer contests concerning the disposition of frozen embryos. Women, who have invested more in the infertility treatments from which the embryos have emerged, and who, due to age and other factors, may have fewer reproductive choices, may be happy to make the bargain that will give them the embryos in exchange for which their ex-husbands are freed from any parental claims. But is this a good bargain and if so, good for whom? Does it not dredge up memories of other instances (pre-child support guidelines) in which women bargained in divorce cases for custody of children by giving up claims for child support and other financial considerations?⁴⁸ The law of child support changed in part to remove from women this Hobson’s choice, and coincidentally, to ensure as best it could that no one bargained away what was the right of the child.

Bargaining and private ordering aside, one author, Ellen Waldman, advocates for state legislation of the UPA Section 706 variety. She believes that the removal of the “threat of

⁴⁸Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979) (discussing generally the links between custody and support).

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financial servitude”⁴⁹ will help to minimize the claims of the spouse who seeks to avoid procreation, and she states that “state legislatures should make clear that a divorcing spouse who objects to the implantation of embryos created during the marriage should be treated like a gamete donor. . . . Shorn of the financial overlay, the interest of the party seeking to avoid procreation rests entirely on the psychological burdens of ‘forced parenthood.’”⁵⁰ This is a hopeful approach for those who are willing to trade support for control over the frozen embryos, but it may be a dangerous one. There is little evidence that this elimination of financial servitude will result in the courts seeing the control issue in a new light. Indeed, Professor Waldman notes that the “threat of psychological bondage is a product of the courts’ collective imagination”;⁵¹ she may be right but the rationale for the court’s preference for the procreation-avoider has focused less on financial considerations and more on the “psychological bondage” aspect. If the courts are not pried out of their preoccupation with the real or imagined psychological aspects of parenting, however, their rulings on the disposition of these embryos will not change.

Assuming that Section 706 remains as is, i.e., “lack of consent equals no parenthood,” one of two possibilities may occur, neither of which is desirable. One could say that this approach will be confined to a small (but only in relative terms) number of children, i.e. those who are the product of cryopreserved embryos upon divorce. This means that these children will be treated differently from others born from traditional sexual intercourse. A child born of a

⁴⁹Ellen Waldman, *The Parent Trap: Uncovering the Myth of “Coerced Parenthood” In Frozen Embryo Disputes*, 53 AM. U. L. REV. 1021, 1062 (2004).

⁵⁰*Id.* at 1060.

⁵¹*Id.* at 1062.

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frozen embryo implanted post-divorce can be denied a legal father, while a child conceived during the marriage but born post-divorce cannot. It is ironic that the Uniform Parentage Act sought to remove the social and legal differences faced by another group of children—those born out of wedlock—and yet has created a new class of children to whom—and only to whom—this provision denying parenthood applies.

The second possibility is that this lack of consent provision of Section 706 will do the opposite. It will place us on the proverbial slippery slope and move beyond this particular instance of a relatively small number of children. To rationalize the Section 706 provision by pleading the virtues of intent, not biology, may cause seepage into other paternity determinations. If lack of intent is so important in these particular cases, why should it NOT count for men who simply change their minds about the desirability of legal fatherhood for non-ART children in utero? For existing children in an acrimonious divorce? What will stop men from claiming to be a “de facto sperm donor” (with no intent to procreate) as a permanent status throughout their sexual and reproductive lives, to the detriment of their partners and offspring? Perhaps without specific consent, estoppel-type arguments will work in some cases in which behavior has clearly indicated consent to procreate and reliance thereon. But parenthood-by-estoppel is an unreliable option, fraught with the need to gather and present persuasive evidence in what may be ambiguous circumstances.

In her article, Katherine Baker asks the question, “[i]f our concern is children, why do we assume that children will be better off with unwilling and resistant fathers?”⁵² It has caused me

⁵²Baker, *supra* note 19, at 21.

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to ask myself—aside from the mere formality of legal parentage—what it is that I think important to preserve for these children. The answer is a right to obtain financial support and economic benefits,⁵³ even if from a father who is unwilling and resistant. Indeed, while some fathers may pay their child support cheerfully, many do not do so with good grace. A payor's lack of good grace does not seem to be a good reason to abandon one's efforts. Some have argued that children born of assisted reproductive technology are likely to have parents, including mothers, of means, which could make financial support from fathers superfluous to the child's actual needs. But if true, that cuts both ways. Fathers of means have actual, not just theoretical, ability to contribute financial support to their children. Current support guidelines are not premised on providing for a child based upon a pre-determined low level of need, but rather, on both parents' ability to pay. It is also not necessarily true that all couples going through infertility treatment are wealthy individuals. "Infertility care is sometimes portrayed as 'wealthy couples creating designer babies'. . . . Nothing could be further from the truth."⁵⁴ Thus child support from a father could provide not just for "frills" but rather could make the difference in providing basic necessities.

⁵³Support encompasses more than simple periodic child support payments. In addition, legal paternity makes a child eligible for a host of other economic benefits, including "inheritance rights, medical support, veteran's educational benefits, workers' compensation dependent's benefits, social security death benefits, pension benefits, and the right to bring certain causes of action including wrongful death." Cynthia R. Mabry, *Who is the Baby's Daddy (And Why Is Important for the Child to Know)?*, 34 U. BALT. L. REV. 211, 233 (2004). Professor Mabry's article also discusses other ramifications of legal paternity including psychological and medical aspects.

⁵⁴*Company Donates Infertility Services Through "From INCIID the Heart"*, BIOTECH WKLY., May 4, 2005, at 331; see also, Alana Semuels, *How Old is Too Old to Have a Baby?*, PITT. POST GAZETTE, Mar. 8, 2005, at C1 (acknowledging the high cost of ART but also noting that "less wealthy infertile couples have sought out other options," including seeking treatment overseas and fighting for more insurance coverage).

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Many have argued that the state should step into the role of these, and perhaps all, fathers. One author states, “the United States is the only industrialized country, save China, to not provide subsidies to the caretakers of children. Numerous eminent scholars routinely call for such subsidies. If we embraced the caretaking norm that most of the rest of the world embraces, the parental status model . . . would run little risk of making mothers too vulnerable.”⁵⁵

This is part of a debate that continues to ponder the role of fathers in a child’s life. It is not necessary at this point to attempt to resolve the ultimate question of whether fathers are indispensable nor whether the State should be the father-substitute when it comes to providing child support. While these are important questions, it appears that paternity, with its rights and obligations toward children, is still a vital part of American jurisprudence. Likewise, as tempting as it may be to urge a back-to-the-drawing-board approach to the issue of child support that separates such support from legal fatherhood, there does not appear to be much political support in the United States for such sweeping change. In fact, the current state welfare system, which doles out exceeding meager amounts of support for children in actual need, has been under attack (in the guise of reform) recently under both Democratic and Republican regimes. Thus, whether it is ultimately a good idea or not, fathers continue to be a prime provider of support for many children. Eliminating them when there is no realistic hope of support from the government leaves a child entirely too vulnerable.

Finally, I concede that there may be some unfairness in forcing men to retain their legal parenthood status when the choice to procreate is decidedly their partner’s and not their own. As

⁵⁵Baker, *supra* note 19, at 4–5.

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we have seen a shift in related areas of the law, e.g., child custody, from an initial focus on parental rights to the newer approach of the “best interests of the child,” so too must we say that requiring support from fathers—even those lacking in consent—is a social policy that is designed to benefit children. One might add that, on balance, any harm to the public in general (administrative costs of enforcement, for example) are dwarfed by the resulting public good.

In the spirit of compromise, I would offer two possibilities that might lessen the burden on fathers involved in ART, who may find themselves with cryopreserved embryos upon divorce, and divergent views between the parties of whether or not to reproduce. One of the especially burdensome aspects of attaching legal paternity to any subsequently produced offspring is that embryos can be kept in a cryopreserved state for at least a decade, if not longer. Theoretically, this could mean that as long as the embryos exist, parenthood and its attendant support obligations could be imposed. Thus, potential fathers could find it difficult to plan their financial lives for decades. A limit on the time within which birth must occur might be a reasonable compromise. This could take the form of a statute that is similar to those that advocate time restrictions on birth for purposes of inheritance.⁵⁶ What would be deemed reasonable for inheritance purposes, however, may not be reasonable in cases of cryopreserved embryos and ART. Any time limits would need to take into account such medical issues as how many cycles of ART are possible given the number of embryos, the success rate of these cycles,

⁵⁶See discussion of this issue at Cahn, *supra* note 35, at 598 (citing the ABA Model Act’s limit of three years, albeit with consent of the deceased). Cahn’s view is that “there should be a time limit on how long after the creator’s death such a child can inherit.” *Id.* at 595 n.150. A “reasonable” amount of time after such death is suggested in the Restatement of Property. RESTATEMENT (THIRD) OF PROP.: DONATIVE TRANSFERS § 2.5, cmt. 1 (1999).

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and other factors that would not preclude the procreating partner from a reasonable chance at conceiving and giving birth. A different sort of statute that would have the same result would be one that did not address the issue of parenthood specifically, but rather, provided that cryopreserved embryos be destroyed after a given period of time.⁵⁷ In either case, a father might be vulnerable to a legal parenthood determination for a known period of time, but not after.

Additionally, even though current case law seems to vitiate any trust the drafters of the UPA have placed in the importance of “carefully drafting of assisted reproduction agreements,”⁵⁸ and because I myself have joined those who favor enforceable contracts in this area,⁵⁹ I offer the contract once again as a solution for men who do not wish to procreate beyond divorce. Such a contract could not preclude liability for parenthood and child support under a theory that the parties are not free to contract away the rights of the third-party/child. But the contract could provide that embryos be destroyed upon divorce, thereby making post-divorce fatherhood an impossibility.

Conclusion

Legal parenthood is an evolving concept. New kinds of families are forming, both with and without the use of assisted reproductive technologies. Part of this evolution is to recognize

⁵⁷In Great Britain, embryos must be destroyed after five years unless the parents both agree to extend the time. Human Fertilisation & Embryology Act, 1990, § 14 (Eng.), *amended by* Human Fertilisation & Embryology Regulations, 1996 (Eng.). See Lee Kuo, *Lessons Learned from Great Britain’s Human Fertilization & Embryology Act: Should the United States Regulate the Fate of Unused Frozen Embryos?*, 19 LOY. L.A. INT’L & COMP. L.J. 1027 (1997).

⁵⁸UPA, § 707 cmt.

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the role of intent in determinations of parentage. It is a step forward for both parents and children when intent is used to ensure that a child and his or her parents have identifiable and legally enforceable parental bonds. Thus, the intended parenthood doctrine is useful and beneficial to the parties, including the child.

There is a danger, however, in using the intended parenthood doctrine to deny a child a legal father. This is particularly so not just because of the result—no father for the child—but because of the rationale of lack of intent. Only in the case of sperm donors has lack of intent to parent absolved a biological father of any parental obligations. The equation of post-divorce incipient fathers with sperm donors is not an apt one; the post-divorce fathers have created the embryos with an intent to parent and have participated in the creating process not just biologically but in other ways as well. Moreover, this establishment of lack of intent as a defense to paternity in these specific, frozen embryo post-divorce, cases is open to expansion to other situations where men claim that they did not intend to create a child.

Some may argue that legal paternity, especially if coerced, is of little benefit to a child; others may believe that legal paternity is a misguided concept that should be replaced by greater state responsibility for all children. Surely if rights to support and other economic benefits were not tied to parental relationships, the prospect of men fleeing from these relationships would not be so alarming. Nor would there be a need or rationale for a law to coerce the behavior of supporting one's children. Unless and until sufficient state resources are available to all children, however, one needs to conserve the existing resources that a child currently has.

⁵⁹Susan Apel, *Disposition of Frozen Embryos: Are Contracts the Solution?*, VT. BAR J., Mar. 2001, p. 29.

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Legal paternity, with all of its consequences and obligations, must remain a viable construct in the absence of better alternatives.