1999 DRAFTING REQUEST

Bill

Received: **02/4/99**

Received By: **malaigm**

Wanted: **As time permits**

Identical to LRB:

For: **Jim Baumgart (608) 266-2056**

By/Representing: **Himself**

This file may be shown to any legislator: **NO**

Drafter: **malaigm**

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Alt. Drafters: **kahlepj**

Subject: **Children - miscellaneous**
Courts - miscellaneous
Dom. Rel. - miscellaneous
Dom. Rel. - paternity

Extra Copies:

Pre Topic:

No specific pre topic given

Topic:

Presumption of parenthood when egg is donated

Instructions:

See Attached--provide that husband and wife who arrange for an egg donor or sperm donor to assist them in having a child are the presumed parents of the child

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Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/?	malaigm 03/2/99	jgeller 03/4/99		_____ _____			S&L
/1			ismith 03/5/99	_____ _____	lrb_docadmin 03/5/99		S&L
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/?	malaigm	1 3/4 jlg	IS 3/5/99	IS/LP 3/5/99			

FE Sent For:

<END>

Bill: CALL:
Tony McCabe.

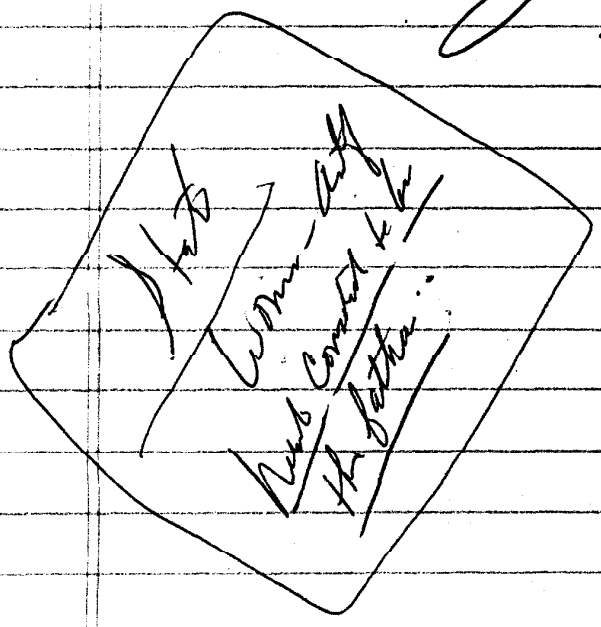
WANTS TO develop
X LEGISLATION.
1. IT PROMOTES USE OF FIREARMS
OF WOMEN, CHILD BEINGS
TO PROMOTE WARNING CHIP

2.

HE WILL WANT TO TALK
ABOUT WOMEN'S VOTING
RIGHTS BUT WORK ON
THIS LOSS

6

6



6-2056

Senator Baumgart

if ~~a~~ use any other person's sperm or egg, (contrary to contract?)

~~married~~ married couples

limit to 1

~~another woman's egg~~ another woman's egg regardless of who "carries" child (implanted in wife or carried by surrogate mother)

re: 891.40 (for artificial insem)

search:

definitions of "parent"

"artificial insemination"

"891.40"

See 89 SB 270

~~Adoptions~~ Artificial Insem.
In Vitro Fertilization

Married
Woman who gives birth is presumed to be natural mother
(-n/w standing that another woman donated egg)
-Except if surrogate mother, then [intended mother is presumed to be natural mother (and intended father is presumed to be natural father)

"Intended father" male who is married to intended mother intends to have parental rights & responsibilities for a child born to a surrogate mother
"intended mother"
(even if no biological relationship)

Husband & wife

Husband's Sperm & Wife's egg

✓ - in wife - ok - normal way

- in surrogate CR presumption wife is mother

Husband's Sperm & Surrogate egg CR

- wife gives birth

✓ - in wife - ~~ok 891.40~~

- in surrogate - CR presumption wife is mother

Donor's Sperm & Wife's Egg

✓ - in wife 891.40

- in surrogate CR presumption husb. 2 is Father wife is mother

Donor Sperm & Donor Egg

- in wife husband ok 891.40

~~birth mother~~

CR presumption wife is mother

- in surrogate CR presumption husband is father wife is mother

ff

891.40 " Wife artificially inseminated w another man's sperm

husband is presumed natural father

married

= Need exception for surrogate mother inseminated

by sperm of intended father

Parallel

Surrogate mother

- wife implanted w ovum of another woman - wife's mother

- surrogate mother artificial insem by married man - wife of man's mother

Presumption

- Woman who gives birth is mother,

"891.40"

46.03 (7) (bm)

48.02 (13)

49.147 (1) (j) 2.

69.14 (1) (g)

115.76 (12)

146.34 (1) (f)

767.47 (9)

938.02 (13)

father of a child" in (a); inserted present (c) and redesignated former (c) as (d); and added (e).

Subchapter 2 — Artificial Insemination

RESEARCH REFERENCES

Am. Jur. 10 Am. Jur. 2d, Bastards, § 1.
Ark. L. Rev. Artificial Insemination, 23 Ark. L. Rev. 81.
UALR L.J. Legislative Survey, Family Law, 8 UALR L.J. 577.

9-10-201. Child born to married or unmarried woman — Presumptions — Surrogate mothers.

(a) Any child born to a married woman by means of artificial insemination shall be deemed the legitimate natural child of the woman and the woman's husband if the husband consents in writing to the artificial insemination.

(b) A child born by means of artificial insemination to a woman who is married at the time of the birth of the child shall be presumed to be the child of the woman giving birth and the woman's husband, except in the case of a surrogate mother, in which event the child shall be that of:

(1) The biological father and the woman intended to be the mother if the biological father is married; or

(2) The biological father only if unmarried; or

(3) The woman intended to be the mother in cases of a surrogate mother when an anonymous donor's sperm was utilized for artificial insemination.

(c)(1) A child born by means of artificial insemination to a woman who is unmarried at the time of the birth of the child shall be, for all legal purposes, the child of the woman giving birth, except in the case of a surrogate mother, in which event the child shall be that of:

(A) The biological father and the woman intended to be the mother if the biological father is married; or

(B) The biological father only if unmarried; or

(C) The woman intended to be the mother in cases of a surrogate mother when an anonymous donor's sperm was utilized for artificial insemination.

(2) For birth registration purposes, in cases of surrogate mothers, the woman giving birth shall be presumed to be the natural mother and shall be listed as such on the certificate of birth, but a substituted

certificate of birth may be issued upon orders of a court of competent jurisdiction.

History. Acts 1985, No. 904, §§ 1, 2; A.S.A. 1947, §§ 34-720, 34-721; Acts 1989, No. 647, § 1.

9-10-202. Supervision by physician — Written agreement.

(a) Artificial insemination of a woman shall only be performed under the supervision of a physician licensed under the Arkansas Medical Practices Act, § 17-95-201 et seq.

(b) Prior to conducting the artificial insemination, the supervising physician shall obtain from the woman and her husband or the donor of the semen a written statement attesting to the agreement to the artificial insemination, and the physician shall certify their signatures and the date of the insemination.

History. Acts 1985, No. 904, § 3; A.S.A. 1947, § 34-722.

CHAPTER 11

MARRIAGE

Subchapter 1 — General Provisions

Effective Dates. Acts 1875, No. 102, § 2: effective six months after passage.

Acts 1941, No. 32, § 3: approved Feb. 6, 1941. Emergency clause provided: "Whereas, numerous marital contracts entered into between persons of immature ages continuously create serious domestic relations problems, and under present

sanction we impose is reasonably consistent with sanctions heretofore imposed in similar cases." We also stated that where "an attorney intended to deprive the client of funds, permanently or temporarily, or if the client was deprived of funds (no matter what the attorney intended), the standard discipline is disbarment or indefinite suspension." *Id.* at 187, 687 N.E.2d 391. In addition, where there are "aggravating circumstances, such as [457] other violations of disciplinary rules established in the same proceeding or earlier," a greater sanction than otherwise appropriate might be warranted. *Id.* at 188, 687 N.E.2d 391.

In this case the board determined that the respondent "plucked" the trust and estates, consumed nearly 80% of their value, and spent much of it for his and his family's benefit. It determined that his churning was exacerbated by his deceit and misrepresentations in attempting to conceal his inappropriate actions, by the value of the assets consumed and the size of the fees taken, and his failure to make any restitution. The board found that the cumulative nature of the respondent's misconduct and his lack of candor before the hearing committee further compounded his transgressions.

Neither bar counsel nor the board has appealed. However, in view of the board's findings and consistent with *Matter of Schoepfer, supra*, we conclude that the respondent should be indefinitely suspended from the practice of law.

The case is remanded to the single justice for an order indefinitely suspending the respondent from the practice of law.

So ordered.

1. D.H., the husband of M.H.

426 Mass. 501

[501] R.R.

v.

M.H. & another.[1]

Supreme Judicial Court of Massachusetts, Worcester.

Argued Oct. 7, 1997.

Decided Jan. 22, 1998.

Father brought action against surrogate mother, seeking to establish his paternity, alleging breach of contract and requesting declaration of his rights under surrogacy agreement. The Probate and Family Court Department, Worcester Division, Susan Ricci, J., reported questions of law, which was transferred from the Appeals Court. The Supreme Judicial Court, Wilkins, C.J., held that surrogacy agreement between surrogate mother and father was unenforceable.

So ordered.

1. Children Out-of-Wedlock ⇐20

Surrogate parenting agreement was governed by Massachusetts law, even though agreement stated that it was governed by Rhode Island law, and even though father lived in Rhode Island, where child was conceived and born in Massachusetts and surrogate mother was a Massachusetts resident, all as contemplated in agreement.

2. Adoption ⇐6

Infants ⇐19.2(2)

No private agreement concerning adoption or custody of child can be conclusive, because judge must decide what is in best interests of child.

3. Children Out-of-Wedlock ⇐20

Surrogate parenting agreement under which surrogate mother agreed to cede custody to father and father agreed to pay $10,000 to surrogate mother for her "services rendered in conceiving, carrying and giving birth to the Child" was unenforceable; surro-

Ci

mother's consent to custody recognized unless given on or following child's birth, agreem that surrogate mother had t mpensation paid if she challen ht to custody, and final payme ie only when surrogate moth hild to father. M.G.L.A. c. 210

[502] Elaine M. Epstein, Bosto Davison, with her) for the mother

Carol A. Erskine, Worcester, tem.

Margaret Clapp–Winchester, the father.

The following submitted brie uriae:

Joyce M. Brousseau, pro se.

John J. Weltman, Boston, for an Surrogacy Center, Inc.

Susan L. Crockin, Boston, for ility Society & another.

Before WILKINS, C.J., and A LYNCH, GREANEY, MARSH IRELAND, JJ.

WILKINS, Chief Justice.

On a report by a judge in the Family Court, we are concer validity of a surrogacy parenti between the plaintiff (father) a iant (mother). Both the mo father are married but not to child was conceived through ar nation of the mother with the f after the mother and father ha surrogate parenting agreemen ment provided that the fathe custody of the child. During t of her pregnancy and after sh funds from the father pursuan gacy agreement, the mother mind and decided that she w the child.

The father thereupon brou and obtained a preliminary him temporary custody of t mother's appeal from that or cause the parties have since a

mother's consent to custody could not recognized unless given on or after fourth following child's birth, agreement provid- that surrogate mother had to refund all mpensation paid if she challenged father's nt to custody, and final payment was to be de only when surrogate mother delivered ild to father. M.G.L.A. c. 210, §§ 2, 11A.

Elaine M. Epstein, Boston (Juliet A. Davison, with her) for the mother.

Carol A. Erskine, Worcester, guardian ad em.

Margaret Clapp–Winchester, Fitchburg, the father.

The following submitted briefs for amici riae:

Joyce M. Brousseau, pro se.

John J. Weltman, Boston, for The Ameri- n Surrogacy Center, Inc.

Susan L. Crockin, Boston, for Boston Fer- ity Society & another.

Before WILKINS, C.J., and ABRAMS, NCH, GREANEY, MARSHALL and RELAND, JJ.

WILKINS, Chief Justice.

On a report by a judge in the Probate and amily Court, we are concerned with the alidity of a surrogacy parenting agreement tween the plaintiff (father) and the defen- ant (mother). Both the mother and the ther are married but not to each other. A ild was conceived through artificial insemi- ation of the mother with the father's sperm, fter the mother and father had executed the urrogate parenting agreement. The agree- ment provided that the father would have ustody of the child. During the sixth month f her pregnancy and after she had received unds from the father pursuant to the surro- acy agreement, the mother changed her ind and decided that she wanted to keep he child.

The father thereupon brought this action nd obtained a preliminary order awarding im temporary custody of the child. The nother's appeal from that order is moot be- ause the parties have since agreed on custo- dy and visitation and the judge has approved that agreement. We, therefore, do not discuss the circumstances of the temporary custody order, and nothing we say in this opinion should be understood to suggest that the subjects of custody or visitation need be reconsidered. The judge's order granting the preliminary injunction is before us on her report of the propriety of that order which was based in part on her conclusion that the father was likely to prevail on his assertion that the surrogacy agreement is enforceable. On our own motion, we transferred here the appeal and the report, which a single justice of the Appeals Court had consolidated. The question of the enforceability of the surrogacy agreement is before us and, although we could defer any ruling until there is a final judgment entered, the issue is one on which we elect to comment because it is fully briefed and is of importance to more than the parties. This court has not previously dealt with the enforceability of a surrogacy agreement.

The Facts

The baby girl who is the subject of this action was born on [503] August 15, 1997, in Leominster. The defendant mother and the plaintiff father are her biological parents. The father and his wife, who live in Rhode Island, were married in June, 1989. The wife is infertile. Sometime in 1994, she and the father learned of an egg donor program but did not pursue it because the procedure was not covered by insurance and had a relatively low success rate. Because of their ages (they were both in their forties), they concluded that pursuing adoption was not feasible. In April, 1996, responding to a newspaper advertisement for surrogacy services, they consulted a Rhode Island attorney who had drafted surrogacy contracts for both surrogates and couples seeking surrogacy services. On the attorney's advice, the father and his wife consulted the New England Surrogate Parenting Advisors (NESPA), a for-profit corporation that helps infertile couples find women willing to act as surrogate mothers. They entered into a contract with NESPA in September, 1996, and paid a fee of $6,000.

Cent.Code § 14–18–05 (1991); Utah Code Ann. § 76–7–204 (1995). Others expressly deny enforcement only if the surrogate is to be compensated. See Ky.[507] Rev.Stat. Ann. § 199.590(4) (Michie 1995)[5]; La.Rev.Stat. Ann. § 9:2713 (West 1991); Neb.Rev.Stat. § 25–21,200 (1995); Wash. Rev.Code §§ 26.26.230, 26.26.240 (1996). Some States have simply exempted surrogacy agreements from provisions making it a crime to sell babies. See Ala.Code § 26–10A–34 (1992); Iowa Code § 710.11 (1997); W. Va.Code § 48–4–16(e)(3) (1996). A few States have explicitly made unpaid surrogacy agreements lawful. See Fla. Stat. ch. 742.15 (1995); Nev. Rev.Stat. § 126.045 (1995); N.H.Rev.Stat. Ann. § 168–B:16 (1994 & Supp.1996); Va. Code Ann. §§ 20–159, 20–160(B)(4) (Michie 1995). Florida, New Hampshire, and Virginia require that the intended mother be infertile. See Fla. Stat. ch. 742.15(2)(a); N.H.Rev.Stat. Ann. § 168–B:17(II) (1994); Va.Code Ann. § 20–160(B)(8). New Hampshire and Virginia place restrictions on who may act as a surrogate and require advance judicial approval of the agreement. See N.H.Rev.Stat. Ann. §§ 168–B:16(I)(b), 168–B:17; Va.Code Ann. §§ 20–159(B), 20–160(B)(6).[6] Last, Arkansas raises a presumption that a child born to a surrogate mother is the child of the intended parents and not the surrogate. Ark.Code Ann. § 9–10–201(b), (c) (Michie 1993).

There are few appellate court opinions on the enforceability of traditional surrogacy agreements. The Kentucky Legislature, as indicated in note 5 above, has provided that a compensated surrogacy agreement is unenforceable (Ky.Rev.Stat.Ann. § 199.590[4]), thus changing the rule that the Supreme Court of Kentucky announced in *Surrogate Parenting Assocs., Inc. v. Commonwealth ex rel. Armstrong*, 704 S.W.2d 209 (Ky.1986). In *In re Marriage of Moschetta*, 25 Cal. App.4th 1218, 30 Cal.Rptr.2d 893 (1994), the court declined to enforce a traditional surrogacy agreement because it was incompatible with California parentage and adoption statutes. *Id.* at 1222, 30 Cal.Rptr.2d 893. The surrogate, who was to be paid $10,000, had agreed that (a) the father could obtain sole custody [508] of any resulting child, (b) she would agree to terminate her parental rights, and (c) she would aid the father's wife in adopting the child. *Id.* at 1223, 30 Cal.Rptr.2d 893. The court sent the case back to the trial court for a determination whether the father should be awarded primary physical custody. *Id.* at 1234, 30 Cal.Rptr.2d 893.

The best known opinion is that of the Supreme Court of New Jersey in *Matter of Baby M.*, 109 N.J. 396, 537 A.2d 1227 (1988), where the court invalidated a compensated surrogacy contract because it conflicted with the law and public policy of the State. *Id.* at 411, 537 A.2d 1227. The *Baby M* surrogacy agreement involved broader concessions from the mother than the agreement before us because it provided that the mother would surrender her parental rights and would allow the father's wife to adopt the child. *Id.* at 412, 537 A.2d 1227. The agreement, therefore, directly conflicted with a statute prohibiting the payment of money to obtain an adoption and a statute barring enforcement of an agreement to adoption made prior to the birth of the child. *Id.* at 422, 537 A.2d 1227. The court acknowledged that an award of custody to the father was in the best interests of the child, but struck down orders terminating the mother's parental rights and authorizing the adoption of the child by the husband's wife. *Id.* at 411, 537 A.2d 1227. The court added that it found no "legal prohibition against surrogacy when the surrogate mother volunteers, without any payment, to act as a surrogate and is given the right to change her mind and to assert

not to accept compensation from the intended parents.

5. This statute in effect overruled *Surrogate Parenting Assocs., Inc. v. Commonwealth ex rel. Armstrong*, 704 S.W.2d 209 (Ky.1986), in which the Supreme Court of Kentucky held that a compensated surrogate parenting procedure did not violate a statute prohibiting the buying and selling of babies. *Id.* at 211.

6. New Hampshire permits the surrogate to opt out of the agreement to surrender custody at any time up to seventy-two hours after birth. N.H.Rev.Stat. Ann. § 168–B:25(IV) (1994). Virginia allows a surrogate who is the child's genetic mother to terminate the agreement within 180 days of the last assisted conception. Va.Code Ann. § 20–161(B) (Michie 1995).

her parental rights." *Id.* at 469, 537 A.2d 1227.

Discussion

[1] 1. *The governing law.* The agreement before us provided that "Rhode Island Law shall govern the interpretation of this agreement." No party has argued that Rhode Island law has any application to the issues before us.[7] We are, in any event, not concerned with "the interpretation of this agreement," but rather with the legal significance, if any, of its provisions. The child was conceived and born in Massachusetts, and the mother is a Massachusetts resident, all as contemplated in the surrogacy arrangement. The significance, if any, of the surrogacy agreement on the relationship of the parties and on the child is appropriately determined by Massachusetts law.

[2] 2. *General Laws c. 46, § 4B.* The case before us concerns traditional surrogacy, in which the fertile member of an infertile couple is one of the child's biological parents. Surrogate fatherhood, the insemination of the fertile wife with sperm of a donor, often an anonymous donor, is a recognized and accepted procedure.[8] If the mother's husband consents to the procedure, the resulting child is considered the legitimate child of the mother and her husband. G.L. c. 46, § 4B.[9] Section 4B does not comment on the rights and obligations, if any, of the biological father, although inferentially he has none. In the case before us, the infertile spouse is the wife. No statute decrees the consequences of the artificial insemination of a surrogate with the sperm of a fertile husband. This situation presents different considerations from surrogate fatherhood because surrogate motherhood is never anonymous and her commitment and contribution is unavoidably much greater than that of a sperm donor.[10]

We must face the possible application of G.L. c. 46, § 4B, to this case. Section 4B tells us that a husband who consents to the artificial insemination of his wife with the sperm of another is considered to be the father of any resulting child. In the case before us, the birth mother was married at the time of her artificial insemination. Despite what he told the psychologist, her husband was not supportive of her desire to become a surrogate parent but acknowledged that it was her decision and her body. The husband, who filed a complaint for divorce on August 8, 1997, may have simply been indifferent because he knew that the marriage was falling apart. The judge found that he was not the biological father of the child. His interest might have been vastly greater if he had been informed that § 4B literally says that any child produced by the artificial insemination of his wife with his consent would be his legitimate child whom he would have a duty to support. It is doubtful, however, that the Legislature intended § 4B to apply to the child of a married surrogate mother. Section 4B seems to concern the status of a child born to a fertile mother whose husband, presumably infertile, consented to her artificial insemination with the sperm of another man so that the couple

7. It appears that Rhode Island does not have statutes similar to those in Massachusetts (G.L. c. 210, §§ 2, 11A) which, as will be seen, provide us guidance.

8. In *Adoption of Galen*, 425 Mass. 201, 680 N.E.2d 70 (1997), and in *Adoption of Tammy*, 416 Mass. 205, 619 N.E.2d 315 (1993), each involving the surrogate fatherhood of a child, we upheld the right of a woman to adopt the child of a woman with whom she had a committed relationship.

9. General Laws c. 46, § 4B, states: "Any child born to a married woman as a result of artificial insemination with the consent of her husband, shall be considered the legitimate child of the mother and such husband."

10. A situation which involves considerations different from those in the case before us arises when the birth mother has had transferred to her uterus an embryo formed through in vitro fertilization of the intended parents' sperm and egg. This latter process in which the birth mother is not genetically related to the child (except coincidentally if an intended parent is a relative) has been called gestational surrogacy. In *Johnson v. Calvert*, 5 Cal.4th 84, 96, 19 Cal.Rptr.2d 494, 851 P.2d 776, cert. denied, 510 U.S. 874, 114 S.Ct. 206, 126 L.Ed.2d 163, and cert. dismissed sub nom. *Baby Boy J. v. Johnson*, 510 U.S. 938, 114 S.Ct. 374, 126 L.Ed.2d 324 (1993), the Supreme Court of California gave effect to a contract that provided that the mother of a child born as a result of a gestational surrogacy would be the egg donor and not the surrogate. *Id.*

could have a child biologically related to the mother.

[2] 3. *Adoption statutes.* Policies underlying our adoption legislation suggest that a surrogate parenting agreement should be given no effect if the mother's agreement was obtained prior to a reasonable time after the child's birth or if her agreement was induced by the payment of money. Adoption legislation is, of course, not applicable to child custody, but it does provide us with some guidance. Although the agreement makes no reference to adoption and does not concern the termination of parental rights or the adoption of the child by the father's wife, the normal expectation in the case of a surrogacy agreement seems to be that the father's wife will adopt the child with the consent of the mother (and the father). Under G.L. c. 210, § 2, adoption requires the written consent of the father and the mother but, in these circumstances, not the mother's husband. Any such consent, written, witnessed, and notarized, is not to be executed "sooner than the fourth calendar day after the date of birth of the child to be adopted." *Id.* That statutory standard should be interpreted as providing that no mother may effectively agree to surrender her child for adoption earlier than the fourth day after its birth, by which time she better knows the strength of her bond with her child. Although a consent to surrender custody has less permanency than a consent to adoption, the legislative judgment that a mother should have time after a child's birth to reflect on her wishes concerning the child weighs heavily in our consideration whether to give effect to a prenatal custody agreement. No private agreement concerning adoption or custody can be conclusive in any event because a [511] judge, passing on custody of a child, must decide what is in the best interests of the child.[11]

Adoptive parents may pay expenses of a birth parent but may make no direct payment to her. See G.L. c. 210, § 11A; 102 Code Mass. Regs. § 5.09 (1997). Even though the agreement seeks to attribute that payment of $10,000, not to custody or adoption, but solely to the mother's services in carrying the child, the father ostensibly was promised more than those services because, as a practical matter, the mother agreed to surrender custody of the child. She could assert custody rights, according to the agreement, only if she repaid the father all amounts that she had received and also reimbursed him for all expenses he had incurred. The statutory prohibition of payment for receiving a child through adoption suggests that, as a matter of policy, a mother's agreement to surrender custody in exchange for money (beyond pregnancy-related expenses) should be given no effect in deciding the custody of the child.

[3] 4. *Conclusion.* The mother's purported consent to custody in the agreement is ineffective because no such consent should be recognized unless given on or after the fourth day following the child's birth. In reaching this conclusion, we apply to consent to custody the same principle which underlies the statutory restriction on when a mother's consent to adoption may be effectively given. Moreover, the payment of money to influence the mother's custody decision makes the agreement as to custody void. Eliminating any financial reward to a surrogate mother is the only way to assure that no economic pressure will cause a woman, who may well be a member of an economically vulnerable class, to act as a surrogate. It is true that a surrogate enters into the agreement before she becomes pregnant and thus is not presented with the desperation that a poor unwed pregnant woman may confront. However, compensated surrogacy arrangements raise the concern that, under financial pressure, a woman will permit her body to be used and her child to be given away.

There is no doubt that compensation was a factor in inducing the mother to enter into the surrogacy agreement and to cede custody to the father. If the payment of $10,000 was really only [512] compensation for the mother's services in carrying the child and giving birth and was unrelated to custody of the child, the

11. In the case of a divorce, a judge may approve an agreement between parents concerning child custody unless the judge makes specific findings that the agreement would not be in the best interests of the child. G.L. c. 208, § 31.

agreement would not have provided that the mother must refund all compensation paid (and expenses paid) if she should challenge the father's right to custody. Nor would the agreement have provided that final payment be made only when the child is delivered to the father. We simply decline, on public policy grounds, to apply to a surrogacy agreement of the type involved here the general principle that an agreement between informed, mature adults should be enforced absent proof of duress, fraud, or undue influence.

We recognize that there is nothing inherently unlawful in an arrangement by which an informed woman agrees to attempt to conceive artificially and give birth to a child whose father would be the husband of an infertile wife. We suspect that many such arrangements are made and carried out without disagreement.

If no compensation is paid beyond pregnancy-related expenses and if the mother is not bound by her consent to the father's custody of the child unless she consents after a suitable period has passed following the child's birth, the objections we have identified in this opinion to the enforceability of a surrogate's consent to custody would be overcome. Other conditions might be important in deciding the enforceability of a surrogacy agreement, such as a requirement that (a) the mother's husband give his informed consent to the agreement in advance; (b) the mother be an adult and have had at least one successful pregnancy; (c) the mother, her husband, and the intended parents have been evaluated for the soundness of their judgment and for their capacity to carry out the agreement; (d) the father's wife be incapable of bearing a child without endangering her health; (e) the intended parents be suitable persons to assume custody of the child; and (f) all parties have the advice of counsel. The mother and father may not, however, make a binding best-interests-of-the-child determination by private agreement. Any custody agreement is subject to a judicial determination of custody based on the best interests of the child.

The conditions that we describe are not likely to be satisfactory to an intended father because, following the birth of the child, the mother can refuse to consent to the father's custody even though the father has incurred substantial pregnancy-related expenses. A surrogacy agreement judicially approved before conception may be a better procedure, as is permitted by [512] statutes in Virginia and New Hampshire. A Massachusetts statute concerning surrogacy agreements, pro or con, would provide guidance to judges, lawyers, infertile couples interested in surrogate parenthood, and prospective surrogate mothers.[12]

We do not reach but comment briefly on the mother's argument that the agreement was unconscionable. She actively sought to become a surrogate and entered into the surrogacy agreement voluntarily, advised by counsel, not under duress, and fully informed. Unconscionability is not apparent on this record.

A declaration shall be entered that the surrogacy agreement is not enforceable. Such further orders as may be appropriate, consistent with this opinion, may be entered in the Probate and Family Court.

So ordered.

12. The National Conference of Commissioners on Uniform State Laws has approved alternative proposals concerning surrogacy agreements. One alternative simply states that "[a]n agreement in which a woman agrees to become a surrogate or to relinquish her rights and duties as parent of a child thereafter conceived through assisted conception is void." Uniform Status of Children of Assisted Conception Act, Alternative B, § 5, 9B U.L.A. 208 (Master ed. Supp.1997). The other alternative provides for judicial approval of an agreement before conception if various conditions are met and allows the payment of compensation. *Id.* at 201–207, Alternative A, §§ 5, 6, 9(a).

[Nos. G022147, G022157. Fourth Dist., Div. Three. Mar. 10, 1998.]

In re the Marriage of JOHN A. and LUANNE H. BUZZANCA.
JOHN A. BUZZANCA, Respondent, v.
LUANNE H. BUZZANCA, Appellant.

SUMMARY

A married couple agreed to have an embryo that was genetically unrelated to either of them implanted in a woman—a surrogate—who would carry and give birth to the child for them. After the fertilization, implantation, and pregnancy, the husband filed a petition for dissolution of marriage, asserting that there were no children of the marriage, and the wife filed her response, asserting that the parties were expecting a child by way of surrogate contract. The child was born six days later. The trial court entered a judgment declaring that the parties were not the lawful parents of the child. (Superior Court of Orange County, No. 95D002992, Robert D. Monarch, Judge.)

The Court of Appeal reversed the judgment and directed the trial court to enter a new judgment declaring that both parties were the lawful parents of the child. The court held that the parties were the lawful parents of the child. Even though neither party was biologically related to the child, they were still her lawful parents given their initiating role as the intended parents in her conception and birth. The same statute that makes a husband the lawful father of a child born because of his consent to artificial insemination (Fam. Code, § 7613) applied to both intended parents in this case. Just as a husband is deemed to be the lawful father of a child unrelated to him when his wife gives birth after artificial insemination, so should a husband and wife be deemed the lawful parents of a child after a surrogate bears a biologically unrelated child on their behalf. (Opinion by Sills, P. J., with Wallin and Crosby, JJ., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Parent and Child § 13—Parentage of Children—Surrogacy Contract—Procreation Initiated and Consented to by Intended Parents

Biologically Unrelated to Child—Application of Artificial Insemination Statute.—In a marital dissolution action involving a couple who had agreed to have an embryo that was genetically unrelated to either of them implanted in a woman—a surrogate—who would carry and give birth to the child for them, the trial court erred in declaring that the parties were not the lawful parents of the child, who was born six days after the dissolution proceedings began. Even though neither party was biologically related to the child, they were still her lawful parents given their initiating role as the intended parents in her conception and birth. The same statute that makes a husband the lawful father of a child born because of his consent to artificial insemination (Fam. Code, § 7613) applied to both intended parents in this case. Just as a husband is deemed the lawful father of a child unrelated to him when his wife gives birth after artificial insemination, so should a husband and wife be deemed the lawful parents of a child after a surrogate bears a biologically unrelated child on their behalf. In each instance, a child is procreated because a medical procedure was initiated and consented to by intended parents. The Legislature has declared its preference for assigning individual responsibility for the care and maintenance of children, not leaving the task to the taxpayers.

[See 10 Witkin, Summary of Cal. Law (9th ed. 1989) Parent and Child, § 448F.]

COUNSEL

Van Deusen, Youmans & Walmsley and Robert R. Walmsley for Appellant.

Taylor Flynn and Mark Rosenbaum as Amici Curiae on behalf of Appellant and Minor.

Schwamb & Stabile, Thomas P. Stabile and Mark A. Hewitt for Respondent.

Jeffrey W. Doeringer, under appointment by the Court of Appeal, for Minor.

Daniel E. Lungren, Attorney General, Roderick E. Walston, Chief Assistant Attorney General, Carol Ann White and Mary A. Roth, Deputy Attorneys General, and Leslie Ellen Shear as Amici Curiae on behalf of Minor.

OPINION

SILLS, P. J.—

INTRODUCTION

Jaycee was born because Luanne and John Buzzanca agreed to have an embryo genetically unrelated to either of them implanted in a woman—a surrogate—who would carry and give birth to the child for them. After the fertilization, implantation and pregnancy, Luanne and John split up, and the question of who are Jaycee's lawful parents came before the trial court.

Luanne claimed that she and her erstwhile husband were the lawful parents, but John disclaimed any responsibility, financial or otherwise. The woman who gave birth also appeared in the case to make it clear that she made no claim to the child.

The trial court then reached an extraordinary conclusion: Jaycee had *no* lawful parents. First, the woman who gave birth to Jaycee was not the mother; the court had—astonishingly—already accepted a stipulation that neither she nor her husband were the "biological" parents. Second, Luanne was not the mother. According to the trial court, she could not be the mother because she had neither contributed the egg nor given birth. And John could not be the father, because, not having contributed the sperm, he had no biological relationship with the child.

We disagree. Let us get right to the point: Jaycee never would have been born had not Luanne and John both agreed to have a fertilized egg implanted in a surrogate.

The trial judge erred because he assumed that legal motherhood, under the relevant California statutes, could *only* be established in one of two ways, either by giving birth or by contributing an egg. He failed to consider the substantial and well-settled body of law holding that there are times when *fatherhood* can be established by conduct apart from giving birth or being genetically related to a child. The typical example is when an infertile husband consents to allowing his wife to be artificially inseminated. As our Supreme Court noted in such a situation over 30 years ago, the husband is the "lawful father" because he *consented* to the procreation of the child. (See *People* v. *Sorensen* (1968) 68 Cal.2d 280, 284-286 [66 Cal.Rptr. 7, 437 P.2d 495, 25 A.L.R.3d 1093].)

The same rule which makes a husband the lawful father of a child born because of his consent to artificial insemination should be applied here—by

the same parity of reasoning that guided our Supreme Court in the first surrogacy case, *Johnson* v. *Calvert* (1993) 5 Cal.4th 84 [19 Cal.Rptr.2d 494, 851 P.2d 776]—to both husband and wife. Just as a husband is deemed to be the lawful father of a child unrelated to him when his wife gives birth after artificial insemination, so should a husband *and* wife be deemed the lawful parents of a child after a surrogate bears a biologically unrelated child on their behalf. In each instance, a child is procreated because a medical procedure was initiated and consented to by intended parents. The only difference is that in this case—unlike artificial insemination—there is no reason to distinguish between husband and wife. We therefore must reverse the trial court's judgment and direct that a new judgment be entered, declaring that both Luanne and John are the lawful parents of Jaycee.[1]

CASE HISTORY

John filed his petition for dissolution of marriage on March 30, 1995, alleging there were no children of the marriage. Luanne filed her response on April 20, alleging that the parties were expecting a child by way of surrogate contract. Jaycee was born six days later. In September 1996 Luanne filed a separate petition to establish herself as Jaycee's mother. Her action was consolidated into the dissolution case. In February 1997, the court accepted a stipulation that the woman who agreed to carry the child, and her husband, were not the "biological parents" of the child.[2] At a hearing held in March, based entirely on oral argument and offers of proof, the trial court determined that Luanne was not the lawful mother of the child and therefore John could not be the lawful father or owe any support.

The trial judge said: "So I think what evidence there is, is stipulated to. And I don't think there would be any more. One, there's no genetic tie between Luanne and the child. Two, she is not the gestational mother. Three,

[1]Technically, artificial insemination is classed as one of two kinds, (1) with or (2) without using the husband's semen, known respectively as homologous artificial insemination and heterologous artificial insemination. (See *People* v. *Sorensen, supra*, 68 Cal.2d at p. 284, fn. 2.) When we refer to artificial insemination in this opinion we are only referring to the heterologous variety.

[2]John's attorney was present at the hearing when the court accepted the stipulation that the surrogate was not the "biological" parent of Jaycee. He made no objection. Yet in the respondent's brief on appeal and in oral argument, he has argued that the surrogate is the lawful mother of Jaycee by virtue of the biological connection of having given birth.

One reaction to this inconsistency might be to hold, simply, that John is barred from arguing the point that the surrogate is the lawful mother because he did not object to the surrogate being let off the hook when he had the chance at the trial level. We reject that course of analysis because in this case of first impression it would be an intellectual cheat. Particularly in matters regarding children and parental responsibilities, courts must be wary of allowing lawyers from trying to cleverly (or inadvertently) maneuver a case into a posture where the court's decision does not reflect the underlying legal reality.

she has not adopted the child. That, folks, to me, respectfully, is clear and convincing evidence that she's not the legal mother."

After another hearing on May 7, regarding attorney fees, a judgment on reserved issues in the dissolution was filed, terminating John's obligation to pay child support, declaring that Luanne was not the legal mother of Jaycee, and declining "to apply any estoppel proposition to the issue of John's responsibility for child support." Luanne then filed a petition for a writ of supersedeas to stay the judgment; she also filed an appeal from it. This court then granted a stay which had the effect of keeping the support order alive for Jaycee. We also consolidated the writ proceeding with the appeal.

In his respondent's brief in this appeal, John tries to intimate—though he stops short of actually saying it—that Jaycee was not born as a result of a surrogacy agreement with his ex-wife. He points to the fact that the actual written surrogacy agreement was signed on August 25, 1994, but the implantation took place a little less than two weeks before, on August 13, 1994. The brief states: "At the time that the implantation took place, no surrogacy contract had been executed by the parties to this action."

Concerned with the implication made in John's respondent's brief, members of this court questioned John's attorney at oral argument about it. It turned out that the intimation in John's brief was a red herring, based merely on the fact that John did not sign a *written* contract until after implantation. Jaycee was nonetheless born as a result of a surrogacy agreement on the part of both Luanne *and* John; it was just that the agreement was an *oral* one prior to implantation. The written surrogacy agreement, John's attorney acknowledged in open court, was the written memorialization of that oral contract.

Members of this panel also pressed John's attorney to state whatever factually based defenses John might have offered if the case had actually been tried. John's attorney had not specifically stated such defenses at the hearing in March 1996; he had only vaguely indicated that "the facts as testified to would be somewhat different than" those which the trial court had "assumed."

Again, there was less than was intimated. John's signature on the written surrogacy agreement was not forged, or anything of the sort. His one trump card, finessed out only after repeated questioning and the importuning of one of our panel to articulate his "best facts," was this: John would offer testimony to the effect that Luanne told him that she would assume all responsibility for the care of any child born. Luanne alone would assume "the burdens of childrearing."

Therefore, even though there was no actual trial in front of the trial court on the matter, this appellate court will assume arguendo that if there had been a trial the judge would have believed John's evidence on the point and concluded that Luanne had indeed promised not to hold John responsible for the child contemplated by their oral surrogacy agreement.

DISCUSSION

The Statute Governing Artificial Insemination Which Makes a Husband the Lawful Father of a Child Unrelated to Him Applies to Both Intended Parents in This Case

(1) Perhaps recognizing the inherent lack of appeal for any result which makes Jaycee a legal orphan, John now contends that the surrogate is Jaycee's legal mother; and further, by virtue of that fact, the surrogate's husband is the legal father. His reasoning goes like this: Under the Uniform Parentage Act (the Act), and particularly as set forth in section 7610 of Family Code, there are only two ways by which a woman can establish legal motherhood, i.e., giving birth or contributing genetically.[3] Because the genetic contributors are not known to the court, the only candidate left is the surrogate who must therefore be deemed the lawful mother. And, as John's counsel commented at oral argument, if the surrogate and her husband cannot support Jaycee, the burden should fall on the taxpayers.

The law doesn't say what John says it says. It doesn't say: "The legal relationship between mother and child shall be established only by either proof of her giving birth or by genetics." The statute says "may," not "shall," and "under this part," *not* "by genetics." Here is the complete text of Family Code section 7610: "The parent and child relationship may be established as follows: [¶] (a) Between a child and the natural mother, it may be established by proof of her having given birth to the child, or under this part. [¶] (b) Between a child and the natural father, it may be established under this part. [¶] (c) Between a child and an adoptive parent, it may be established by proof of adoption."

The statute thus contains no direct reference to genetics (i.e., blood tests) at all. The *Johnson* decision teaches us that genetics is simply *subsumed* in the words "under this part." In that case, the court held that genetic consanguinity was equally "acceptable" as "proof of maternity" as evidence of giving birth. (*Johnson* v. *Calvert, supra*, 5 Cal.4th at p. 93.)

It is important to realize, however, that in construing the words "under this part" to include genetic testing, the high court in *Johnson* relied on several

[3]The Act can be found in 9B West's Uniform Laws Annotated (1987) Uniform Parentage Act (1973 act) page 287.

statutes in the Evidence Code (Evid. Code, former §§ 892, 895, & 895.5) all of which, by their terms, only applied to *paternity*. (See *Johnson* v. *Calvert, supra*, 5 Cal.4th at pp. 90-92.)[4] It was only by a "parity of reasoning" that our high court concluded those statutes which, on their face applied only to men, were also "dispositive of the question of maternity." (5 Cal.4th at p. 92.)

The point bears reiterating: It was only by a parity of reasoning from statutes which, on their face, referred only to *paternity* that the court in *Johnson* v. *Calvert* reached the result it did on the question of *maternity*. Had the *Johnson* court reasoned as John now urges us to reason—by narrowly confining the means under the Act by which a woman could establish that she was the lawful mother of a child to texts which on their face applied only to motherhood (as distinct from fatherhood)—the court would have reached the opposite result.[5]

[4]All three of the statutes were designed for proceedings involving disputed paternity. None mentioned maternity. Here is the relevant portion of each statute as it read in 1993 when *Johnson* was decided, all emphasis ours:

Evidence Code former section 892: "In a civil action *in which paternity is a relevant fact*, the court may . . . order the mother, child and alleged father to submit to blood tests. If any party refuses to submit to such tests, the court may resolve *the question of paternity* against such party . . . . Any party's refusal . . . shall be admissible in evidence in any proceeding *to determine paternity*." (Italics added.)

Evidence Code former section 895: "If the court finds that the conclusions of all the experts . . . are that the alleged father is not the father of the child, *the question of paternity* shall be resolved accordingly. If the experts disagree . . . or if the tests show the probability of *the alleged father's paternity*, the question . . . shall be submitted upon all the evidence, including evidence based upon the tests." (Italics added.)

Evidence Code former section 895.5: "(a) There is a rebuttable presumption, affecting the burden of proof, *of paternity*, if the court finds that the paternity index . . . is 100 or greater." (Italics added.)

With the introduction of the Family Code, Evidence Code former sections 892, 895, and 895.5 have become, respectively, Family Code sections 7551, 7554, and 7555. There is no material change in the language; the statutes still refer only to paternity.

[5]In *In re Marriage of Moschetta* (1994) 25 Cal.App.4th 1218, 1224-1226 [30 Cal.Rptr.2d 893], the court refused to apply certain *presumptions* regarding paternity found in the Act to overcome the claim of a woman who was both the genetic and birth mother. Relying on *In re Zacharia D.* (1993) 6 Cal.4th 435 [24 Cal.Rptr.2d 751, 862 P.2d 751], we observed that there may be times when the Act cannot be applied in a gender interchangeable manner. (See *In re Moschetta, supra,* 25 Cal.App.4th at p. 1225, fn. 8.)

It made sense in *Moschetta* not to apply the paternity statutes cited by the father to the biologically unrelated intended mother because those statutes merely embody presumptions. The statutes were: (1) the presumption that a child of a wife cohabiting with her husband at the time of birth is conclusively presumed to be a child of the marriage unless the husband is impotent or sterile (see Fam. Code, § 7540), and (2) the presumption that a man is the natural father if he receives the child into his home and openly holds out the child as his own (Fam. Code, § 7611, subd. (d)). We rejected application of these presumptions because, even assuming they could be applied to a woman, they were only presumptions and, just like a paternity case, could be overcome by blood tests showing an actual genetic relationship. (*In re*

In addition to blood tests there are several other ways the Act allows paternity to be established. Those ways are not necessarily related at all to any biological tie. Thus, under the Act, paternity may be established by:

—marrying, remaining married to, or attempting to marry the child's mother when she gives birth (see Fam. Code, § 7611, subds. (a) & (b));

—marrying the child's mother after the child's birth and either consenting to being named as the father on the birth certificate (Fam. Code, § 7611, subd. (c)(1)) or making a written promise to support the child (see Fam. Code, § 7611, subd. (c)(2)).

A man may also be deemed a father under the Act in the case of artificial insemination of his wife, as provided by section 7613 of the Family Code.[6] To track the words of the statute: "If, under the supervision of a licensed physician and surgeon and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived."[7]

As noted in *Johnson*, "courts must construe statutes in factual settings not contemplated by the enacting legislature." (*Johnson* v. *Calvert*, *supra*, 5

Marriage of Moschetta, *supra*, 25 Cal.App.4th at pp. 1225-1226.) Most fundamentally, as we pointed out on page 1226 of the opinion, the presumptions were inapposite because they arose out of the "old law of illegitimacy" and were designed as evidentiary devices to make a determination of a child's biological father.

Moschetta thus cannot be read for the proposition that statutes which are part of the Act and refer to an individual of one sex can never be applied to an individual of another. For one reason, *Moschetta* never said that. For another, such a broad proposition would contradict the rationale used by a higher court in *Johnson*.

[6]Family Code section 7613 is California's enactment of the artificial insemination provision of section 5 of the Act

[7]The entire statute reads as follows: "If, under the supervision of a licensed physician and surgeon and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband's consent must be in writing and signed by him and his wife. The physician and surgeon shall certify their signatures and the date of the insemination, and retain the husband's consent as part of the medical record, where it shall be kept confidential and in a sealed file. However, the physician and surgeon's failure to do so does not affect the father and child relationship. All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising physician and surgeon or elsewhere, are subject to inspection only upon an order of the court for good cause shown. [¶] (b) The donor of semen provided to a licensed physician and surgeon for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived." (Fam. Code, § 7613.)

Family Code section 7613 varies from the promulgated version in that it omits the word "married" in subdivision (b) in front of the word "woman," a textual indication that the California Legislature contemplated use of artificial insemination by single women.

Cal.4th at p. 89.) So it is, of course, true that application of the artificial insemination statute to a gestational surrogacy case where the genetic donors are unknown to the court may not have been contemplated by the Legislature. Even so, the two kinds of artificial reproduction are *exactly* analogous in this crucial respect: Both contemplate the procreation of a child by the consent to a medical procedure of someone who intends to raise the child but who otherwise does not have any biological tie.

If a husband who consents to artificial insemination under Family Code section 7613 is "treated in law" as the father of the child by virtue of his consent, there is no reason the result should be any different in the case of a married couple who consent to in vitro fertilization by unknown donors and subsequent implantation into a woman who is, as a surrogate, willing to carry the embryo to term for them. The statute is, after all, the clearest expression of past legislative intent when the Legislature did contemplate a situation where a person who caused a child to come into being had no biological relationship to the child.

Indeed, the establishment of fatherhood and the consequent duty to support when a husband consents to the artificial insemination of his wife is one of the well-established rules in family law.[8] The leading case in the country (so described by a New York family court in *In re Adoption of Anonymous* (1973) 74 Misc.2d 99 [345 N.Y.S.2d 430, 433]) is *People* v. *Sorensen, supra*, 68 Cal.2d 280, in which our Supreme Court held that a man could even be *criminally* liable for failing to pay for the support of a child born to his wife during the marriage as a result of artificial insemination using sperm from an anonymous donor.

In *Sorensen*, the high court emphasized the role of the husband in *causing* the birth, even though he had no biological connection to the child: "[A] reasonable man who . . . actively participates and consents to his wife's artificial insemination in the hope that a child will be produced whom they will treat as their own, *knows that such behavior carries with it the legal responsibilities of fatherhood and criminal responsibility for nonsupport.*" (68 Cal.2d at p. 285, italics added.) The court went on to say that the husband was "directly responsible" for the "existence" of the child and repeated the point that "without defendant's active participation and consent the child would not have been procreated." (*Ibid.*)

Sorensen expresses a rule universally in tune with other jurisdictions. "Almost exclusively, courts which have addressed this issue have assigned

[8]The cases have been collected in the Annotation, Rights and Obligations Resulting From Human Artificial Insemination (1991) 83 A.L.R.4th 295.

parental responsibility to the husband based on conduct evidencing his consent to the artificial insemination." (*In re Baby Doe* (1987) 291 S.C. 389 [353 S.E.2d 877, 878]; accord, *Gursky* v. *Gursky* (1963) 39 Misc.2d 1083 [242 N.Y.S.2d 406, 411-412] [even though child was not technically "legitimate" under New York law at the time, husband's conduct in consenting to the artificial insemination properly invoked application of the doctrine of equitable estoppel requiring him to support the child]; *Anonymous* v. *Anonymous* (1964) 41 Misc.2d 886 [246 N.Y.S.2d 835, 836-837] [following *Gursky*]; *K.S.* v. *G.S.* (1981) 182 N.J. Super. 102 [440 A.2d 64, 68] [because husband did not offer clear and convincing evidence that he had *withdrawn* his consent to artificial insemination procedure, he was bound by initial consent given earlier and accordingly held to be lawful father of the child]; *In re Marriage of Adams* (1988) 174 Ill.App.3d 595 [124 Ill.Dec. 184, 528 N.E.2d 1075, 1087] [affirming child support award where trial court had determined there was "actual consent" to artificial insemination];[9] *K.B.* v. *N.B.* (Tex.Ct.App. 1991) 811 S.W.2d 634, 639] [even though husband did not consent in writing to insemination procedure, his full knowledge of the facts and willing participation in the artificial insemination, involvement in child birth classes, speaking of the child as "our baby" and passage of time before repudiation established that he ratified procedure and was therefore liable for child support]; *Levin* v. *Levin* (Ind. 1994) 645 N.E.2d 601, 605 [consent of husband to wife's artificial insemination meant obligation to support because child was a "child of the marriage," the same as if the child had been adopted during the marriage].)

One New York family court even went so far as to hold the lesbian partner of a woman who was artificially inseminated responsible for the support of two children where the partner had dressed as a man and the couple had obtained a marriage license and a wedding ceremony had been performed prior to the inseminations. (*Karin T.* v. *Michael T.* (1985) 127 Misc.2d 14 [484 N.Y.S.2d 780].)[10] Echoing the themes of causation and estoppel which underlie the cases, the court noted that the lesbian partner had "by her course of conduct in this case . . . brought into the world two innocent children" and should not "be allowed to benefit" from her acts to the detriment of the children and public generally. (484 N.Y.S.2d at p. 784.)[11]

Indeed, in the one case we are aware of where the court did not hold that the husband had a support obligation, the reason was *not* the absence of a

[9]*Adams* was later reversed on the procedural ground that Florida law, not Illinois law, governed the dispute and the case was remanded to the trial court for further proceedings in light of that. (See *In re Marriage of Adams* (1990) 133 Ill.2d 437 [141 Ill.Dec. 448, 551 N.E.2d 635].)

[10]Michael T.'s name was originally Marlene. (*Karin T. v. Michael T.*, *supra*, 484 N.Y.S.2d at p. 781.)

[11]In *Karin T.* v. *Michael T.*, the court held in a case involving child support that the lesbian partner was "indeed a 'parent' to whom such responsibility attaches." (484 N.Y.S.2d at p.

biological relationship as such, but because of actual lack of consent to the insemination procedure. (See *In re Marriage of Witbeck-Wildhagen* (1996) 281 Ill.App.3d 502 [217 Ill.Dec. 329, 667 N.E.2d 122, 125-126] [it would be "unjust" to impose support obligation on husband who never consented to the artificial insemination].)

It must also be noted that in applying the artificial insemination statute to a case where a party has caused a child to be brought into the world, the statutory policy is really echoing a more fundamental idea—a sort of *grundnorm* to borrow Hans Kelsen's famous jurisprudential word—already established in the case law. That idea is often summed up in the legal term "estoppel." Estoppel is an ungainly word from the Middle French (from the word meaning "bung" or "stopper") expressing the law's distaste for inconsistent actions and positions—like consenting to an act which brings a child into existence and then turning around and disclaiming any responsibility.

While the *Johnson* v. *Calvert* court was able to predicate its decision on the Act rather than making up the result out of whole cloth, it is also true that California courts, prior to the enactment of the Act, had based certain decisions establishing paternity merely on the common law doctrine of estoppel. We have already discussed one of those decisions, *People* v. *Sorensen*, in detail. There an ex-husband was held, in light of his role in causing the birth of the child, to be estopped from disclaiming responsibility. Common law estoppel was also the basis for establishing paternity and its concomitant responsibility as far back as the 1961 decision of *Clevenger* v. *Clevenger* (1961) 189 Cal.App.2d 658, 662 [11 Cal.Rptr. 707, 90 A.L.R.2d 569] (husband who took illegitimate child into his home and held child out

784.) By contrast, *Nancy S.* v. *Michele G.* (1991) 228 Cal.App.3d 831 [279 Cal.Rptr. 212] held that the lesbian partner of a woman who gave birth to two children through artificial insemination was not a parent *for purposes of custody and visitation*, even though the partner alleged that she "helped facilitate the conception and birth of both children." (*Id.* at p. 836.) The parties presented no issue of support obligation in *Nancy S.*, so while the court acknowledged the doctrine of estoppel in *that* context, it declined to extend the estoppel doctrine "for the purpose of awarding custody and visitation to a nonparent." (*Id.* at p. 839.)

Likewise, in *West* v. *Superior Court* (1997) 59 Cal.App.4th 302 [69 Cal.Rptr.2d 160], the court held that a former lesbian partner did not even have standing to obtain visitation rights. As in *Nancy S.* there was no issue of child support based on the partner's role in the conception and birth.

In the present case we are dealing with a man and woman who were married at the time of conception and signing of the surrogacy agreement, and we are reasoning from a statute, Family Code section 7613, which contemplates parenthood on the part of a married man without biological connection to the child borne by his wife. Whether section 7613 might be applied by a parity of reasoning, as we do today to a married couple, to a *non*married couple is not before us and we will not speculate as to the answer. It is enough to say that because the *Nancy S.* and *West* cases did not involve the issue of support and did involve *non*married couples at the time of the artificial insemination, they are distinguishable.

as his own "estopped" to assert illegitimacy and "avoid liability for its support").

There is no need in the present case to predicate our decision on common law estoppel alone, though the doctrine certainly applies. The estoppel concept, after all, is *already* inherent in the artificial insemination statute. In essence, Family Code section 7613 is nothing more than the codification of the common law rule articulated in *Sorensen*: By consenting to a medical procedure which results in the birth of a child—which the *Sorensen* court has held establishes parenthood by common law estoppel—a husband incurs the legal status and responsibility of fatherhood. (See *People* v. *Sorensen, supra*, 68 Cal.2d at p. 285.)

John argues that the artificial insemination statute should not be applied because, after all, his wife did not give birth. But for purposes of the statute with its core idea of estoppel, the fact that Luanne did not give birth is irrelevant. The statute contemplates the establishment of lawful fatherhood in a situation where an intended father has no biological relationship to a child who is procreated as a result of the father's (as well as the mother's) *consent* to a medical procedure.

Luanne is the Lawful Mother of Jaycee, Not the Surrogate, and Not the Unknown Donor of the Egg

In the present case Luanne is situated like a husband in an artificial insemination case whose consent triggers a medical procedure which results in a pregnancy and eventual birth of a child. Her motherhood may therefore be established "under this part," by virtue of that consent. In light of our conclusion, John's argument that the surrogate should be declared the lawful mother disintegrates. The case is now postured like the *Johnson* v. *Calvert* case, where motherhood could have been "established" in either of two women under the Act, and the tie broken by noting the intent to parent as expressed in the surrogacy contract. (See *Johnson* v. *Calvert, supra*, 5 Cal.4th at p. 93.) The only difference is that this case is not even close as between Luanne and the surrogate. Not only was Luanne the clearly intended mother, no bona fide attempt has been made to establish the surrogate as the lawful mother.[12]

We should also add that neither could the woman whose egg was used in the fertilization or implantation make any claim to motherhood, even if she

[12]As noted in footnote 2, *ante*, John's attorney did nothing to object when the trial court accepted a stipulation taking the surrogate and her husband out of this case. Accordingly, nothing in this opinion is intended to address the question of who might be responsible for a child when *only* the surrogate mother is available.

were to come forward at this late date. Again, as between two women who would both be able to establish motherhood under the Act, the *Johnson* decision would mandate that the tie be broken in favor of the intended parent, in this case, Luanne.

Our decision in *In re Marriage of Moschetta, supra,* 25 Cal.App.4th 1218, relied on by John, is inapposite and distinguishable. In *Moschetta*, this court held that a contract giving rise to a "traditional" surrogacy arrangement where a surrogate was simply inseminated with the husband's sperm could not be *enforced* against the surrogate by the intended father. (*Id.* at p. 1231.) In order for the surrogate not to be the lawful mother she would have to give the child up for adoption. (See *id.* at pp. 1231, 1233.) In *Moschetta*, the surrogate was the mother both by birth and genes; the woman contemplated as the intended mother in the surrogacy contract gave up any claim to the child. (*Id.* at pp. 1223-1225.) In fact, at the appellate level, she went so far as to file a brief in favor of the birth mother's claim. (See *id.* at p. 1224.)

Moschetta is inapposite because this court never had occasion to consider or discuss whether the original intended mother's participation in the surrogacy arrangement, which brought about the child's birth, might have formed the basis for holding her responsible as a parent. She had given up her claim; the issue was not before the court. Unlike the *Johnson* case there was no tie to break between two women both of whom could be held to be mothers under the Act. (See 25 Cal.App.4th at p. 1224. ["There is no 'tie' to break."].) When courts do not consider propositions, their subsequent decisions are not precedent for them. (E.g., *American Federation of Labor* v. *Unemployment Ins. Appeals Bd.* (1996) 13 Cal.4th 1017, 1039 [56 Cal.Rptr.2d 109, 920 P.2d 1314]; *Roberts* v. *City of Palmdale* (1993) 5 Cal.4th 363, 372 [20 Cal.Rptr.2d 330, 853 P.2d 496].)

Moschetta is distinguishable because it involved the claim of a woman who both gave birth to the child, "contributed" the egg, and who wanted the child enough to go to court to seek custody. (See *In re Marriage of Moschetta, supra*, 25 Cal.App.4th at p. 1223.) The only alternative was a woman who did not give birth, did not contribute genes, and who gave up her claim. (*Id.* at pp. 1224-1225.) Only if the surrogacy contract were *specifically enforced* in *Moschetta* could this court have ruled in favor of the father's claim to *exclusive* parenthood.

There is a difference between a court's *enforcing* a surrogacy agreement and making a legal determination based on the intent *expressed in* a surrogacy agreement. (See 25 Cal.App.4th at pp. 1230, 1235, fn. 23.) By the same token, there is also an important distinction between enforcing a surrogacy

contract and making a legal determination based on the fact that the contract itself *sets in motion* a medical procedure which results in the birth of a child.

In the case before us, we are not concerned, as John would have us believe, with a question of the enforceability of the oral and written surrogacy contracts into which he entered with Luanne. This case is not about "transferring" parenthood pursuant to those agreements. We are, rather, concerned with the consequences of those agreements as *acts* which *caused the birth* of a child.

The legal paradigm adopted by the trial court, and now urged upon us by John, is one where all forms of artificial reproduction in which intended parents have no biological relationship with the child result in legal parentlessness. It means that, absent adoption, such children will be dependents of the state. One might describe this paradigm as the "adoption default" model: The idea is that by not specifically addressing some permutation of artificial reproduction, the Legislature has, in effect, set the default switch on adoption. The underlying theory seems to be that when intended parents resort to artificial reproduction without biological tie the Legislature wanted them to be *screened* first through the adoption system. (Thus John, in his brief, argues that a surrogacy contract must be "subject to state oversight.")

The "adoption default" model is, however, inconsistent with both statutory law and the Supreme Court's *Johnson* decision. As to the statutory law, the Legislature has already made it perfectly 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 then goes on to elaborate why establishing paternity is a good thing: It means someone besides the taxpayers will be responsible for the child: "Establishing paternity is the first step toward a child support award, which, in turn, provides children with equal rights and access to benefits . . . ." (*Ibid.*) In light of this strong public policy, the statutes which follow section 7570, subdivision (a) seek to provide a "simple system allowing for the establishment of voluntary paternity." (Fam. Code, § 7570, subd. (b).)

Family Code Section 7570 necessarily expresses a legislative policy applicable to maternity as well. It would be lunatic for the Legislature to declare that establishing paternity is a compelling state interest yet conclude that establishing maternity is not. The obvious reason the Legislature did not include an explicit parallel statement on "maternity" is that the issue almost never arises except for extraordinary cases involving artificial reproduction.

Very plainly, the Legislature has declared its preference for assigning *individual* responsibility for the care and maintenance of children; not leaving the task to the taxpayers. That is why it has gone to considerable lengths to ensure that parents will live up to their support obligations. (Cf. *Moss* v. *Superior Court* (1998) 17 Cal.4th 396, 424 [71 Cal.Rptr.2d 215, 950 P.2d 59] [noting legislative priority put on child support obligations].) The adoption default theory flies in the face of that legislative value judgment.

As this court noted in *Jaycee B.* v. *Superior Court* (1996) 42 Cal.App.4th 718, 731 [49 Cal.Rptr.2d 694], the *Johnson* court had occasion, albeit in dicta, to address "pretty much the exact situation before us." The language bears quoting again: "In what we must hope will be the extremely rare situation in which neither the gestator nor the woman who provided the ovum for fertilization is willing to assume custody of the child after birth, a rule recognizing the intending parents as the child's legal, natural parents should best promote certainty and stability . . . ." (*Johnson* v. *Calvert, supra*, 5 Cal.4th at pp. 94-95.) This language quite literally describes precisely the case before us now: neither the woman whose ovum was used nor the woman who gave birth have come forward to assume custody of the child after birth.

John now argues that the Supreme Court's statement should be applied only in situations, such as that in the *Johnson* case, where the intended parents have a genetic tie to the child. The context of the *Johnson* language, however, reveals a broader purpose, namely, to emphasize the intelligence and utility of a rule that looks to intentions.

The statement, quoted above, is at the bottom of 5 Cal.4th at page 94 and top of page 95 of the opinion. Contextually, however, it is part of the development of a series of ideas which begin on page 93. The *Johnson* court had just enunciated its conclusion that in cases of "genetic consanguinity" and "giving birth" the intended mother is to be held the lawful mother.[13] The court then found "support" for its conclusions in the writings of several legal commentators (*id.* at p. 93), the first of whom, Professor Hill, had made the point that the intended parents are the " 'first cause, or prime movers, of the procreative relationship.' " (*Id.* at p. 94, quoting Hill, *What Does It Mean to Be a "Parent"? The Claims of Biology as the Basis for Parental Rights* (1991) 66 N.Y.U. L. Rev. 353, 415.) The court then quoted two more law review

[13]This rule, incidentally, has the salutary effect of working both ways. Thus if an intended mother who could carry a baby to term but had no suitable eggs was implanted with an embryo in which the egg was from a donor who did not intend to parent the child, the law would still reflect the intentions of the parties rather than some arbitrary or imposed preference.

articles, both of which emphasized the same theme as Professor Hill.[14] This laid the foundation for the court's next point, which was that people who " 'choose' " to bring a child into being are likely to have the child's best interest at heart,[15] which the court immediately juxtaposed against the surrogate's position which would result in a woman becoming the legal mother *against* her expectations. (*Johnson* v. *Calvert, supra,* 5 Cal.4th at p. 94.) Then came the sentence which we have already quoted addressing the "extremely rare situation" where—as is precisely the case before us now—neither the woman who has given birth nor the woman who provided the ovum were "willing to assume custody of the child after birth"—and therefore recognizing intentions as the best rule to promote certainty and stability for the child. (*Id.* at pp. 94-95.)

In context, then, the high court's considered dicta is directly applicable to the case at hand. The context was not limited to just *Johnson*-style contests between women who gave birth and women who contributed ova, but to any situation where a child would not have been born " 'but for the efforts of the intended parents.' " (5 Cal.4th at p. 94, quoting Hill, *op. cit., supra,* 66 N.Y.U. L.Rev. at p. 415.)

Finally, in addition to its contravention of statutorily enunciated public policy and the pronouncement of our high court in *Johnson,* the adoption default model ignores the role of our dependency statutes in protecting children. Parents are not screened for the procreation of their *own* children; they are screened for the adoption of *other* people's children. It is the role of the dependency laws to protect children from neglect and abuse from their own parents. The adoption default model is essentially an exercise in circular reasoning, because it assumes the idea that it seeks to prove; namely, that a child who is born as the result of artificial reproduction is somebody else's child from the beginning.

In the case before us, there is absolutely no dispute that Luanne caused Jaycee's conception and birth by initiating the surrogacy arrangement whereby an embryo was implanted into a woman who agreed to carry the

[14]The *Johnson* court quoted Professor Schulz to the effect that " 'intentions that are voluntarily chosen, deliberate, express and bargained-for ought presumptively to determine legal parenthood' " (*Johnson* v. *Calvert, supra,* 5 Cal.4th at p. 94, quoting Schultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality* (1990) Wis. L.Rev. 297, 323) and a Yale Law Journal Note that the " '[m]ental concept of the child *is a controlling factor of its creation*' " (*Johnson* v. *Calvert, supra,* 5 Cal.4th at p. 94, quoting Note, *Redefining Mother: A Legal Matrix for New Reproductive Technologies* (1986) 96 Yale L.J. 187, 196 (italics added).)

[15]See *Johnson* v. *Calvert, supra,* 5 Cal.4th at page 94, quoting Schulz, *op. cit. supra,* Wis. L.Rev. at page 397.

baby to term on Luanne's behalf. In applying the artificial insemination statute to a gestational surrogacy case where the genetic donors are unknown, there is, as we have indicated above, no reason to distinguish *between* husbands and wives. Both are equally situated from the point of view of consenting to an act which brings a child into being.[16] Accordingly, Luanne should have been declared the lawful mother of Jaycee.

John Is the Lawful Father of Jaycee Even If Luanne Did Promise to Assume All Responsibility for Jaycee's Care

The same reasons which impel us to conclude that Luanne is Jaycee's lawful mother also require that John be declared Jaycee's lawful father. Even if the written surrogacy contract had not yet been signed at the time of conception and implantation, those occurrences were nonetheless the direct result of actions taken pursuant to an oral agreement which envisioned that the fertilization, implantation and ensuing pregnancy would go forward. Thus, it is still accurate to say, as we did the first time this case came before us, that for all practical purposes John caused Jaycee's conception every bit as much as if things had been done the old-fashioned way. (*Jaycee B.* v. *Superior Court, supra,* 42 Cal.App.4th at p. 730.)

When pressed at oral argument to make an offer of proof as to the "best facts" which John might be able to show if this case were tried, John's attorney raised the point that Luanne had (allegedly, we must add) promised to assume all responsibility for the child and would not hold him responsible for the child's upbringing. However, even if this case were returned for a trial on this point (we assume that Luanne would dispute the allegation) 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.[17]

The rule is nicely illustrated by the case of *In re Marriage of Ayo* (1987) 190 Cal.App.3d 442 [235 Cal.Rptr. 458]. There, a husband adopted his

[16]Apropos our discussion in footnote 5, *ante,* it may be—though the question does not need to be decided now—that some of the other ways by which *paternity* may be shown under the Act in addition to genetics are not "interchangeable" between the sexes. (*In re Marriage of Moschetta, supra,* 25 Cal.App.4th at p. 1225.) The artificial insemination statute, however, most certainly is. Unlike *presumptions* used to establish paternity which have their root in the "old law of illegitimacy" (see *id.,* at p. 1226), the artificial insemination statute bears directly on a medical procedure which contemplates parenthood apart from any biological tie with the father.

[17]The legal consequences of John's allegation that Luanne would assume sole responsibility were briefed. Minor's appointed counsel specifically anticipated the point on page 11, footnote 11 of the minor's opening brief. Rather than attempt to show that Luanne's alleged promise *would* make a difference, John's respondent's brief merely alludes to a vague need to consider "[a]ll of the aspects of contract formation . . . including, but not limited to, the issues of mistake of law or fact, fraud, coercion and duress" and claims that John had been

wife's son from a previous marriage, then the couple were divorced. (*Id.* at p. 445.) A year after the dissolution, the son's natural father (despite the fact he had already been adopted) started visiting him. (*Ibid.*) In light of the natural father's renewed interest, and in settlement of some arrearages in the division of community property and child support by a lump sum payment, the parties entered into a written agreement in which the wife promised, as Luanne has allegedly promised in this case, to hold the husband "harmless from any claims of any kind regarding her minor child." (*Id.* at p. 448.) The agreement was filed as a written stipulation with the court and was even signed by the trial judge after the words, "it is so ordered." (*Id.* at p. 448.)

More than five years later the wife reneged on the agreement and sought to renew the husband's child support obligation. (190 Cal.App.3d at p. 445.) The appellate court held that the agreement was invalid, reasoning that the "rights of the contracting parties under agreements such as this one affecting children must yield to the welfare of the children." (*Id.* at p. 451.)

The rule against enforcing agreements obviating a parent's child support responsibilities is also illustrated by *Stephen K.* v. *Roni L.* (1980) 105 Cal.App.3d 640 [164 Cal.Rptr. 618, 31 A.L.R.4th 383], a case which is virtually on point about Luanne's alleged promise. In *Stephen K.*, a woman was alleged to have falsely told a man that she was taking birth control pills. In "reliance" upon that statement the man had sexual intercourse with her. (*Id.* at p. 642.) The woman became pregnant and brought a paternity action. While the man did not attempt to use the woman's false statement as grounds to avoid paternity, he did seek to achieve the same result by cross-complaining against the woman for damages based on her fraud.

The trial court dismissed the cross-complaint on demurrer and the appellate court affirmed. The cross-complaint was "nothing more than asking the court to supervise the promises made between two consenting adults as to the circumstances of their private sexual conduct." (105 Cal.App.3d at pp. 644-645.)

There is no meaningful difference between the rule articulated in *Stephen K.* and the situation here—indeed, the result applies a fortiori to the present

precluded from presenting evidence on these issues by the "preemptive ruling of the trial court." Three times now—when this case was here before (*Jaycee B.* v. *Superior Court, supra,* 42 Cal.App.4th 718), at the trial, and in his respondent's brief—John has had the opportunity to present offers of proof of facts to the court which would change the result which would otherwise flow from his oral and written consent to the surrogacy. Having chosen not to respond to a point made by minor's counsel in her opening brief, John cannot now be heard to complain that he didn't have the opportunity to brief it. Then again, to be fair, John's attorney may himself have recognized that Luanne's alleged promise was of no consequence and it would be almost frivolous to press the issue at the appellate level. Every family law attorney knows that courts will not enforce promises by one parent to hold the other parent harmless from any claims of child support.

case: If the man who engaged in an act which merely opened the possibility of the procreation of a child was held responsible for the consequences in *Stephen K.*, how much more so should a man be held responsible for giving his express consent to a medical procedure that was *intended* to result in the procreation of a child. Thus, it makes no difference that John's wife Luanne did not become pregnant. John still engaged in "procreative conduct." In plainer language, a deliberate procreator is as responsible as a casual inseminator.[18]

CONCLUSION

Even though neither Luanne nor John are biologically related to Jaycee, they are still her lawful parents given their initiating role as the intended parents in her conception and birth. And, while the absence of a biological connection is what makes this case extraordinary, this court is hardly without statutory basis and legal precedent in so deciding. Indeed, in both the most famous child custody case of all time,[19] and in our Supreme Court's *Johnson* v. *Calvert* decision, the court looked to *intent to parent* as the ultimate basis of its decision.[20] Fortunately, as the *Johnson* court also noted, intent to parent " 'correlate[s] significantly' " with a child's best interests. (*Johnson* v. *Calvert, supra*, 5 Cal.4th at p. 94, quoting Schultz, *op. cit. supra*, Wis. L.Rev., at p. 397.) That is far more than can be said for a model of the law that renders a child a legal orphan.[21]

Again we must call on the Legislature to sort out the parental rights and responsibilities of those involved in artificial reproduction. No matter what

[18]This specific point was urged by Attorney Shear, counsel for amicus curiae Association of Certified Family Law Specialists, at oral argument. The phrase "casual inseminator" was coined by Justice Mosk in his concurring opinion in *Michael U.* v. *Jamie B.* (1985) 39 Cal.3d 787, 797 [218 Cal.Rptr. 39, 705 P.2d 362].

[19]See 1 Kings 3: 25-26 (dispute over identity of live child by two single women, each of whom had recently delivered a child but one child had died, resolved by novel evidentiary device designed to ferret out intent to parent).

[20]While in each case intent to parent was used as a tiebreaker as between two claimants who either had or claimed a biological connection, it is still undeniable that, when push came to shove, the court employed a legal idea that was *unrelated* to any necessary biological connection.

[21]It is significant that even if the *Johnson* majority had adopted the position of Justice Kennard advocating best interest as the more flexible and better rule (see 5 Cal.4th at p. 118 (dis. opn. of Kennard, J.)) there is no way the trial court's decision could stand. Luanne has cared for Jaycee since infancy; she is the only parent Jaycee has ever known. It would be unthinkable, given the facts of this case and her role as caregiver for Jaycee, for Luanne not to be declared the lawful mother under a best interest test.

As for the father, John would not be the first man whose responsibility was based on having played a role in causing a child's procreation, regardless of whether he really wanted to assume it.

one thinks of artificial insemination, traditional and gestational surrogacy (in all its permutations), and—as now appears in the not-too-distant future, cloning and even gene splicing—courts are still going to be faced with the problem of determining lawful parentage. A child cannot be ignored. Even if all means of artificial reproduction were outlawed with draconian criminal penalties visited on the doctors and parties involved, courts will still be called upon to decide who the lawful parents really are and who—other than the taxpayers—is obligated to provide maintenance and support for the child. These cases will not go away.

Courts can continue to make decisions on an ad hoc basis without necessarily imposing some grand scheme, looking to the imperfectly designed Uniform Parentage Act and a growing body of case law for guidance in the light of applicable family law principles. Or the Legislature can act to impose a broader order which, even though it might not be perfect on a case-by-case basis, would bring some predictability to those who seek to make use of artificial reproductive techniques. As jurists, we recognize the traditional role of the common (i.e., judge-formulated) law in applying old legal principles to new technology. (See, e.g., *Hurtado* v. *State of California* (1884) 110 U.S. 516, 530 [4 S.Ct. 111, 118, 28 L.Ed. 232] ["This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law."]; *Rodriguez* v. *Bethlehem Steel Corp.* (1974) 12 Cal.3d 382, 394 [115 Cal.Rptr. 765, 525 P.2d 669] ["in the common law system the primary instruments of this evolution are the courts, adjudicating on a regular basis the rich variety of individual cases brought before them"].) However, we still believe it is the Legislature, with its ability to formulate general rules based on input from all its constituencies, which is the more desirable forum for lawmaking.

That said, we must now conclude the business at hand.

(1) The portion of the judgment which declares that Luanne Buzzanca is not the lawful mother of Jaycee is reversed. The matter is remanded with directions to enter a new judgment declaring her the lawful mother. The trial court shall make all appropriate orders to ensure that Luanne Buzzanca shall have legal custody of Jaycee, including entering an order that Jaycee's birth certificate shall be amended to reflect Luanne Buzzanca as the mother.

(2) The judgment is reversed to the extent that it provides that John Buzzanca is not the lawful father of Jaycee. The matter is remanded with directions to enter a new judgment declaring him the lawful father. Consonant with this determination, today's ruling is without prejudice to John in future proceedings as regards child custody and visitation as his relationship

with Jaycee may develop.[22] The judgment shall also reflect that the birth certificate shall be amended to reflect John Buzzanca as the lawful father.

(3) To the degree that the judgment makes no provision for child support it is reversed. The matter is remanded to make an appropriate permanent child support order. Until that time, the temporary child support order shall remain in effect. (See *Jaycee B.* v. *Superior Court, supra*, 42 Cal.App.4th at p. 730.)

Luanne and Jaycee will recover their costs on appeal.

Wallin, J., and Crosby, J., concurred.

Respondent's petition for review by the Supreme Court was denied June 10, 1998.

[22]Luanne has had actual physical custody of Jaycee from the beginning. Obviously, it would be frivolous of John to seek custody of Jaycee right now in light of that fact. However, as the lawful father he certainly must be held to have the right, consistent with Jaycee's best interest, to visitation. Our decision today leaves Luanne and John in the same position as any other divorced couple with a child who has been exclusively cared for by the mother since infancy.

And while it may be true that John's consent to the fertilization, implantation and pregnancy was done as an accommodation to allow Luanne to surmount a formality, who knows what relationship he may develop with Jaycee in the future? Human relationships are not static; things done merely to help one individual overcome a perceived legal obstacle sometimes become much more meaningful. (See, e.g., Nicholson, Shadowlands (1990) [play based on true story of prominent British author who married American citizen in Britain in perfunctory civil ceremony to allow her to remain in country; a deeper relationship then developed].)

91 N.Y.2d 554

[554]Maureen KASS, Appellant,

v.

Steven KASS, Respondent.

Court of Appeals of New York.

May 7, 1998.

Wife brought a matrimonial action, seeking, inter alia, sole custody of five cryopreserved pre-zygotes produced during the parties' participation in an in vitro fertilization (IVF) program. Following entry of a divorce judgment, the Supreme Court, Nassau County, Roncallo and Davis, JJ., granted custody to the wife, and the husband appealed. The Supreme Court, Appellate Division, Sullivan, J., reversed and remitted, 235 A.D.2d 150, 663 N.Y.S.2d 581, and the wife appealed. The Court of Appeals, Kaye, C.J., addressing a matter of first impression, held that: (1) agreements between progenitors, or gamete donors, regarding disposition of their pre-zygotes should generally be presumed valid and binding, and enforced in any dispute between them, and (2) the informed consents signed by the parties before cryopreservation required that the custody dispute be resolved by donating the pre-zygotes to the IVF program for research.

Affirmed.

1. Constitutional Law ⇐82(10), Divorce ⇐289

Divorce court's disposition of five cryopreserved pre-zygotes produced during the parties' participation in an in vitro fertilization (IVF) program did not implicate the wife's right of privacy or bodily integrity in the area of reproductive choice.

2. Constitutional Law ⇐82(10), Divorce ⇐289

Five cryopreserved pre-zygotes produced during a married couple's participation in an in vitro fertilization (IVF) program would not be recognized as "persons" for constitutional purposes in a matrimonial action in which the wife was seeking sole custody of the pre-zygotes.

See publication Words and Phrases for other judicial constructions and definitions.

3. Parent and Child ⇐1

Agreements between progenitors, gamete donors, regarding disposition of their pre-zygotes should generally be presumed valid and binding, and enforced in any dispute between them.

4. Husband and Wife ⇐31(3)

Informed consents signed by a husband and wife before cryopreservation of five pre-zygotes produced during their participation in an in vitro fertilization (IVF) program required that their subsequent dispute over custody of the pre-zygotes be resolved by donating the pre-zygotes to the IVF program for research, where the consents repeatedly manifested an unequivocal intent that disposition of the pre-zygotes in general, and implantation in particular, was to be decided jointly.

5. Contracts ⇐176(2)

Whether an agreement is ambiguous is a question of law for the courts.

6. Contracts ⇐143(2)

Ambiguity in a contract is determined by looking within the four corners of the document, not to outside sources.

7. Contracts ⇐143.5, 169

Court deciding whether an agreement is ambiguous should examine the entire contract and consider the relation of the parties and the circumstances under which it was executed.

8. Contracts ⇐143.5, 147(3)

Court deciding whether an agreement is ambiguous should consider particular words not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby.

9. Contracts ⇐143(2), 154

In deciding whether an agreement is ambiguous, form should not prevail over sub-

stance, and a sensible meaning of words should be sought.

10. Contracts ⇐143.5

Where a document makes clear the parties' overall intention, courts examining isolated provisions should then choose that construction which will carry out the plain purpose and object of the agreement.

11. Evidence ⇐448

Extrinsic evidence cannot create an ambiguity in an agreement.

12. Evidence ⇐450(5)

Court deciding a divorcing married couple's dispute over custody of five cryopreserved pre-zygotes produced during their participation in an in vitro fertilization (IVF) program properly looked to the parties' "uncontested divorce" instrument in resolving an ambiguity in the informed consents which the parties had signed before cryopreservation, particularly since it was signed only weeks after the consents.

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[555] Vincent F. Stempel and Lisa Ann Spero, Garden City, for appellant.

Linda T. Armatti–Epstein, Mineola, for respondent.

[556] Yueh-ru Chu and Donna Lieberman, New York City, for New York Civil Liberties Union, amicus curiae.

OPINION OF THE COURT

KAYE, Chief Judge.

Although *in vitro* fertilization (IVF) procedures are now [557] more than two decades old and in wide use, this is the first such dispute to reach our Court. Specifically in issue is the disposition of five frozen, stored pre-embryos, or "pre-zygotes," [1] created five years ago, during the parties' marriage, to assist them in having a child. Now divorced, appellant (Maureen Kass) wants the pre-zygotes implanted, claiming this is her only chance for genetic motherhood; respondent (Steven Kass) objects to the burdens of unwanted fatherhood, claiming that the parties agreed at the time they embarked on the effort that in the present circumstances the pre-zygotes would be donated to the IVF program for approved research purposes. Like the two-Justice plurality at the Appellate Division, we conclude that the parties' agreement providing for donation to the IVF program controls. The Appellate Division order should therefore be affirmed.

Facts

Appellant and respondent were married on July 4, 1988, and almost immediately began trying to conceive a child. While appellant believed that, owing to prenatal exposure to diethylstilbestrol (DES) she might have difficulty carrying a pregnancy to term, her condition in fact was more serious—she failed to become pregnant. In August 1989, the couple turned to John T. Mather Memorial Hospital in Port Jefferson, Long Island and, after unsuccessful efforts to conceive through artificial insemination, enrolled in the hospital's IVF program.

Typically, the IVF procedure begins with hormonal stimulation of a woman's ovaries to produce multiple eggs. The eggs are then removed by laparoscopy or ultrasound-directed needle aspiration and placed in a glass dish, where sperm are introduced. Once a sperm cell fertilizes the egg, this fusion—or pre-zygote—divides until it reaches the four- to eight-cell stage, after which several pre-zygotes are transferred to the woman's uterus by a cervical catheter. If the procedure succeeds, an embryo will attach itself to the uterine wall, differentiate and develop into a fetus. As an alternative to immediate implantation, pre-zygotes may be cryopreserved indefinitely in liquid nitrogen for later use. Cryopreservation serves to reduce both medical and physical costs because eggs do not have to be retrieved with each attempted implantation, and delay may actually improve the chances of pregnancy. At the same time, [558] the preservation of "extra" pre-zygotes—those not immediately implanted—allows for later disagreements, as occurred here.

Beginning in March 1990, appellant underwent the egg retrieval process five times and

[1] We use the parties' term "pre-zygotes," which were defined in the record as "eggs which have been penetrated by sperm but have not yet joined genetic material."

fertilized eggs were transferred to her nine times. She became pregnant twice—once in October 1991, ending in a miscarriage and again a few months later, when an ectopic pregnancy had to be surgically terminated.

Before the final procedure, for the first time involving cryopreservation, the couple on May 12, 1993 signed four consent forms provided by the hospital. Each form begins on a new page, with its own caption and "Patient Name." The first two forms, "GENERAL INFORMED CONSENT FORM NO. 1: IN VITRO FERTILIZATION AND EMBRYO TRANSFER" and "ADDENDUM NO. 1–1," consist of 12 single-spaced typewritten pages explaining the procedure, its risks and benefits, at several points indicating that, before egg retrieval could begin, it was necessary for the parties to make informed decisions regarding disposition of the fertilized eggs. ADDENDUM NO. 1–1 concludes as follows:

"We understand that it is general IVF Program Policy, as medically determined by our IVF physician, to retrieve as many eggs as possible and to inseminate and transfer 4 of those mature eggs in this IVF cycle, unless our IVF physician determines otherwise. It is necessary that we decide * * * [now] how excess eggs are to be handled by the IVF Program and how many embryos to transfer. *We are to indicate our choices by signing our initials where noted below.*

"1. We consent to the retrieval of as many eggs as medically determined by our IVF physician. If more eggs are retrieved than can be transferred during this IVF cycle, we direct the IVF Program to take the following action (choose one):

"(a) The excess eggs are to be inseminated and cryopreserved for possible use by us during a later IVF cycle. We understand that our choice of this option requires us to complete an additional Consent Form for Cryopreservation" (emphasis in original).

The "Additional Consent Form for Cryopreservation," a seven-page, single-spaced typewritten document, is also in two parts. The first, "INFORMED CONSENT FORM NO. 2: CRYOPRESERVATION OF HUMAN PRE–ZYGOTES," provides:

[559]"III. *Disposition of Pre–Zygotes.*

"We understand that our frozen pre-zygotes will be stored for a maximum of 5 years. We have the principal responsibility to decide the disposition of our frozen pre-zygotes. Our frozen pre-zygotes will not be released from storage for any purpose without the written consent of *both* of us, consistent with the policies of the IVF Program and applicable law. In the event of divorce, we understand that legal ownership of any stored pre-zygotes must be determined in a property settlement and will be released as directed by order of a court of competent jurisdiction. Should we for any reason no longer wish to attempt to initiate a pregnancy, we understand that we may determine the disposition of our frozen pre-zygotes remaining in storage.* * *

"The possibility of our death or any other unforeseen circumstances that may result in neither of us being able to determine the disposition of any stored frozen pre-zygotes requires that we now indicate our wishes. THESE IMPORTANT DECISIONS MUST BE DISCUSSED WITH OUR IVF PHYSICIAN AND OUR WISHES MUST BE STATED (BEFORE EGG RETRIEVAL) ON THE ATTACHED ADDENDUM NO. 2–1, STATEMENT OF DISPOSITION. THIS STATEMENT OF DISPOSITION MAY BE CHANGED ONLY BY OUR SIGNING ANOTHER STATEMENT OF DISPOSITION WHICH IS FILED WITH THE IVF PROGRAM" (emphasis in original).

The second part, titled "INFORMED CONSENT FORM NO. 2—ADDENDUM NO. 2–1: CRYOPRESERVATION—STATEMENT OF DISPOSITION," states:

"We understand that it is IVF Program Policy to obtain our informed consent to the number of pre-zygotes which are to be cryopreserved and to the disposition of excess cryopreserved pre-zygotes. *We are to indicate our choices by signing our initials where noted below.*

"1. We consent to cryopreservation of all pre-zygotes which are not transferred during this IVF cycle for possible use * * * by us in a future IVF cycle. * * *

"2. In the event that we no longer wish to initiate a [560]pregnancy or are unable to make a decision regarding the disposition of our stored, frozen pre-zygotes, we now

indicate our desire for the disposition of our pre-zygotes and direct the IVF program to (choose one): * * *

"(b) Our frozen pre-zygotes may be examined by the IVF Program for biological studies and be disposed of by the IVF Program for approved research investigation as determined by the IVF Program" (emphasis in original).

On May 20, 1993, doctors retrieved 16 eggs from appellant, resulting in nine pre-zygotes. Two days later, four were transferred to appellant's sister, who had volunteered to be a surrogate mother, and the remaining five were cryopreserved. The couple learned shortly thereafter that the results were negative and that appellant's sister was no longer willing to participate in the program. They then decided to dissolve their marriage. The total cost of their IVF efforts exceeded $75,000.

With divorce imminent, the parties themselves on June 7, 1993—barely three weeks after signing the consents—drew up and signed an "uncontested divorce" agreement, typed by appellant, including the following:

"The disposition of the frozen 5 pre-zygotes at Mather Hospital is that they should be disposed of [in] the manner outlined in our consent form and that neither Maureen Kass[,] Steve Kass or anyone else will lay claim to custody of these pre-zygotes."

On June 28, 1993, appellant by letter informed the hospital and her IVF physician of her marital problems and expressed her opposition to destruction or release of the pre-zygotes.

One month later, appellant commenced the present matrimonial action, requesting sole custody of the pre-zygotes so that she could undergo another implantation procedure. Respondent opposed removal of the pre-zygotes and any further attempts by appellant to achieve pregnancy, and counterclaimed for specific performance of the parties' agreement to permit the IVF program to retain the pre-zygotes for research, as specified in ADDENDUM NO. 2-1. By stipulation dated December 17, 1993, the couple settled all issues in the matrimonial action except each party's claim with respect to the pre-zygotes, which was submitted to the court for determination. While this aspect of the case remained open, a divorce judgment was entered on May 16, 1994.

[561] In connection with the continuing litigation over the pre-zygotes, by letter dated January 9, 1995 the parties agreed that the matter should be decided on the existing record.

Supreme Court granted appellant custody of the pre-zygotes and directed her to exercise her right to implant them within a medically reasonable time. The court reasoned that a female participant in the IVF procedure has exclusive decisional authority over the fertilized eggs created through that process, just as a pregnant woman has exclusive decisional authority over a nonviable fetus, and that appellant had not waived her right either in the May 12, 1993 consents or in the June 7, 1993 "uncontested divorce" agreement.

While a divided Appellate Division reversed that decision (235 A.D.2d 150, 663 N.Y.S.2d 581), all five Justices unanimously agreed on two fundamental propositions. First, they concluded that a woman's right to privacy and bodily integrity are not implicated before implantation occurs. Second, the court unanimously recognized that when parties to an IVF procedure have themselves determined the disposition of any unused fertilized eggs, their agreement should control.

The panel split, however, on the question whether the agreement at issue was sufficiently clear to control disposition of the pre-zygotes. According to the two-Justice plurality, the agreement unambiguously indicated the parties' desire to donate the pre-zygotes for research purposes if the couple could not reach a joint decision regarding disposition. The concurring Justice agreed to reverse but found the consent fatally ambiguous. In his view, but for the most exceptional circumstances, the objecting party should have a veto over a former spouse's proposed implantation, owing to the emotional and financial burdens of compelled parenthood. A fact-finding hearing would be authorized only when the party desiring

parenthood could make a threshold showing of no other means of achieving genetic or adoptive parenthood, which was not shown on this stipulated record.

While agreeing with the concurrence that the informed consent document was ambiguous, the two-Justice dissent rejected a presumption in favor of either party and instead concluded that the fate of the pre-zygotes required a balancing of the parties' respective interests and burdens, as well as their personal backgrounds, psychological make-ups, financial and physical circumstances. Factors would include appellant's independent ability to support the child and the sincerity of [562]her emotional investment in this particular reproductive opportunity, as well as the burdens attendant upon a respondent's unwanted fatherhood and his motivations for objecting to parenthood. Finding that the record was insufficient to permit a fair balancing, and that the parties' January 9, 1995 stipulation that there would be no further submissions violated public policy because it precluded full review, the dissent would remit the case to the trial court for a full hearing.

We now affirm, agreeing with the plurality that the parties clearly expressed their intent that in the circumstances presented the pre-zygotes would be donated to the IVF program for research purposes.

Analysis

A. *The Legal Landscape Generally.* We begin analysis with a brief description of the broader legal context of this dispute. In the past two decades, thousands of children have been born through IVF, the best known of several methods of assisted reproduction. Additionally, tens of thousands of frozen embryos annually are routinely stored in liquid nitrogen canisters, some having been in that state for more than 10 years with no instructions for their use or disposal (*see*, New York State Task Force on Life and the Law, *Assisted Reproductive Technologies: Analysis and Recommendations for Public Policy*, at 289 [Apr.1998] ["*Assisted Reproductive Technologies*"]; Caplan, Due Consideration: Controversy in the Age of Medical Miracles, at 63 [1998]). As science races ahead, it leaves in its trail mind-numbing ethical and legal questions (*see generally*, Robertson, Children of Choice: Freedom and the New Reproductive Technologies [1994] ["Children of Choice"]).

The law, whether statutory or decisional, has been evolving more slowly and cautiously. A handful of States—New York not among them—have adopted statutes touching on the disposition of stored embryos (*see, e.g.*, Fla. Stat. Annot § 742.17 [couples must execute written agreement providing for disposition in event of death, divorce or other unforeseen circumstances]; N.H. Rev. Stat. Annot. §§ 168-B:13–168-B:15, 168-B:18 [couples must undergo medical exams and counseling; 14-day limit for maintenance of *ex utero* pre-zygotes]; La.Rev.Stat.Annot.[563] §§ 9:121–9:133 [pre-zygote considered "juridical person" that must be implanted]).[2]

In the case law, only *Davis v. Davis*, 842 S.W.2d 588, 604 [Tenn. 1992], *cert. denied sub nom. Stowe v. Davis*, 507 U.S. 911, 113 S.Ct. 1259, 122 L.Ed.2d 657, attempts to lay out an analytical framework for disputes between a divorcing couple regarding the disposition of frozen embryos (*see also, York v. Jones*, 717 F.Supp. 421 [E.D. Va.]; *Del Zio v. Columbia Presbyt. Hosp.*, 1978 U.S.Dist. LEXIS 14450 [U.S.Dist. Ct., S.D.N.Y., Apr. 12, 1978, 74 Civ. 3588]; *AZ v. BZ*, Mass. Probate Ct., Mar. 25, 1996). Having declared that embryos are entitled to "special respect because of their potential for human life" (842 S.W.2d at 597, *supra*), *Davis* recognized the procreative autonomy of both gamete providers, which includes an interest in avoiding genetic parenthood as well as an interest in becoming a genetic parent. In the absence of any prior written agreement

2. Recently, the New York State Task Force on Life and the Law issued a comprehensive report, *Assisted Reproductive Technologies*, together with recommendations for regulation. The report, following two years of study by the full Task Force, addresses a wide range of relevant subjects, such as the commercial aspects of what has become a sizable business, and impacts on children born of assisted reproductive technologies (*see also*, 1997–1998 N.Y. Senate Bill S 5815 [Nov. 24, 1997] [requiring that couples specify in writing how embryos are to be disposed of before a facility can accept them for storage]).

between the parties—which should be presumed valid, and implemented—according to *Davis*, courts must in every case balance these competing interests, each deserving of judicial respect. In *Davis* itself, that balance weighed in favor of the husband's interest in avoiding genetic parenthood, which was deemed more significant than the wife's desire to donate the embryos to a childless couple.

Although statutory and decisional law are sparse, abundant commentary offers a window on the issues ahead, particularly suggesting various approaches to the issue of disposition of pre-zygotes. Some commentators would vest control in one of the two gamete providers (*see, e.g.*, Poole, *Allocation of Decision-Making Rights to Frozen Embryos*, 4 Am J. Fam. L. 67 [1990] [pre-zygotes to party wishing to avoid procreation]; Andrews, *The Legal Status of the Embryo*, 32 Loy. L. Rev. 357 [1986] [woman retains authority when she desires to implant]). Others would imply a contract to procreate from participation in an IVF program (*see, e.g.*, Note, *Davis v. Davis: What About Future Disputes?*, 26 Conn. L. Rev. 305 [1993]; Comment, *Frozen Embryos: Towards An Equitable Solution*, 46 U. Miami L. Rev. 803 [1992]).

Yet a third approach is to regard the progenitors as holding a "bundle of rights" in relation to the pre-zygote that can be exercised through joint disposition agreements (*see*, Robertson, *Prior Agreements for Disposition of Frozen Embryos*, 51 Ohio St. L.J. 407 [1990] ["*Prior Agreements*"]; Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 Va. L. Rev. 437 [1990] ["*Early Embryos*"]). The most recent view—a "default rule"—articulated in the report of the New York State Task Force on Life and the Law, is that, while gamete bank regulations should require specific instructions regarding disposition, no embryo should be implanted, destroyed or used in research over the objection of an individual with decision-making authority (*see, Assisted Reproductive Technologies, op. cit.*, at 317–320).

Proliferating cases regarding the disposition of embryos, as well as other assisted reproduction issues, will unquestionably spark further progression of the law[3]. What is plain, however, is the need for clear, consistent principles to guide parties in protecting their interests and resolving their disputes, and the need for particular care in fashioning such principles as issues are better defined and appreciated. Against that backdrop we turn to the present appeal.

[1, 2] B. *The Appeal Before Us.* Like the Appellate Division, we conclude that disposition of these pre-zygotes does not implicate a woman's right of privacy or bodily integrity in the area of reproductive choice; nor are the pre-zygotes recognized as "persons" for constitutional purposes (*see, Roe v. Wade*, 410 U.S. 113, 162, 93 S.Ct. 705, 731, 35 L.Ed.2d 147; *Byrn v. New York City Health & Hosps. Corp.*, 31 N.Y.2d 194, 203, 335 N.Y.S.2d 390, 286 N.E.2d 887, *appeal dismissed* 410 U.S. 949, 93 S.Ct. 1414, 35 L.Ed.2d 683). The relevant inquiry thus becomes who has dispositional authority over them. Because that question is answered in this case by the parties' agreement, for purposes of resolving the present appeal we have no cause to decide whether the pre-zygotes are entitled to "special respect" (*cf., Davis v. Davis*, 842 S.W.2d 588, 596–597, *supra; see also*, Ethics Comm. of Am. Fertility Socy., *Ethical Considerations of the New Reproductive Technologies*, 46 Fertility & Sterility 1S, 32S [Supp. 1 1986])[4].

3. Within recent months, for example, the press has carried news of a divorcing New Jersey couple now litigating the disposition of frozen embryos, with the *husband* wanting them for implantation in a future spouse and the wife objecting (*see*, Booth, *Fate of Frozen Embryos Brings N.J. Again to Bioethics Fore: With No Precedent, Court to Decide on Request to Destroy Fertilized Ova*, N.J.L.J., Mar. 9, 1998, at 1, col. 2). And a now-divorced California couple is litigating the issue of support of a child conceived during their marriage through a donor egg, donor sperm and surrogate mother (*see, In re Marriage of Buzzanca*, 61 Cal.App.4th 1410, 72 Cal.Rptr.2d 280 [Ct. App 4th Dist.]; *see also*, Hernandez and Maharaj, *O.C. Couple Who Used Surrogate Ruled Parents; Custody: In Closely Watched Case, Appeals Court Declares That Intent Is More Important Than Biological Ties*, L.A. Times, Mar. 11, 1998, at A1).

4. Parties' agreements may, of course, be unenforceable as violative of public policy (*see, e.g.*, Domestic Relations Law § 121 *et seq.* [declaring surrogate parenting contracts contrary to policy,

[3] Agreements between progenitors, or gamete donors, regarding disposition of their pre-zygotes should generally be presumed valid and binding, and enforced in any dispute between them (*see, Davis v. Davis*, 842 S.W.2d at 597, *supra; see also, Early Embryos, op. cit.*, 76 Va. L. Rev. at 463–469). Indeed, parties should be encouraged in advance, before embarking on IVF and cryopreservation, to think through possible contingencies and carefully specify their wishes in writing. Explicit agreements avoid costly litigation in business transactions. They are all the more necessary and desirable in personal matters of reproductive choice, where the intangible costs of any litigation are simply incalculable. Advance directives, subject to mutual change of mind that must be jointly expressed, both minimize misunderstandings and maximize procreative liberty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision. Written agreements also provide the certainty needed for effective operation of IVF programs (*see, Prior Agreements, op. cit.*, 51 Ohio St. L. Rev. at 414–418; *see also*, Children of Choice, *op. cit.*, at 107, 113).

While the value of arriving at explicit agreements is apparent, we also recognize the extraordinary difficulty such an exercise presents. All agreements looking to the future to some extent deal with the unknown. Here, however, the uncertainties inherent in the IVF process itself are vastly complicated by cryopreservation, which extends the viability of pre-zygotes indefinitely and allows time for minds, and circumstances, to change. Divorce; death, disappearance or incapacity of one or both partners; aging; the birth of other children are but a [566] sampling of obvious changes in individual circumstances that might take place over time.

These factors make it particularly important that courts seek to honor the parties' expressions of choice, made before disputes erupt, with the parties' over-all direction always uppermost in the analysis. Knowing that advance agreements will be enforced underscores the seriousness and integrity of the consent process. Advance agreements as to disposition would have little purpose if they were enforceable only in the event the parties continued to agree. To the extent possible, it should be the progenitors—not the State and not the courts—who by their prior directive make this deeply personal life choice.

[4] Here, the parties prior to cryopreservation of the pre-zygotes signed consents indicating their dispositional intent. While these documents were technically provided by the IVF program, neither party disputes that they are an expression of their own intent regarding disposition of their pre-zygotes. Nor do the parties contest the legality of those agreements, or that they were freely and knowingly made. The central issue is whether the consents clearly express the parties' intent regarding disposition of the pre-zygotes in the present circumstances. Appellant claims the consents are fraught with ambiguity in this respect; respondent urges they plainly mandate transfer to the IVF program.

[5–10] The subject of this dispute may be novel but the common-law principles governing contract interpretation are not. Whether an agreement is ambiguous is a question of law for the courts (*see, Van Wagner Adv. Corp. v. S & M Enters.*, 67 N.Y.2d 186, 191, 501 N.Y.S.2d 628, 492 N.E.2d 756). Ambiguity is determined by looking within the four corners of the document, not to outside sources (*see, W.W.W. Assocs. v. Giancontieri*, 77 N.Y.2d 157, 162–163, 565 N.Y.S.2d 440, 566 N.E.2d 639). And in deciding whether an agreement is ambiguous courts

> "should examine the entire contract and consider the relation of the parties and the circumstances under which it was executed. Particular words should be consid-

void and unenforceable]; Scheinkman, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 14, Domestic Relations Law § 122, 1998 Pocket Part, at 255 ["commercial surrogacy arrangements involve a form of procreation for profit, if not prostitution"]). Significantly changed circumstances also may preclude contract enforcement. Here, however, appellant does not urge that the consents violate public policy, or that they are legally unenforceable by reason of significantly changed circumstances.

fered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby. Form should not prevail over substance and a sensible meaning of words should be sought" (*Atwater & Co. v. Panama R.R. Co.*, 246 N.Y. 519, 524, 159 N.E. 418).

[567] Where the document makes clear the parties' over-all intention, courts examining isolated provisions "'should then choose that construction which will carry out the plain purpose and object of the [agreement]'" (*Williams Press v. State of New York*, 37 N.Y.2d 434, 440, 373 N.Y.S.2d 72, 335 N.E.2d 299, quoting *Empire Props. Corp. v. Manufacturers Trust Co.*, 288 N.Y. 242, 249, 43 N.E.2d 25).

2. Applying those principles, we agree that the informed consents signed by the parties unequivocally manifest their mutual intention that in the present circumstances the pre-zygotes be donated for research to the IVF program.

The conclusion that emerges most strikingly from reviewing these consents as a whole is that appellant and respondent intended that disposition of the pre-zygotes was to be their joint decision. The consents manifest that what they above all did not want was a stranger taking that decision out of their hands. Even in unforeseen circumstances, even if they were unavailable, even if they were dead, the consents jointly specified the disposition that would be made. That sentiment explicitly appears again and again throughout the lengthy documents. Words of shared understanding—"we," "us" and "our"—permeate the pages. The overriding choice of these parties could not be plainer: "*We have the principal responsibility to decide the disposition of our frozen pre-zygotes. Our frozen pre-zygotes will not be released from storage for any purpose without the written consent of both of us, consistent with the policies of the IVF Program and applicable law*" (emphasis added).

That pervasive sentiment—both parties assuming "principal responsibility to decide the disposition of [their] frozen pre-zygotes"—is carried forward in ADDENDUM NO. 2–1:

> "In the event that we * * * are unable to make a decision regarding disposition of our stored, frozen pre-zygotes, we now indicate our desire for the disposition of our pre-zygotes and direct the IVF Program to * * *
>
> "Our frozen pre-zygotes may be examined by the IVF Program for biological studies and be disposed of by the IVF Program for approved research investigation as determined by the IVF Program."

Thus, only by joint decision of the parties would the pre-zygotes be used for implantation. And otherwise, by mutual consent they would be donated to the IVF program for research purposes.

[568] The Appellate Division plurality identified, and correctly resolved, two claimed ambiguities in the consents. The first is the following sentence in INFORMED CONSENT NO. 2: "In the event of divorce, we understand that legal ownership of any stored pre-zygotes must be determined in a property settlement and will be released as directed by order of a court of competent jurisdiction." Appellant would instead read that sentence: "In the event of divorce, we understand that legal ownership of any stored pre-zygotes must be determined by a court of competent jurisdiction." That is not, however, what the sentence says. Appellant's construction ignores the direction that ownership of the pre-zygotes "must be determined in a property settlement"—words that also must be given meaning, words that connote the parties' anticipated agreement as to disposition. Indeed, appellant and respondent did actually reach a settlement stipulation, reserving only the issue of the pre-zygotes (the subject of their earlier consents).

[11, 12] Additionally, while extrinsic evidence cannot *create* an ambiguity in an agreement, the plurality properly looked to the "uncontested divorce" instrument, signed only weeks after the consents, to *resolve* any ambiguity in the cited sentence. Although that instrument never became operative, it reaffirmed the earlier understanding that neither party would alone lay claim to pos-

session of the pre-zygotes.[5]

Apart from construing the sentence in isolation, the plurality also read it in the context of the consents as a whole. Viewed in that light, we too conclude that the isolated sentence was not dispositional at all but rather was "clearly designed to insulate the hospital and the IVF program from liability in the event of a legal dispute over the pre-zygotes arising in the context of a divorce" (235 A.D.2d at 160, 663 N.Y.S.2d 581). To construe the sentence as appellant suggests—surrendering all control over the pre-zygotes to the courts—is directly at odds with the intent of the parties plainly manifested throughout the consents that disposition be only by joint agreement.

For much the same reason, we agree with the plurality's conclusion that ADDENDUM NO. 2–1—the "STATEMENT OF DISPOSITION"—was not strictly limited to instances of "death or other 569 unforseen circumstances." Those are contingencies that would be resolved by the ADDENDUM, but they are not the only ones. We reach this conclusion, again, from reviewing the provisions in isolation and then in the context of the consents as a whole. While we agree that the words "death or other unforeseen circumstances" in INFORMED CONSENT NO. 2 did not create a condition precedent (235 A.D.2d at 159, 663 N.Y.S.2d 581), we also note that the present circumstances—including the parties' inability to reach the anticipated settlement—might well be seen as an "unforeseen" circumstance. Moreover, viewing the ADDENDUM in isolation, there is no hint of the claimed condition in the document itself. The document is a free-standing form, separately captioned and separately signed by the parties. Finally, viewing the issue in the context of the consents as a whole, as the plurality noted, "the overly narrow interpretation advocated by [appellant] is refuted not only by the broad language of the dispositional provision itself, but by other provisions of the informed consent document as well" (235 A.D.2d at 159, 663 N.Y.S.2d 581).

As they embarked on the IVF program, appellant and respondent—"husband" and "wife," signing as such—clearly contemplated the fulfillment of a life dream of having a child during their marriage. The consents they signed provided for other contingencies, most especially that in the present circumstances the pre-zygotes would be donated to the IVF program for approved research purposes. These parties having clearly manifested their intention, the law will honor it.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

TITONE, BELLACOSA, SMITH, LEVINE, CIPARICK and WESLEY, JJ., concur.

Order affirmed, with costs.

91 N.Y.2d 570

570 **The PEOPLE of the State of New York, Respondent,**

v.

Manuel A. MUNIZ, Appellant.

Court of Appeals of New York.

June 4, 1998.

Defendant was convicted, following jury trial in the County Court, Suffolk County, Mallon, J., of manslaughter in second degree as lesser-included offense of depraved indifference murder, and of felony murder. Defendant appealed. The Supreme Court, Appellate Division affirmed as modified, remanding for new trial on felony murder count, 204 A.D.2d 576, 612 N.Y.S.2d 168. On remand, defendant entered plea of guilty be-

5. As noted by the Appellate Division, unless public policy is violated, parties to a litigation are free to chart their own procedural course—as they did here. On January 9, 1995, both sides agreed that the matter should be determined on the submissions, and one week later plaintiff's attorney indicated that the last affidavit had been submitted. "The record upon which we must rule was thereby established" (235 A.D.2d at 162, 663 N.Y.S.2d 581).

State of Wisconsin
1999 – 2000 LEGISLATURE

LRB–2135/P1
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AN ACT ...; **relating to:** presumption of parenthood when the egg or sperm is donated or when a surrogate mother gives birth to the child.

Analysis by the Legislative Reference Bureau

Under current law, the husband of a woman who is artificially inseminated with the semen of a man who is not her husband is presumed to be the natural father of a child conceived as a result of the procedure. This bill makes that presumption inapplicable to the husband of a woman who is artificially inseminated under a surrogate parenting agreement, which is defined in the bill as an agreement under which a surrogate mother agrees to become impregnated through other than natural means and to relinquish the custody of the child born as a result of the pregnancy to an intended father and an intended mother who are married to each other and who intend to have parental rights and responsibilities over the child. In that case, the natural father of the child is presumed to be the intended father under the agreement and not the husband of the surrogate mother.

The bill also creates a presumption of maternity for when a woman is implanted with an egg donated by another woman. In that case, the woman who is implanted with the egg and who gives birth to the child is presumed to be the natural mother of the child, unless the child is born as a result of a surrogate parenting agreement, in which case the intended mother is presumed to be the natural mother of the child, notwithstanding that the surrogate mother gave birth to the child and regardless of who provided the egg.

Under current law, if a child is born to a surrogate mother, information about the surrogate mother must be entered on the child's birth certificate and information about the father must be omitted. If a court determines parental rights over the child, the state registrar of vital statistics must prepare and register a new birth

certificate and impound the original birth certificate. This bill provides that if the intended parents of a child who is born to a surrogate mother submit to the state registrar within 365 days after the date of birth of the child a copy of the surrogate parenting agreement, together with affidavits sworn to by the surrogate mother, her husband, if any, the intended father and the intended mother indicating that each affiant consents to the preparation and registration of a new birth certificate, the state registrar must prepare and register a new birth certificate showing, among other things, the given name and surname of the registrant as requested by the intended parents and the names and personal information of the intended parents.

For further information see the ***state and local*** fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 46.03 (7) (bm) of the statutes is amended to read:

46.03 **(7)** (bm) Maintain a file containing records of artificial inseminations under s. 891.40 (2) (a), egg donations under s. 891.40 (3) (a) and records of declarations of paternal interest under s. 48.025 and of statements acknowledging paternity under s. 69.15 (3) (b). The department shall release these records only upon an order of the court except that the department may use nonidentifying information concerning artificial inseminations and egg donations for the purpose of compiling statistics and except that records relating to declarations of paternal interest and statements acknowledging paternity shall be released to the department of workforce development or a county child support agency under s. 59.53 (5) without a court order upon the request of the department of workforce development or a county child support agency under s. 59.53 (5) pursuant to the program responsibilities under s. 49.22 or by any other person with a direct and tangible interest in the record.

History: 1971 c. 270 s. 104; 1973 c. 90; 1973 c. 284 ss. 2, 32; 1973 c. 333; 1975 c. 39, 82; 1975 c. 189 s. 99 (1), (2); 1975 c. 224, 377, 413, 422; 1977 c. 29, 193; 1977 c. 196 s. 131; 1977 c. 203, 205, 271, 354; 1977 c. 418 ss. 287 to 289m, 924 (18) (d); 1977 c. 447, 449; 1979 c. 32 s. 92 (1); 1979 c. 34; 1979 c. 175 s. 46; 1979 c. 221, 331, 352; 1981 c. 20, 81; 1981 c. 314 s. 144; 1981 c. 390; 1983 a. 27, 193; 1983 a. 435 s. 7; 1983 a. 447, 474; 1983 a. 532 s. 36; 1985 a. 19, 29, 120, 176, 234, 285, 328, 331; 1985 a. 332 s. 251 (3); 1987 a. 3, 5, 27, 161, 186, 307, 339, 385, 399, 403, 413; 1989 a. 31 ss. 938m to 951, 2909g, 2909i; 1989 a. 56, 105, 107, 122; 1991 a. 39, 277; 1993 a. 16 ss. 851 to 859, 3072d; 1993 a. 98, 377, 385, 446, 481; 1995 a. 27 ss. 2026m to 2038b, 9126 (19); 1995 a. 77, 201, 225, 352, 370, 404, 448; 1997 a. 3, 27, 111, 283, 292.

SECTION 2. 48.02 (13) of the statutes is amended to read:

48.02 **(13)** "Parent" means either a biological parent, a husband who has consented to the artificial insemination of his wife under s. 891.40 (2) (a), a wife who gives birth as a result of an egg donation under s. 891.40 (3) (a), or a parent by adoption. If the child is a nonmarital child who is not adopted or whose parents do not subsequently intermarry under s. 767.60, "parent" includes a person acknowledged under s. 767.62 (1) or a substantially similar law of another state or adjudicated to be the biological father. "Parent" does not include any person whose parental rights have been terminated.

History: 1971 c. 41 s. 12; 1971 c. 164; 1973 c. 263; 1977 c. 205, 299, 354, 418, 447, 449; 1979 c. 135, 300, 352; 1981 c. 81; 1983 a. 189, 447, 471; 1985 a. 176; 1987 a. 27, 285, 339; 1989 a. 31; Sup. Ct. Order, 151 W (2d) xxv (1989); 1989 a. 107; 1991 a. 39; 1993 a. 98, 375, 377, 385, 446, 491; 1995 a. 27 ss. 2423 to 2426p, 9126 (19), 9145 (1); 1995 a. 77, 275, 352, 448; 1997 a. 27, 104, 191, 292.

SECTION 3. 49.141 (1) (j) 2. of the statutes is amended to read:

49.141 **(1)** (j) 2. A person who has consented to the artificial insemination of his wife under s. 891.40 (2) (a) or a wife who gives birth as a result of an egg donation under s. 891.40 (3) (a).

History: 1995 a. 289; 1997 a. 27, 41, 283.

SECTION 4. 69.14 (1) (g) of the statutes is renumbered 69.14 (1) (g) 1. and amended to read:

69.14 **(1)** (g) *Birth by artificial insemination.* 1. ~~*Birth by artificial insemination.*~~ ~~If~~ Subject to subd. 2., if the registrant of a birth certificate under this section is born as a result of artificial insemination under the requirements of s. 891.40 (2) (a), the husband of the woman shall be considered the father of the registrant on the birth certificate. If the registrant is born as a result of artificial insemination which does not satisfy the requirements of s. 891.40 (2) (a), the information about the father of the registrant shall be omitted from the registrant's birth certificate.

History: 1985 a. 315; 1987 a. 413; 1993 a. 27; 1997 a. 27, 191.

SECTION 5. 69.14 (1) (g) 2. of the statutes is created to read:

69.14 **(1)** (g) 2. If the registrant of a birth certificate under this section is born as a result of artificial insemination under a surrogate parenting agreement, the birth certificate shall be completed as provided under par. (h).

SECTION 6. 69.14 (1) (h) of the statutes is renumbered 69.14 (1) (h) (intro.) and amended to read:

69.14 **(1)** (h) (intro.) *Surrogate mother.* If the registrant of a birth certificate under this section is born to a surrogate mother, information about the surrogate mother shall be entered on the birth certificate and the information about the father shall be omitted from the birth certificate. If ~~a court determines parental rights over the registrant, the clerk of court shall report the court's determination to the state registrar~~ the intended parents under a surrogate parenting agreement submit to the state registrar within 365 days after the date of birth of the child a copy of the surrogate parenting agreement, together with affidavits sworn to by the surrogate mother, her husband, if any, the intended mother and the intended father on a form prescribed by the state registrar~~, along with~~ indicating that each affiant consents to the preparation and registration of a new birth certificate and the fee required under s. 69.22. ~~Upon receipt of the report,~~ the state registrar shall prepare and register a new birth certificate for the registrant under s. 69.15 (6) and send a copy of the new certificate to the local registrar who filed the original certificate. Upon receipt of the copy, the local registrar shall destroy his or her copy of the replaced certificate and file the new certificate. The new birth certificate ~~shall show all of the following:~~

Insert 4-21

History: 1985 a. 315; 1987 a. 413; 1993 a. 27; 1997 a. 27, 191.

SECTION 7. 69.14 (1) (h) 1. to 6. of the statutes are created to read:

69.14 **(1)** (h) 1. The given name and surname of the registrant as requested by the intended parents.

2. The date and place of birth as transcribed from the original certificate.

3. The names and personal information of the intended parents.

4. The hospital and time of birth as unknown.

5. The filing date on the original certificate.

6. Any other information necessary to complete the new certificate.

SECTION 8. 115.76 (12) of the statutes is amended to read:

115.76 **(12)** "Parent" means a biological parent; a husband who has consented to the artificial insemination of his wife under s. 891.40 (2) (a); a wife who gives birth as a result of an egg donation under s. 891.40 (3) (a); a male who is presumed to be the child's father under s. 891.41; a male who has been adjudicated the child's father under subch. VIII of ch. 48, under ss. 767.45 to 767.51, by final order or judgment of an Indian tribal court of competent jurisdiction or by final order or judgment of a court of competent jurisdiction in another state; an adoptive parent; a legal guardian; a person acting as a parent of a child; a person appointed as a sustaining parent under s. 48.428; or a person assigned as a surrogate parent under s. 115.792 (1) (a) 2. "Parent" does not include any person whose parental rights have been terminated; the state or a county or a child welfare agency if a child was made a ward of the state or a county or child welfare agency under ch. 880 or if a child has been placed in the legal custody or guardianship of the state or a county or a child welfare agency under ch. 48 or ch. 767; or an American Indian tribal agency if the child was made a ward of the agency or placed in the legal custody or guardianship of the agency.

History: 1997 a. 164, 237.

SECTION 9. 146.34 (1) (f) of the statutes is amended to read:

146.34 **(1)** (f) "Parent" means a biological parent, a husband who has consented to the artificial insemination of his wife under s. 891.40 (2) (a), a wife who gives birth

as a result of an egg donation under s. 891.40 (3) (a) or a parent by adoption. If the minor is a nonmarital child who is not adopted or whose parents do not subsequently intermarry under s. 767.60, "parent" includes a person adjudged in a judicial proceeding under ch. 48 to be the biological father of the minor. "Parent" does not include any person whose parental rights have been terminated.

History: 1985 a. 50; 1995 a. 77; 1997 a. 188.

SECTION 10. 767.47 (9) of the statutes is amended to read:

767.47 **(9)** Where a child is conceived by artificial insemination, the husband of the mother of the child at the time of the conception of the child is the natural father of the child, as provided in s. 891.40 (2) (a).

History: 1979 c. 352; 1981 c. 20 s. 2202 (20) (m); 1981 c. 359 ss. 13, 17; 1983 a. 447; 1987 a. 413; 1989 a. 31, 122, 212; 1993 a. 395, 481; 1995 a. 27 s. 9126 (19); 1995 a. 77, 100, 275, 289, 404; 1997 a. 27, 105, 191, 252.

SECTION 11. 891.40 (title) of the statutes is amended to read:

891.40 (title) **Artificial insemination and egg donation.**

SECTION # CR; 891.40 (2) (title) to 891.40 (2) (title)

History: 1979 c. 352; 1983 a. 447; 1995 a. 27 s. 9126 (19).

SECTION 12. 891.40 (1) of the statutes is renumbered 891.40 (2) (a) and amended to read:

move

891.40 **(2)** ARTIFICIAL INSEMINATION. (a) If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband of the mother at the time of the conception of the child shall be the natural father of a child conceived, unless the wife is inseminated artificially under a surrogate parenting agreement, in which case the intended father under the surrogate parenting agreement shall be the natural father of a child conceived. The husband's consent must be in writing and signed by him and his wife. The physician shall certify their signatures and the date of the insemination, and shall file the husband's consent with the department of health and family services, where it shall be kept confidential and in a sealed file

except as provided in s. 46.03 (7) (bm). However, the physician's failure to file the consent form does not affect the legal status of father and child. All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising physician or elsewhere, may be inspected only upon an order of the court for good cause shown.

History: 1979 c. 352; 1983 a. 447; 1995 a. 27 s. 9126 (19).

SECTION 13. 891.40 (1d) of the statutes is created to read:

891.40 **(1d)** DEFINITIONS. In this section and s. 891.403:

(a) "Intended father" means a man who is married to an intended mother and who intends to have the parental rights and responsibilities for a child born as a result of a surrogate parenting agreement.

(b) "Intended mother" means a woman who is married to an intended father and who intends to have the parental rights and responsibilities for a child born as a result of a surrogate parenting agreement.

(c) "Intended parents" mean an intended father and an intended mother who are married to each other and who enter into a surrogate parenting agreement.

(d) "Surrogate mother" means a woman who enters into a surrogate parenting agreement.

(e) "Surrogate parenting agreement" means an agreement under which a surrogate mother agrees to become impregnated through other than natural means and to relinquish to the intended parents the custody of the child born as a result of the pregnancy.

SECTION 14. 891.40 (2) of the statutes is renumbered 891.40 (2) (b) and amended to read:

891.40 **(2)** (b) The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is not the natural father of a child conceived, bears no liability for the support of the child and has no parental rights with regard to the child, unless the donor is the intended father and the woman is a surrogate mother, in which case the donor is the natural father of a child conceived, is liable for the support of the child and otherwise has all parental rights and responsibilities with regard to the child.

History: 1979 c. 352; 1983 a. 447; 1995 a. 27 s. 9126 (19).

SECTION 15. 891.40 (3) of the statutes is created to read:

891.40 **(3)** EGG DONATION. (a) If, under the supervision of a licensed physician and with the consent of her husband, a wife is implanted with an egg donated by another woman, the wife shall be the natural mother of a child conceived, unless the wife is implanted under a surrogate parenting agreement, in which case the intended mother under the surrogate parenting agreement shall be the natural mother of a child conceived. The husband's consent must be in writing and signed by him and his wife. The physician shall certify their signatures and the date of the implantation, and shall file the husband's consent with the department of health and family services, where it shall be kept confidential and in a sealed file except as provided in s. 46.03 (7) (bm). However, the physician's failure to file the consent form does not affect the legal status of mother and child. All papers and records pertaining to the implantation, whether part of the permanent record of a court or of a file held by the supervising physician or elsewhere, may be inspected only upon an order of the court for good cause shown.

(b) The donor of an egg provided to a licensed physician for implantation in a woman other than the donor is not the natural mother of a child conceived, bears no

liability for the support of the child and has no parental rights with regard to the child, unless the donor is the intended mother and the woman is a surrogate mother in which case the donor is the natural mother of a child conceived, is liable for the support of the child and otherwise has all parental rights and responsibilities with regard to the child.

SECTION 16. 891.403 of the statutes is created to read:

891.403 Presumption of maternity based on giving birth; surrogate mother exception. (1) Subject to sub. (2), a woman is presumed to be the natural mother of a child if she gives birth to the child, notwithstanding that another woman may have donated the egg.

(2) If a child is born to a surrogate mother, the intended mother is presumed to be the natural mother of the child, notwithstanding that the surrogate mother gave birth to the child and regardless of whether the egg came from the intended mother, the surrogate mother or a donor who is not the intended mother or surrogate mother. The surrogate mother is not presumed to be the natural mother of the child, bears no liability for the support of the child and has no parental rights with regard to the child.

SECTION 17. 891.41 (1) (intro.) of the statutes is amended to read:

891.41 **(1)** (intro.) ~~A~~ Subject to sub. (1m), a man is presumed to be the natural father of a child if any of the following applies:

History: 1979 c. 352; 1983 a. 447; 1985 a. 315 s. 22; 1987 a. 413; 1989 a. 212; 1997 a. 191.

SECTION 18. 891.41 (1m) of the statutes is created to read:

891.41 **(1m)** The husband of a surrogate mother who bears a child under a surrogate parenting agreement is not presumed to be the natural father of the child,

bears no liability for the support of the child and has no parental rights with regard to the child.

SECTION 19. 938.02 (13) of the statutes is amended to read:

938.02 **(13)** "Parent" means either a biological parent, a husband who has consented to the artificial insemination of his wife under s. 891.40 (2) (a), a wife who gives birth as a result of an egg donation under s. 891.40 (3) (a), or a parent by adoption. If the juvenile is a nonmarital child who is not adopted or whose parents do not subsequently intermarry under s. 767.60, "parent" includes a person acknowledged under s. 767.62 (1) or a substantially similar law of another state or adjudicated to be the biological father. "Parent" does not include any person whose parental rights have been terminated.

History: 1995 a. 77, 216, 352, 448; 1997 a. 27, 35, 181, 191.

SECTION 20. Initial applicability.

(1) This act first applies to artificial insemination and egg implant procedures performed on the effective date of this subsection.

(END)

Insert 4-21

Section #. 69.14 (1) (h) of the statutes is amended to read:

(intro.)

69.14 **(1)** (h) *Surrogate mother.* If the registrant of a birth certificate under this section is born to a surrogate mother, information about the surrogate mother shall be entered on the birth certificate and the information about the father shall be omitted from the birth certificate. If ~~a court determines parental rights over the registrant, the clerk of court shall report the court's determination to the state registrar on a form prescribed by the state registrar, along with~~ the fee required under s. 69.22~~. Upon receipt of the report~~, the state registrar shall prepare and register a new birth certificate for the registrant under s. 69.15 (6) and send a copy of the new certificate to the local registrar who filed the original certificate. Upon receipt of the copy, the local registrar shall destroy his or her copy of the replaced certificate and file the new certificate.

History: 1985 a. 315; 1987 a. 413; 1993 a. 27; 1997 a. 27, 191.

The new birth certificate shall show all of the following:

the intended parents under a surrogate parenting agreement submit to the state registrar within 365 days after the date of birth of the child a copy of the surrogate parenting agreement and

, together with affidavits sworn to by the surrogate mother, her husband, if any, the intended mother and the intended father on a form prescribed by the state registrar

(defined)

Cover situation where physician does not perform procedure, but rather woman does it herself under direction of physician

Constituent: Jerry McCabe (920) 457-7811

by or under supervision or direction

at the direction - authorization of physician - explicit instructions = order

under the direction - guidance or supervision

by at the direction or under the supervision

supervision - oversight

State of Wisconsin
1999 - 2000 LEGISLATURE

LRB-2135/1 (2)
GMM:jlg:ijs RMR

1999 BILL

Regen

AN ACT *to renumber and amend* 69.14 (1) (g), 69.14 (1) (h), 891.40 (1) and 891.40 (2); *to amend* 46.03 (7) (bm), 48.02 (13), 49.141 (1) (j) 2., 115.76 (12), 146.34 (1) (f), 767.47 (9), 891.40 (title), 891.41 (1) (intro.) and 938.02 (13); and *to create* 69.14 (1) (g) 2., 69.14 (1) (h) 1. to 6., 891.40 (1d), 891.40 (2) (title), 891.40 (3), 891.403 and 891.41 (1m) of the statutes; **relating to:** presumption of parenthood when the egg or sperm is donated or when a surrogate mother gives birth to the child.

Analysis by the Legislative Reference Bureau

Under current law, the husband of a woman who is artificially inseminated with the semen of a man who is not her husband is presumed to be the natural father of a child conceived as a result of the procedure. This bill makes that presumption inapplicable to the husband of a woman who is artificially inseminated under a surrogate parenting agreement, which is defined in the bill as an agreement under which a surrogate mother agrees to become impregnated through other than natural means and to relinquish the custody of the child born as a result of the pregnancy to an intended father and an intended mother who are married to each other and who intend to have parental rights and responsibilities over the child. In that case, the natural father of the child is presumed to be the intended father under the agreement and not the husband of the surrogate mother.

The bill also creates a presumption of maternity for when a woman is implanted with an egg donated by another woman. In that case, the woman who is implanted with the egg and who gives birth to the child is presumed to be the natural mother of the child, unless the child is born as a result of a surrogate parenting agreement, in which case the intended mother is presumed to be the natural mother of the child, notwithstanding that the surrogate mother gave birth to the child and regardless of who provided the egg.

Under current law, if a child is born to a surrogate mother, information about the surrogate mother must be entered on the child's birth certificate and information about the father must be omitted. If a court determines parental rights over the child, the state registrar of vital statistics must prepare and register a new birth certificate and impound the original birth certificate. This bill provides that if the intended parents of a child who is born to a surrogate mother submit to the state registrar within 365 days after the date of birth of the child a copy of the surrogate parenting agreement, together with affidavits sworn to by the surrogate mother, her husband, if any, the intended father and the intended mother indicating that each affiant consents to the preparation and registration of a new birth certificate, the state registrar must prepare and register a new birth certificate showing, among other things, the given name and surname of the registrant as requested by the intended parents and the names and personal information of the intended parents.

For further information see the ***state and local*** fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 46.03 (7) (bm) of the statutes is amended to read:

46.03 **(7)** (bm) Maintain a file containing records of artificial inseminations under s. 891.40 (2) (a), egg donations under s. 891.40 (3) (a) and records of declarations of paternal interest under s. 48.025 and of statements acknowledging paternity under s. 69.15 (3) (b). The department shall release these records only upon an order of the court except that the department may use nonidentifying information concerning artificial inseminations and egg donations for the purpose of compiling statistics and except that records relating to declarations of paternal interest and statements acknowledging paternity shall be released to the department of workforce development or a county child support agency under s.

59.53 (5) without a court order upon the request of the department of workforce development or a county child support agency under s. 59.53 (5) pursuant to the program responsibilities under s. 49.22 or by any other person with a direct and tangible interest in the record.

SECTION 2. 48.02 (13) of the statutes is amended to read:

48.02 **(13)** "Parent" means either a biological parent, a husband who has consented to the artificial insemination of his wife under s. 891.40 (2) (a), a wife who gives birth as a result of an egg donation under s. 891.40 (3) (a), or a parent by adoption. If the child is a nonmarital child who is not adopted or whose parents do not subsequently intermarry under s. 767.60, "parent" includes a person acknowledged under s. 767.62 (1) or a substantially similar law of another state or adjudicated to be the biological father. "Parent" does not include any person whose parental rights have been terminated.

SECTION 3. 49.141 (1) (j) 2. of the statutes is amended to read:

49.141 **(1)** (j) 2. A person who has consented to the artificial insemination of his wife under s. 891.40 (2) (a) or a wife who gives birth as a result of an egg donation under s. 891.40 (3) (a).

SECTION 4. 69.14 (1) (g) of the statutes is renumbered 69.14 (1) (g) 1. and amended to read:

69.14 **(1)** (g) 1. ~~If~~ Subject to subd. 2., if the registrant of a birth certificate under this section is born as a result of artificial insemination under the requirements of s. 891.40 (2) (a), the husband of the woman shall be considered the father of the registrant on the birth certificate. If the registrant is born as a result of artificial insemination which does not satisfy the requirements of s. 891.40 (2) (a), the

information about the father of the registrant shall be omitted from the registrant's birth certificate.

SECTION 5. 69.14 (1) (g) 2. of the statutes is created to read:

69.14 **(1)** (g) 2. If the registrant of a birth certificate under this section is born as a result of artificial insemination under a surrogate parenting agreement, the birth certificate shall be completed as provided under par. (h).

SECTION 6. 69.14 (1) (h) of the statutes is renumbered 69.14 (1) (h) (intro.) and amended to read: indicating that each affiant consents to the preparation and registration of a new birth certificate

69.14 **(1)** (h) *Surrogate mother.* (intro.) If the registrant of a birth certificate under this section is born to a surrogate mother, information about the surrogate mother shall be entered on the birth certificate and the information about the father shall be omitted from the birth certificate. If ~~a court determines parental rights over the registrant, the clerk of court shall report the court's determination to the state registrar on a form prescribed by the state registrar, along with~~ the intended parents under a surrogate parenting agreement submit to the state registrar within 365 days after the date of birth of the child a copy of the surrogate parenting agreement and the fee required under s. 69.22. ~~Upon receipt of the report,~~ together with affidavits sworn to by the surrogate mother, her husband, if any, the intended mother and the intended father on a form prescribed by the state registrar, the state registrar shall prepare and register a new birth certificate for the registrant under s. 69.15 (6) and send a copy of the new certificate to the local registrar who filed the original certificate. Upon receipt of the copy, the local registrar shall destroy his or her copy of the replaced certificate and file the new certificate. The new birth certificate shall show all of the following:

SECTION 7. 69.14 (1) (h) 1. to 6. of the statutes are created to read:

69.14 **(1)** (h) 1. The given name and surname of the registrant as requested by the intended parents.

2. The date and place of birth as transcribed from the original certificate.

3. The names and personal information of the intended parents.

4. The hospital and time of birth as unknown.

5. The filing date on the original certificate.

6. Any other information necessary to complete the new certificate.

SECTION 8. 115.76 (12) of the statutes is amended to read:

115.76 **(12)** "Parent" means a biological parent; a husband who has consented to the artificial insemination of his wife under s. 891.40 (2) (a); a wife who gives birth as a result of an egg donation under s. 891.40 (3) (a); a male who is presumed to be the child's father under s. 891.41; a male who has been adjudicated the child's father under subch. VIII of ch. 48, under ss. 767.45 to 767.51, by final order or judgment of an Indian tribal court of competent jurisdiction or by final order or judgment of a court of competent jurisdiction in another state; an adoptive parent; a legal guardian; a person acting as a parent of a child; a person appointed as a sustaining parent under s. 48.428; or a person assigned as a surrogate parent under s. 115.792 (1) (a) 2. "Parent" does not include any person whose parental rights have been terminated; the state or a county or a child welfare agency if a child was made a ward of the state or a county or child welfare agency under ch. 880 or if a child has been placed in the legal custody or guardianship of the state or a county or a child welfare agency under ch. 48 or ch. 767; or an American Indian tribal agency if the child was made a ward of the agency or placed in the legal custody or guardianship of the agency.

SECTION 9. 146.34 (1) (f) of the statutes is amended to read:

146.34 **(1)** (f) "Parent" means a biological parent, a husband who has consented to the artificial insemination of his wife under s. 891.40 (2) (a), a wife who gives birth as a result of an egg donation under s. 891.40 (3) (a) or a parent by adoption. If the minor is a nonmarital child who is not adopted or whose parents do not subsequently intermarry under s. 767.60, "parent" includes a person adjudged in a judicial proceeding under ch. 48 to be the biological father of the minor. "Parent" does not include any person whose parental rights have been terminated.

SECTION 10. 767.47 (9) of the statutes is amended to read:

767.47 **(9)** Where a child is conceived by artificial insemination, the husband of the mother of the child at the time of the conception of the child is the natural father of the child, as provided in s. 891.40 (2) (a).

SECTION 11. 891.40 (title) of the statutes is amended to read:

891.40 (title) **Artificial insemination and egg donation.**

SECTION 12. 891.40 (1) of the statutes is renumbered 891.40 (2) (a) and amended to read:

891.40 **(2)** (a) If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband of the mother at the time of the conception of the child shall be the natural father of a child conceived, unless the wife is inseminated artificially under a surrogate parenting agreement, in which case the intended father under the surrogate parenting agreement shall be the natural father of a child conceived. The husband's consent must be in writing and signed by him and his wife. The physician shall certify their signatures and the date of the insemination, and shall file the husband's consent with the department of health and family services, where it shall be kept confidential and in a sealed file except as provided in s. 46.03

(7) (bm). However, the physician's failure to file the consent form does not affect the legal status of father and child. All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the ~~supervising~~ physician or elsewhere, may be inspected only upon an order of the court for good cause shown.

SECTION 13. 891.40 (1d) of the statutes is created to read:

891.40 **(1d)** DEFINITIONS. In this section and s. 891.403:

(a) "Intended father" means a man who is married to an intended mother and who intends to have the parental rights and responsibilities for a child born as a result of a surrogate parenting agreement.

(b) "Intended mother" means a woman who is married to an intended father and who intends to have the parental rights and responsibilities for a child born as a result of a surrogate parenting agreement.

(c) "Intended parents" mean an intended father and an intended mother who are married to each other and who enter into a surrogate parenting agreement.

(d) "Surrogate mother" means a woman who enters into a surrogate parenting agreement.

(e) "Surrogate parenting agreement" means an agreement under which a surrogate mother agrees to become impregnated through other than natural means and to relinquish to the intended parents the custody of the child born as a result of the pregnancy.

SECTION 14. 891.40 (2) (title) of the statutes is created to read:

891.40 **(2)** (title) ARTIFICIAL INSEMINATION.

SECTION 15. 891.40 (2) of the statutes is renumbered 891.40 (2) (b) and amended to read:

891.40 **(2)** (b) The donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is not the natural father of a child conceived, bears no liability for the support of the child and has no parental rights with regard to the child, unless the donor is the intended father and the woman is a surrogate mother, in which case the donor is the natural father of a child conceived, is liable for the support of the child and otherwise has all parental rights and responsibilities with regard to the child.

SECTION 16. 891.40 (3) of the statutes is created to read:

891.40 **(3)** EGG DONATION. (a) If, under the supervision of a licensed physician and with the consent of her husband, a wife is implanted with an egg donated by another woman, the wife shall be the natural mother of a child conceived, unless the wife is implanted under a surrogate parenting agreement, in which case the intended mother under the surrogate parenting agreement shall be the natural mother of a child conceived. The husband's consent must be in writing and signed by him and his wife. The physician shall certify their signatures and the date of the implantation, and shall file the husband's consent with the department of health and family services, where it shall be kept confidential and in a sealed file except as provided in s. 46.03 (7) (bm). However, the physician's failure to file the consent form does not affect the legal status of mother and child. All papers and records pertaining to the implantation, whether part of the permanent record of a court or of a file held by the supervising physician or elsewhere, may be inspected only upon an order of the court for good cause shown.

(b) The donor of an egg provided to a licensed physician for implantation in a woman other than the donor is not the natural mother of a child conceived, bears no liability for the support of the child and has no parental rights with regard to the

child, unless the donor is the intended mother and the woman is a surrogate mother in which case the donor is the natural mother of a child conceived, is liable for the support of the child and otherwise has all parental rights and responsibilities with regard to the child.

SECTION 17. 891.403 of the statutes is created to read:

891.403 Presumption of maternity based on giving birth; surrogate mother exception. (1) Subject to sub. (2), a woman is presumed to be the natural mother of a child if she gives birth to the child, notwithstanding that another woman may have donated the egg.

(2) If a child is born to a surrogate mother, the intended mother is presumed to be the natural mother of the child, notwithstanding that the surrogate mother gave birth to the child and regardless of whether the egg came from the intended mother, the surrogate mother or a donor who is not the intended mother or surrogate mother. The surrogate mother is not presumed to be the natural mother of the child, bears no liability for the support of the child and has no parental rights with regard to the child.

SECTION 18. 891.41 (1) (intro.) of the statutes is amended to read:

891.41 **(1)** (intro.) ~~A~~ Subject to sub. (1m), a man is presumed to be the natural father of a child if any of the following applies:

SECTION 19. 891.41 (1m) of the statutes is created to read:

891.41 **(1m)** The husband of a surrogate mother who bears a child under a surrogate parenting agreement is not presumed to be the natural father of the child, bears no liability for the support of the child and has no parental rights with regard to the child.

SECTION 20. 938.02 (13) of the statutes is amended to read:

938.02 **(13)** "Parent" means either a biological parent, a husband who has consented to the artificial insemination of his wife under s. 891.40 (2) (a), a wife who gives birth as a result of an egg donation under s. 891.40 (3) (a), or a parent by adoption. If the juvenile is a nonmarital child who is not adopted or whose parents do not subsequently intermarry under s. 767.60, "parent" includes a person acknowledged under s. 767.62 (1) or a substantially similar law of another state or adjudicated to be the biological father. "Parent" does not include any person whose parental rights have been terminated.

SECTION 21. Initial applicability.

(1) This act first applies to artificial insemination and egg implant procedures performed on the effective date of this subsection.

(END)

Smith, Irma

From: Henderson, Patrick
Sent: Friday, July 09, 1999 9:30 AM
To: Smith, Irma
Subject: Bill Jacket for LRB 2135/2

Dear Irma,

Please jacket LRB 2135/2 for Senator Jim Baumgart. The bill drafter was Gordon M. Malaise. Thank you for your attention to this matter. If you have any questions, please give me a call at 6-2056.

Patrick Henderson
Senator Baumgart's Office
9th Senate District