

Taking Account of ARTs in Determining Parenthood: A Troubling Dispute in California

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TABLE OF CONTENTS

I. INTRODUCTION	78
II. HISTORY OF <i>ROBERT V. SUSAN</i>	83
A. <i>Facts</i>	83
B. <i>Litigation History</i>	84
III. THE CALIFORNIA STATUTORY SCHEME FOR PATERNITY.....	85
A. <i>The Traditional Paternity Framework</i>	86
B. <i>Differences Between Assisted Reproduction and Coital Procreation</i>	92
C. <i>Paternity in Robert B. v. Susan B.</i>	94
IV. THE ROLE OF MARITAL STATUS.....	103
A. <i>The Marital Presumption</i>	103
B. <i>A Normative Preference for Two Parent Families?</i>	105
C. <i>Assisted Reproduction, Single Parent Families, and Parentage Law</i>	108
V. BEST INTERESTS OF THE CHILD.....	115
A. <i>The Dispute Over Best Interests in Johnson</i>	116
B. <i>Susan's Case and Best Interests</i>	120
C. <i>Other Relevant Factors in Robert v. Susan</i>	125
VI. CONCLUSION.....	127

* Professor, Boalt Hall School of Law, University of California at Berkeley. I am greatly indebted to my client, Susan, for her permission to discuss in this paper the painful and difficult issues she has faced over the past four years. The opportunity to work with Marc Gradstein (Gradstein and Gorman, Burlingame, CA) in representing Susan was a real privilege. Marc not only deepened my understanding of the practice and substance of parenthood law but did so with warmth and grace in the midst of difficult litigation. I very much appreciate as well the high quality work of my research assistants, Erica Brand and Katina Boosalis.

*[W]hat this court has decided to do is to apply a literal interpretation of both code sections. . . . There are no cases on point.*¹

I. INTRODUCTION

Assisted reproductive techniques (“ARTs”) have brought significant changes to the arrangements and choices some people make about procreation. Complex new technologies inevitably generate mistakes;² assisted reproduction is no exception.³ In resolving these disputes, legislatures have left in place and courts have continued to rely on family law statutes that were drafted before any of the new procreative techniques developed. Applying these older statutes to disputes involving ARTs is problematic. When courts face situations that have not arisen before, and indeed *could not* have arisen before, they cannot legislate, but they also cannot escape deciding whether and how to interpret and apply codes that are arguably anachronistic.

Judicial reasoning about new issues often proceeds by analogy, but it is critical that the analogy chosen be apt both factually and in terms of underlying policy. In 1990, I argued that the New Jersey Supreme Court’s choice of analogy in *Baby M*,⁴ the first high visibility ARTs dispute, was seriously flawed.⁵ *Baby M* involved a

1. Reporter’s Transcript on Appeal at 43, *Robert B. v. Susan B.*, 135 Cal. Rptr. 2d 785 (Cal. Ct. App. 2003) (No. 1-02-CP-010574).

2. See generally CHARLES PERROW, *NORMAL ACCIDENTS: LIVING WITH HIGH-RISK TECHNOLOGIES* (Princeton University Press 1999) (1984).

3. See generally Leslie Bender, *Genes, Parents, and Assisted Reproductive Technologies: ARTs, Mistakes, Sex, Race, & Law*, 12 COLUM. J. GENDER & L. 1 (2003). Professor Bender’s intriguing article illumines that however unusual their facts, ARTs mistakes are not simply idiosyncratic, but constitute a category in their own right. *Id.* at 4–5. Bender criticizes courts’ resolution of ARTs mistake cases both for genetic essentialism and for gender and race bias. *Id.* at 4. I make no attempt here at any definitive statement about the role of genetics in parental status. I do believe, however, that Bender under-appreciates the degree of convergence and reciprocal entanglement between genetic connection and intentions. If that convergence is ignored, it is more difficult to identify factors that do and should influence parentage decisions.

4. *In re Baby M*, 537 A.2d 1227, 1234 (N.J. 1988).

5. Marjorie M. Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 372–98 (1990) (arguing that the *Baby M* court inappropriately assessed the surrogacy agreement through a pre-modern lens of

dispute over the enforcement of a surrogacy contract between the surrogate mother and the intending parents.⁶ In refusing to enforce the parties' contract, the *Baby M* court held that the facts at hand were "the same as if Mr. Stern and Mrs. Whitehead had had the child out of wedlock, intended or unintended."⁷ The court analogized to family law frameworks of unwed parents, adoption and baby selling to settle the dispute. These analogies were inapposite then, and, for reasons I explain below, they remain so today. Even where legislatures have refused to modernize relevant family statutes, courts that treat ARTs disputes the same as they treat disputes arising from coital relations have not sufficiently reflected on the very significant differences between traditional and assisted procreation. This approach yields results that are deeply arbitrary and often perverse.

A few states have adopted new statutes that specifically speak to ARTs issues.⁸ Also, the National Conference of Commissioners on Uniform State Laws proposed first the Status of Children of Assisted Conception Act,⁹ and then a significantly revised Uniform Parentage Act,¹⁰ both of which seek to address problems emerging from ARTs disputes. While those statutory efforts improve the resolution of certain kinds of problems,¹¹ they do not provide a template that is

conventional procreational and family patterns).

6. *Baby M*, 537 A.2d at 1235–37. Mary Beth Whitehead agreed to bear a child for William and Elizabeth Stern. *Id.* at 1235. Ms. Whitehead was artificially inseminated with Mr. Stern's sperm. *Id.* When Ms. Whitehead changed her mind about turning over the child to the Sterns, they sued to enforce the ARTs agreement. *Id.* at 1237.

7. *Id.* at 1238 (emphasis added).

8. Four states, Delaware, Texas, Washington, and Wyoming, have adopted the Uniform Parentage Act 2002 amendments. UNIF. PARENTAGE ACT General Statutory Note (amended 2002), 9B U.L.A. 6–7 (Supp. 2005). Two states, North Dakota and Virginia, adopted the Uniform Status of Children of Assisted Conception Act of 1988. UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT General Statutory Note (1988), 9C U.L.A. 366 (2001).

9. UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT (1988), 9C U.L.A. 367 (2001), *superseded by* UNIF. PARENTAGE ACT §§ 701–809 (amended 2002), 9B U.L.A. 6, 39–50 (Supp. 2005). Articles 7 and 8 of the Uniform Parentage Act, as amended in 2002, replace the Uniform Status of Children of Assisted Conception Act as the official recommendation of the National Conference of Commissioners on Uniform State Laws. *Id.*

10. UNIF. PARENTAGE ACT (amended 2002), 9B U.L.A. 4 (Supp. 2005).

11. The 2002 revisions to the UPa were written in part to address disputes arising out of assisted reproductive technique agreements. UNIF. PARENTAGE ACT arts. 7, 8 (amended 2002), 9B U.L.A. 39–50 (Supp. 2005) (arranging parental status based on ARTs and providing for enforcement of court-validated gestational agreements). The prefatory comment to Article 8 of the Act states that because gestational agreements are controversial, a child born pursuant to a

fully adequate to the constantly evolving challenges presented by ARTs.

In grappling with those challenges, a number of courts have adopted an intent-based approach when confronting ARTs disputes.¹² I have argued that intentions are at the heart of what makes us human.¹³ Segmentation of the physical processes of reproduction allows and indeed requires choices that are far more intentional than those made in previous eras. When one of the parties to an ARTs agreement wants to change his or her mind,¹⁴ intentions and expectations that are deliberate, planned and bargained for should be enforced.¹⁵ When I urged this approach, I did not foresee how *unplanned* events within the generally planned ARTs environment could create daunting disputes of a different type. Disputes arising from a mistake by a third party professional thrust individuals with

gestational agreement is entitled to have his or her status clarified. UNIF. PARENTAGE ACT art. 8 (amended 2002), 9B U.L.A. 44–45 (Supp. 2005). However, the Act expressly allows States not ready to deal with that issue to omit this part of the UPA without doing damage to the other provisions. *Id.* Even if the new provisions were adopted, they would not directly address the issues raised by the illustrative case discussed in this paper.

12. Other courts have taken different approaches than that of the New Jersey court. Several courts have chosen to enforce ARTs contracts. *See, e.g.,* *Kass v. Kass*, 696 N.E.2d 174, 180 (N.Y. 1998) (stating that an agreement between parties using ARTs “should generally be presumed valid and binding, and [should be] enforced in any dispute between [the parties]”). Other courts have suggested that contracts would be the preferred way to resolve ARTs disputes. *See, e.g.,* *Davis v. Davis*, 842 S.W.2d 588, 597 (Tenn. 1992) (“[A]greement[s] regarding disposition of any untransferred pre-embryos . . . should be presumed valid and should be enforced.”). *But see* *A.Z. v. B.Z.*, 725 N.E.2d 1051, 1056–58 (Mass. 2000) (upholding order enjoining wife’s use of frozen preembryos on the basis of public policy and of the husband’s interest in avoiding having children, despite provisions in the couple’s initial consent form); *J.B. v. M.B.*, 783 A.2d 707, 719–20 (N.J. 2001) (refusing to enforce a contract involving IVF because parties’ intent was not clear and because the interests of both parties and the possibility of their reconsidering earlier decisions should first be weighed).

13. *See* JOSEPH FLETCHER, *Humanness, in* HUMANHOOD: ESSAYS IN BIOMEDICAL ETHICS 1, 12–16 (1979); *see also* Shultz, *supra* note 5, at 321–72. In his essay, Fletcher, a bioethicist, identified criteria relevant to determining humanness or personhood, including possessing self-awareness, a sense of time, and a sense of futurity (purposiveness). FLETCHER, *supra*, at 12–16.

14. One can undertake IVF procedures, recruit a gamete donor, or perform AI without having intentions.

15. Shultz, *supra* note 5, at 303. Various courts have quoted this language to support enforcement of ARTs contracts. *See, e.g.,* *Johnson v. Calvert*, 851 P.2d 776, 783 (Cal. 1993) (upholding surrogacy agreement and declaring intended genetic mother, not surrogate mother, as legal mother); *Dunkin v. Boskey*, 98 Cal. Rptr. 2d 44, 57 (Cal. Ct. App. 2000) (enforcing an agreement by which plaintiff was granted paternity rights to a child conceived by artificial insemination).

no previous relationship and no mutually bargained for expectations into conflict with one another over parental status. This is the problem I address here.

The number of ARTs lawsuits California's courts have faced suggests that the state's citizens use assisted reproduction rather frequently. Known for being on the cutting edge of social and cultural as well as technological development, California provides an apt context for analyzing the distinctive legal issues that characterize assisted reproduction. A recent California case, *Robert B. v. Susan B.*¹⁶ ("Susan's case" or "*Robert v. Susan*"), provides a heart-wrenching illustration of an ARTs mistake that is not amenable to an intent-based approach to resolution. As was true in the *Baby M* decision, the courts deciding Susan's case applied statutes that were not drafted to govern the particular factual issues confronting them. Judges fell back on inapposite analogies to coital reproduction, and, in so doing, they imposed poorly reasoned and pragmatically damaging results. Both the trial and appellate courts claimed that they were following the plain meaning of the statutes, and were simply declining to consider policy or fill gaps left by the legislature.¹⁷ Certainly, legislatures could and should address the disputes that are arising more frequently from the growing use of ARTs. But the prospect of rapid or thorough legislative resolution seems slim, given the seeming inability of many legislatures to address contested social issues. In the meantime, courts should understand that interpreting and applying statutes inherently involves discretion. Literal reading of outdated statutes and reliance on unpersuasive analogies are consequential judicial choices.

Before discussing the issues illustrated by Susan's case, I should confess that my client lost, so perhaps this paper is a species of

16. *Robert B. v. Susan B.*, 135 Cal. Rptr. 2d 785 (Cal. Ct. App. 2003), *cert. denied*, *Robert B. v. Susan B.*, No. S117664, 2003 Cal. LEXIS 6671 (Cal. Sept. 10, 2003).

17. For example, the Court of Appeal opinion comments that Susan's "appeal to the 'clear social policy supporting single parenthood' would more appropriately be directed to the Legislature." *Susan B.*, 135 Cal. Rptr. 2d at 787. The trial judge noted that "[w]hat this court has decided to do is to apply a literal interpretation of both code sections." Reporter's Transcript on Appeal, *supra* note 1, at 43. For a case making a similar plea for legislative direction, see *Prato-Morrison v. Doe*, 126 Cal. Rptr. 2d 509, 516 (Cal. Ct. App. 2002).

academic sour grapes.¹⁸ However, gauging by the final appellate opinion,¹⁹ we lost for reasons that are unpersuasive, at least to me. If better reasons had been offered for the outcome, I would still be dissatisfied, but less globally so. Reasonable people could differ about the optimal outcome of *Robert v. Susan*, but the opinions and rulings in the case provide another distressing instance of courts' failure to recognize and adapt to the differences between ARTs situations and traditional parentage disputes.

I offer one other prefatory observation before diving into the details of this difficult case. People sometimes ask why so much attention is paid to a problem that affects only a small number of people. My answer is that these cases force us to think about some of our most fundamental values. What makes a family? Who is a parent? In determining who to recognize as a legal parent, we reveal our attitudes about the body, biology and genetics, about psychology and environment, about human connection and responsibility, about the role of intentions and plans in our lives and in our law.

Part II provides a sketch of the facts and the litigation history of *Robert v. Susan*. Part III explores California's statutory scheme for paternity and evaluates its application in ARTs disputes generally and in Susan's case in particular. Part IV assesses the relevance of marital status to resolution of parentage disputes, especially in ARTs conflicts like the one between Robert and Susan. Part V examines the interests of the child and considers whether a different or broader standard should be applied to resolve parentage problems in the context of ARTs. Part VI summarizes and concludes.

18. After initially serving as a consultant to Marc Gradstein of Gradstein and Gorman (who represented Susan throughout the dispute over parental status), I eventually became co-counsel, working on all briefs and arguing the appeal in California's Sixth District Court of Appeal.

19. The *Susan B.* opinion did not reflect the oral argument. Questions raised by the panel at argument covered even wider ground than the broad briefing and argument offered by the parties. By contrast, the opinion was narrow almost to the point of being formulaic. The thinness of the analysis is more suggestive of a desire not to be reversed than of meaningful engagement with the facts and issues of this complex case of first impression.

II. HISTORY OF *ROBERT V. SUSAN*²⁰A. *Facts*

My client, Susan, is a single woman who tried repeatedly but unsuccessfully to conceive a child through *in vitro* fertilization (IVF) using her own eggs and her then-fiance's sperm. After careful consideration of her options, Susan decided to make a final IVF attempt, this time using not only donor sperm but also donor ova. She purchased genetic material from donors who sought no parental rights, and who specifically intended to donate to someone who would gestate the embryos and rear the resulting child. This last IVF cycle created a number of high quality embryos, which her fertility doctor was to transfer to her womb in June of 2000. To Susan's great joy, she became pregnant, and in early 2001 she gave birth to her son, Daniel. Susan continued at her full-time job and Daniel enjoyed daycare during the week. Together, they were a happy and healthy family unit.

When Daniel was about ten months old, an inspector from the California Medical Board contacted Susan, who then called her fertility doctor.²¹ A few days after Christmas, the doctor came to her home to tell her that a mistake had been made. The embryo from which Daniel grew was an embryo from a married couple in treatment at the same fertility practice during the same time period as Susan. Susan later learned that the fertility center had known about the mistake in a matter of minutes after it was made, but did not tell either Susan or the couple until they were forced to do so by a whistleblower, a former employee of the practice, who had notified

20. The following information is derived from conversation with my client, Susan B., and co-counsel Marc Gradstein. Except where otherwise noted, the facts can be found in the following sources: the Sixth District Court of Appeal decision, *Robert B. v. Susan B.*, 135 Cal. Rptr. 2d 785 (Cal. Ct. App. 2003); Appellant's Opening Brief in the Sixth District Court of Appeal, *Robert B. v. Susan B.*, 135 Cal. Rptr. 2d 785 (Cal. Ct. App. 2003) (No. 1-02-CP-010574); Respondent's Opening Brief, *Robert B. v. Susan B.*, 135 Cal. Rptr. 2d (Cal. Ct. App. 2003) (No. 1-02-CP-010574).

21. See Harriet Chiang, *Mom Awarded \$1 Million Over Embryo Mix-Up*, S.F. CHRON., Aug. 4, 2004, at B3.

the state medical board about the error, triggering the board's investigation.²²

As Susan remembers it, her doctor told her that the couple were "nice folks," that they wanted to meet Susan and to see Daniel, and that he thought things could be worked out in an informal meeting. Reluctantly, Susan agreed to the doctor's suggestion that he give her name to the couple. She invited them to her home in early 2002. When Robert and his wife, Denise, came to Susan's home, they brought with them the daughter they had borne as a result of treatment on the same day at the same fertility practice.²³ Early in the conversation, Susan was stunned and outraged when she heard what she perceived to be a non-negotiable demand. The couple seemed to view Daniel as *their* son, a genetic twin of their youngest child. They wanted custody of Daniel and insisted that Susan turn him over to them immediately. Susan refused. Two weeks later, Robert sued for paternity and full custody, requesting that the court order immediate genetic testing that he believed would show that Daniel was his son. Denise also filed an action asking to be declared Daniel's mother. At this point, Susan hired a lawyer.

B. Litigation History

The trial court began hearing the paternity action in the spring of 2002, and, after receiving briefing on the issue, took up the request for genetic testing. After several hearings, the judge ordered the testing,²⁴ issuing a stay to allow Susan's lawyers to file for a Writ of Prohibition. Both the District Court of Appeal and the California Supreme Court refused to grant review, and genetic testing went forward in the late spring of 2002.

To no one's surprise, DNA tests showed that Robert was Daniel's genetic father and that Robert and Denise's child was a genetically

22. *Id.* The nightmare of continuing litigation and the continuing struggle over Daniel's custody forced Susan to mortgage her home and also cost her her job as an interior decorator because she missed so much time at work. *Id.*

23. The child was born to Denise from an embryo transfer the same day that Susan had been treated.

24. The judge based her order on California Family Code Sections 7630(c) and 7551. For the text of these provisions, see CAL. FAM. CODE § 7630(c) (West 2004); *Id.* § 7551.

related sibling. In preparation for their treatment, Robert and Denise had also purchased ova, so neither Daniel nor the other child was genetically related to Denise. Shortly after the genetic test report came back, the trial court, after further briefing and argument, declared that Robert was Daniel's father and that Susan, the gestator, was Daniel's mother. The judge eventually also held that Denise lacked standing to pursue her claim to be named Daniel's mother. Susan appealed the ruling of Robert's paternity and Denise appealed her dismissal from the case.

After extensive briefing, the Sixth District of the California Court of Appeal heard argument in May of 2002. The argument covered a wide range of topics and lasted several hours. In June, the Court issued a brief opinion affirming all of the trial judge's rulings. The opinion did not reflect the depth of the argument. The holding on Robert's paternity was affirmed in four short paragraphs on the ground that California Family Code Section 7613(b), the section on which Susan based much of her appeal, did not literally apply to the dispute. Spending more than twice as much space on Denise's claim, which had been treated at argument as almost entirely implausible, the Court concluded that because Denise had neither a genetic nor a gestational relationship to Daniel, she was not "an interested person" under Family Code Section 7650, and therefore lacked standing to seek a declaration of parental relationship. Susan petitioned for review by the California Supreme Court, but review was denied in the summer of 2003.

III. THE CALIFORNIA STATUTORY SCHEME FOR PATERNITY

Important real world events preceded the legal struggle in Susan's case. Particularly crucial were the mistaken embryo transfer itself, the professionals' decision not to disclose the error at the time it occurred,²⁵ and, after the error was reported months later to the state

25. In a license revocation hearing, the doctor in Susan's case "acknowledged that he opted not to inform his patients because he thought silence was 'the best thing for them.' He also feared 'a violent battle' between [Susan] and the couple over the rights to the implanted embryos." Mary Anne Ostrom, *Doctor Recounts Embryo-Mistake Drama*, SAN JOSE MERCURY NEWS, Jan. 13, 2005, at 15A. The Medical Board of California revoked the doctor's license on March 29, 2005, after the presiding Administrative Law Judge stated "nothing short of

medical board, Susan's decision at her physician's urging to allow the doctor to give her name to Robert and his wife.²⁶ Had any one of these events occurred differently, the dispute might never have arisen. However, once the events unfolded as they did, the first critical legal event in Robert's quest for paternal rights was the trial court's order for genetic testing.

A. *The Traditional Paternity Framework*

Like many other states, California adopted much of its basic statutory scheme for determining parental status from the 1973 Uniform Parentage Act.²⁷ California maintains a "conclusive" marital presumption of paternity and specified the grounds for rebutting that presumption.²⁸ Various minor changes were made to the statutory

revocation will restore to the public confidence that this type of behavior will not be tolerated by the medical profession." Mary Anne Ostrom, *Board Revokes Doctor's License*, SAN JOSE MERCURY NEWS, Mar. 30, 2005, at B1. The doctor appealed the Medical Board's decision to revoke his license.

26. In explaining her willingness to cooperate with Dr. Katz' suggestion, Susan described the gratitude and trust she felt at the time toward the doctor who had helped her to achieve her much-desired pregnancy. Had she refused, the issue would have shifted to whether the doctor could be ordered to disclose Susan's identity to Robert. This is a complex and interesting question in its own right, but given a patient's right to confidentiality, it is quite possible that no such duty would have been imposed. That this entire struggle might have been avoided had her "trusted" doctor not taken it upon himself to "advise" Susan, incorrectly as it turned out, is tragic. The doctor may simply have been irrationally optimistic, but his intentions seem more likely to have been directed to self- rather than patient-protection. Dr. Katz should have suggested that Susan retain counsel.

27. UNIF. PARENTAGE ACT (1973), 9B U.L.A. 377 (2001), codified at CAL. FAM. CODE § 7600 (West 2004).

28. CAL. FAM. CODE § 7540 (West 2004). The quotation marks around "conclusive" reflect the fact that the presumption applies *provided* the husband is not "impotent or sterile," and except that under section 7541 a husband, a child by their guardian ad litem, or a presumed father under section 7611 may within two years of the child's birth prove his paternity by means of blood tests. *Id.*; *Id.* § 7541. This opportunity for presumed fathers was created by the California legislature in apparent reaction to *Michael H. v. Gerald D.*, 491 U.S. 110 (1989). In *Michael H.*, the court held that the husband was conclusively presumed to be the legal father of the child born during marriage despite definitive proof of the genetic paternity of another man. *Id.*; see also Anthony Miller, *Baseline, Bright-line, Best Interests: A Pragmatic Approach for California to Provide Certainty in Determining Parentage*, 34 MCGEORGE L. REV. 637, 687–88 (2003) (citing Mindy S. Halpern, Comment, *Father Knows Best—But Which Father? California's Presumption of Legitimacy Loses Its Conclusiveness: Michael H. v. Gerald D. and Its Aftermath*, 25 LOY. L.A. L. REV. 275, 277 (1991)) (noting the close proximity of the modification of section 7541(b) to the *Michael H.* decision as evidence that the change was made in response to the decision).

framework in the 1990s. At that time, the conclusive marital presumption was narrowed slightly,²⁹ extensive provision was made to seek and give effect to voluntary declarations of paternity,³⁰ and terminology was updated to substitute the language of “genetic” tests for “blood” tests in some, but not all, of the Code’s parentage provisions.³¹ Nothing has been done, however, to address the changes and choices made possible by modern techniques of assisted reproduction.³² This failure to adapt to dramatically different circumstances of procreation has led to legal decisions that are fundamentally flawed.

Under California’s statutes, paternity revolves around three overlapping axes: a man’s legal or social relationship to the birth mother; his biological fatherhood through sexual relations with the

29. Section 7541(b) now allows a man who is a *presumed father* under section 7611 to prove that he, rather than the husband, is the child’s father. *See, e.g., In re Jesusa V.*, 85 P.3d 2, 21 (Cal. 2004) (noting that the 1990 amendment to California Family Code section 7541 was intended to provide unwed biological fathers with the opportunity to establish paternity despite the conclusive presumption); *Craig L. v. Sandy S.*, 22 Cal. Rptr. 3d 606, 607–08 (Cal. Ct. App. 2004) (holding that a biological father who was permitted by the mother and the mother’s husband to establish a relationship with his child qualified as a presumed father and therefore could initiate paternity proceedings).

30. CAL. FAM. CODE §§ 7571–77 (West 2004 & Supp. 2005).

31. California Family Code sections 7540 and 7541 retain the language of “blood” tests. *Id.* §§ 7540, 7541. However, California Family Code sections 7551–58 instead authorize “genetic” tests. *Id.* §§ 7551–58. The code sets a paternity index score of 100 or more as decisive for proof of parental connection. *Id.* § 7555. The number score of the paternity index is a “likelihood ratio,” showing how many times more likely it is that a union of the mother and putative father would produce an offspring with the child’s observed genetic markers than would a union of the mother and a set of paired genes picked at random from men of the alleged father’s race. *County of El Dorado v. Misura*, 38 Cal. Rptr. 2d 908, 911 (Cal. Ct. App. 1995) (citing *Plemel v. Walter*, 735 P.2d 1209, 1213 (Or. 1987)); David H. Kaye, *Plemel as a Primer on Proving Paternity*, 24 WILLAMETTE L. REV. 867, 877 (1988)). Robert’s paternity index score was 5300. Reporter’s Transcript of Proceedings at 4, *Robert B. v. Susan B.*, 135 Cal. Rptr. 2d 785 (2003) (No. 1-02-CP-010574). *But see* Ronald J. Richards, *DNA Fingerprinting and Paternity Testing*, 22 U.C. DAVIS L. REV. 609, 613 (1989) (advocating that California allow DNA fingerprinting to prove paternity rather than relying on the current genetic marker tests method).

32. As Justice Kennard noted, “[t]he only California statute defining parental rights is the Uniform Parentage Act. . . . The UPA was never intended by the Legislature to govern the issues arising from new reproductive technologies such as gestational surrogacy.” *Johnson v. Calvert*, 5 Cal. 4th 84, 112 (Cal. 1993) (Kennard, J., dissenting) (citations omitted). However, she also notes that “the UPA is on its face broadly applicable, and it is in any event the only statutory guidance this court has in resolving this case.” *Id.* The sole provision in the 1973 Uniform Parentage Act dealing with ARTs is the section governing artificial insemination. UNIF. PARENTAGE ACT § 5 (1973), 9B U.L.A. 407 (2001).

mother; or particular voluntary actions he takes (either executing a statutorily outlined voluntary declaration of paternity³³ or “openly holding out the child” as his own).³⁴ One complicated set of presumptions regarding paternity rests on a man’s marital or cohabiting relationship with the child’s mother.³⁵ Other sections provide for biological testing to identify the man whose sexual relations with the mother led to the pregnancy.³⁶ Voluntary acknowledgement of paternity will usually result from one of the other two foundations—either a social or a sexual connection to the mother.

The California framework reveals that *legal* parenthood is a societal instrument rather than simply a confirmation of biological fact. Both adoption and marital presumptions of fatherhood sometimes place other factors ahead of biology. The marital presumption, which makes a husband the legal father of any children born to his wife during a marriage, was enacted when biological proof of paternity was hard to come by and the inference of a husband’s actual paternity seemed a reasonable one. Societal norms about property, patriarchy and morality also encouraged this assignment of paternity, as did the desire to supply both economic support and legitimacy to as many children as possible. In *Michael H. v. Gerald D.*,³⁷ the United States Supreme Court upheld the marital presumption against constitutional challenge by the biological father, emphasizing the normative importance of the unitary family even in the face of genetic proof that another man was the child’s biological

33. CAL. FAM. CODE §§ 7571–77 (West 2004 & Supp. 2005). The Code instructs hospitals and birth centers to try to get such a declaration and even offers them a monetary incentive for doing so. *Id.* § 7571 (c), (g).

34. *Id.* § 7611(d).

35. *Id.* §§ 7540–41, 7611. These code sections include attempts to marry or prior marriage.

36. Sexual relations are not explicitly mentioned in the statute, but at the time these provisions were enacted, blood or genetic tests to determine paternity necessarily required sexual contact except where artificial insemination, governed by California Family Code section 7613, had occurred.

37. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (upholding the constitutionality of the conclusive presumption that where a mother’s husband affirms his role as the child’s father, he is the legal father of her child, even if the child was conceived with another man, and despite the other man having had an active and extended relationship with the child and having provided economic support).

father.³⁸ *Michael H.* demonstrates that despite its declining statistical prevalence,³⁹ the nuclear family continues to exert substantial legal influence. The California legislature somewhat reduced the effect of *Michael H.* by giving certain non-marital biological fathers a limited right to challenge a husband's paternity,⁴⁰ and case law has since held that the presumption must be evaluated on a case-by-case basis.⁴¹ Despite these adjustments, *Michael H.* retains powerful symbolic and practical impact.

California's marital presumption places paternity rights and obligations on many men who *are* their children's biological fathers, but it has the effect of treating some men as fathers who *are not* the child's biological progenitor. Statutory exceptions barring application of the presumption when a husband is sterile or impotent evidence the code's ambivalence between reinforcing the nuclear family and protecting children on the one hand and assuring that the presumption rests on biological fact on the other. Husbands need not accept the rights and obligations of fatherhood if they doubt their biological connection. Husbands are on the short list of those empowered to challenge paternity when it is based on the marital presumption, albeit they must do so quickly.⁴² Two years after the child's birth, this

38. *Id.* at 125–27. See generally Miller, *supra* note 28, at 645–49 (tracing the intertwined roles of conventional morality and probabilistic inference in supporting the marital presumption).

39. Between 1970 and 1995, the number of two-parent families remained relatively stable at approximately twenty-six million, but their proportion of all family groups with children declined from 87% to 69%. JASON FIELDS, U.S. CENSUS BUREAU, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: 2003, at 7 (2004), <http://www.census.gov/prod/2004pubs/p20-553.pdf>. Since 1996, the proportion of two-parent families has remained fairly level at about 68%. *Id.*

40. CAL. FAM. CODE § 7541(b) (West Supp. 2005).

41. See *Dawn D. v. Superior Court*, 952 P.2d 1139, 1142 (Cal. 1998).

As our discussions have indicated, the reasonableness of a statutory limitation on the right to offer proof of parentage depends on circumstances prevailing in each particular case. Accordingly, a court, before receiving evidence thereof, must in each instance make a preliminary determination, as by offer of proof, that due process concepts would be offended if the particular claimant to parentage were denied an opportunity to prove his claim.”

Id. (quoting *In Re Lisa R.*, 532 P.2d 123, 133 n.17 (Cal. 1975)).

42. Others who can rebut the presumption include the presumed father, the child through or by his or her guardian ad litem, and the mother if the child's biological father has filed an affidavit acknowledging paternity. CAL. FAM. CODE § 7541(b)-(c) (West Supp. 2005). The

limited opportunity for biology to trump marriage expires and societal interests once again take priority.⁴³

Paternity statutes recognize the importance of marriage and relationship status, but genetics has always been important to family ties, both in life and in law. The popularity of the cliché that blood is thicker than water speaks volumes about tradition and popular sentiment.⁴⁴ In the years since California enacted the Uniform Parentage Act, genetics has, if anything, come to be seen as even more important. Half a century ago, both expert and lay understandings of child development emphasized the centrality of nurture over nature. Revulsion both about Nazi eugenics and about its milder forms practiced in the United States intensified the attachment to psycho-social theories of parenting.⁴⁵ Today, however, the pendulum has swung quite substantially toward the nature end of the continuum. The sequencing of the human genome and other scientific advances now fuel a growing sense that genetics is crucial to *who one is*—medically, intellectually, and in terms of personality and temperament.⁴⁶ If biological connection played so important a role

presumption may only be rebutted for two years after the child's birth. *Id.* Presumably, husbands challenge paternity when there is familial discord, or when it is more important to them to divest themselves of support obligations than to conform to conventional propriety.

43. *Id.*

44. Interesting examples of the common attitude are found in recent news reports about men who “discovered” through DNA tests that “their” children were not actually “theirs” and tried to walk away from parenthood and marriage as a result. *See, e.g.,* Martin Kasindorf, *Men Wage Battle on ‘Paternity Fraud,’* USA TODAY, Dec. 3, 2002, at 3A; Richard Willing, *DNA and Daddy,* USA TODAY, July 29, 1999, at 1A. By contrast, once people have cared for a child, they often resist any notion that the child is not “theirs.” A particularly poignant example occurred in *Perry-Rogers v. Fasano*, in which parents learned during pregnancy that one of the two embryos Ms. Fasano carried was not genetically “theirs.” *Perry-Rogers v. Fasano*, 715 N.Y.S.2d 19, 22 (N.Y. App. Div. 2000). The Fasanos were committed to this baby and only reluctantly surrendered the child to its genetic parents after obtaining an agreement that they could continue to see the child. *Id.* They went to court seeking visitation after the child's parents abrogated the agreement as having been procured through duress. *Id.* at 22–23.

45. TROY DUSTER, *BACKDOOR TO EUGENICS* xiv, 114 (2003).

46. Over the past decade and a half, the human genome has been mapped and the pace of discoveries about the role of genetics in development and disease has been dramatic. Because our current views about the decisiveness of genetics are rooted in this unusually rapid scientific advance, those attitudes may yet prove to have been overly exuberant. But it would be foolish to deny that the direction and magnitude of the cultural flow toward the nature end of the continuum will influence how we weigh parent-child relations today as compared to twenty years ago when William Stern and Mary Beth Whitehead entered into the agreement that gave rise to the *Baby M* decision. *In re Baby M*, 537 A.2d 1227 (N.J. 1988); *see also supra* notes 4–7

even in the more nurture-centric era when California adopted most of its parentage statutes, the continued emphasis on genetics today is not surprising.

When no marital or quasi-marital presumption applies, the policy underlying paternity provisions is clear, although actual accomplishment of the goal may be considerably more difficult. Biology unquestionably dominates the quest to name a father. Although the legislature declared its desire to assure that every child has a father,⁴⁷ the primary underlying purpose of such assurance is evident in the list of those entitled to bring paternity actions. When the woman who gave birth is not married to the father, she, a representative of the child, or, importantly, the Department of Child Support Services⁴⁸ may initiate such action, usually in order to impose an economic support obligation.⁴⁹ To be sure, men who father a child out of wedlock sometimes do affirmatively seek the status of legal father for reasons of genuine affection and interest in rearing their child or out of attachment to the child's mother. But where a child's parents were not married to each other, the focus is on determining which sexual partner's sperm actually brought about conception so that he can be ordered to pay child support.

Preoccupation with biological fatherhood, tempered mainly by reinforcement of legal marriage and acceptance of paternal volunteers, is not surprising in the statutes drafted to govern the consequences of coital reproduction. The scenarios that animate this statutory scheme, however, differ significantly from circumstances that prevail where parties use techniques of collaborative

and accompanying text.

47. California Family Code section 7570 introduces the provisions for voluntary declaration of paternity, but its sweeping statements are neither limited to that route to establishing fatherhood, nor do they mince words about the underlying purposes of this legislative declaration of policy. CAL. FAM. CODE § 7570 (West 2004).

48. *Id.* §§ 7630, 7634 (West 2004 & Supp. 2005).

49. In 2003, 1.5 million paternities were established, 1.2 million new child support orders were entered, and \$21.2 billion in child support payments were collected. U.S. Dept. of Health & Human Serv., Office of Child Support Enforcement, Child Support Enforcement FY 2003 Preliminary Data Report (2004), http://www.acf.hhs.gov/programs/cse/pubs/2004/reports/preliminary_data/. Preoccupation with economic support has even led the legislature to recognize written promises to pay child support even if those promises lack consideration and thus would otherwise be unenforceable under contract law. CAL. FAM. CODE § 7614 (West 2004).

reproduction. Those differences ought not to be overlooked through rote application of statutes that are obsolete for these purposes.

B. Differences Between Assisted Reproduction and Coital Procreation

Assisted reproduction is different from coital reproduction. Those differences are magnified by other developments, both social and scientific. The most important differences stem from the relatively recent ability to separate various stages of reproduction. Promoting biological connection to progeny remains an important motivator for people's procreative behavior, but assisted reproductive techniques rely precisely on their ability to replace a particular biological or genetic input, or to substitute a different collaborating person, in order to achieve a particular procreative goal. Assistive techniques can allow an infertile couple or an individual without a heterosexual partner to reproduce or, together with diagnostic genetics, can help to prevent the birth of a child with a genetic condition that derives from a parent's status as a carrier.

The new possibilities created by reproductive segmentation create new legal problems. For example, the traditionally easy task of determining biological motherhood can now be more problematic. In traditional coital conception, gestation and gametes were necessarily provided by the same woman, but because assistive techniques unbundle roles within the procreative process, they allow one woman to gestate and a different woman to contribute the ovum. Where two women are biologically significant in the formation of a child, value judgments about what should matter in legal motherhood are required.⁵⁰

Conversely, to the extent that a major and long-standing goal of paternity law has been to assess biological connections, the inferences and presumptions that have organized much of this field of law are far less necessary. With the advent of DNA testing, biological paternity can now be conclusively established or ruled out if potential candidates can be identified and tested. The complex statutory

50. *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993); Shultz, *supra* note 5, at 330–33.

presumptions about paternity now contribute mainly by way of expediting or reducing the cost of relatively routine proceedings.

Segmentation in reproduction also allows the decoupling of sexual relations from procreation. Although reliable abortion and birth control are fairly new developments in human history, we have become accustomed to the fact that they allow motivated and financially capable individuals to engage in sexual relations with little or no risk of unwanted birth. Less familiar is the newer reality that assistive techniques make procreation possible through collaboration with individuals with whom one has had no sexual or intimate relationship. This unbundling of roles opens up a broader array of choices and family forms than previously existed. In particular, new technological and interpersonal means of achieving procreation make parenthood an option for more individuals in a wider range of intimate relationships, or in no relationship at all. These changes expand the range of biological and medical, as well as social and personal, choice. Because they are used by various categories of people (married couples, non-traditional aspirants to parenthood, diverse individuals who need reproductive assistance to achieve particular health or genetic outcomes), collaborative reproductive techniques enjoy wider societal acceptance than if they were linked to a single type of user.

Other changes in society and values also affect the reproductive context. Increased numbers of births outside the bounds of marriage, the prevalence of divorce and of step- or blended families, and rising numbers of single-parent households have diluted the moral salience and statistical frequency of life-long marriage and the conventional nuclear family.⁵¹ These developments, too, contribute to today's variety of family forms and foster tolerance for alternative arrangements. Even in this evolving context, both marriage and biology remain important human incentives and concerns, but they interact in less exclusive and more variegated ways with other kinds of plans and motivations. ARTs users and their relations with each other are more diverse and their motivations more varied than those that characterize coital procreation.

51. See *infra* note 100 and accompanying text.

One other point should be noted. The scientific and social developments just described not only affect outcomes, they also shape the intellectual and emotional context. When assisted reproductive techniques are employed, people have made plans. People do not wander into fertility clinics for embryo implant, nor do they arrange agreements with collaborators outside their personal circle without having formed meaningful intentions and expectations.⁵² Although the distribution curves certainly overlap, intentions are typically more deliberate and central in ARTs than they are in coital reproduction. This is an important difference. When careful plans have been made, when hopes and expectations have been well developed and acted upon, when reliance has been incurred, it should matter. Biology and embodiment are vital, but intentions are also central to humanness.

C. *Paternity in Robert B. v. Susan B.*

Against this backdrop, I now turn to the facts and law of *Robert v. Susan*, and to what I characterize as the first significant legal issue—whether DNA testing should have been ordered for Susan’s child, Daniel, in order to determine Robert’s biological paternity. In the early hearings regarding Robert’s demand for genetic testing, Judge Carr repeatedly emphasized her plan to take the process “step by step.”⁵³ Although laudable in many circumstances, a step by step approach to a fact pattern quite different from those contemplated by the statutory template risks a failure of perspective. One of my favorite quotations about the law, both for its undeniable insight and for the wry distress it conveys, is attributed to a Harvard Professor, Thomas Reed Powell. Powell stated, “[i]f you have a mind that can

52. To be sure, people’s plans are never fully reasoned or articulated, but neither are they random or haphazard. For a discussion of bounded rationality, see generally Jon Elster, *Where Rationality Fails*, in *THE LIMITS OF RATIONALITY* 19 (Karen Schweers Cook & Margaret Levi eds., 1990); Owen D. Jones & Timothy H. Goldsmith, *Law and Behavioral Biology*, 105 *COLUM. L. REV.* 405 (2005). For a discussion of decision-making when not all relevant information is known, see generally *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* (Daniel Kahneman et al. eds., 1982). Lawyers can contribute to the development of ARTs by enhancing participants’ ability to anticipate issues that may arise.

53. “[W]hen all is said and done all we can do is take one step at a time.” Reporter’s Transcript on Appeal, *supra* note 1, at 44.

think about something that is inextricably connected with something else, without thinking about the something else, then you have The Legal Mind.”⁵⁴ This kind of segmented thinking facilitates close analysis, but it also obstructs perception about things that fall outside of pre-determined categories.

The trial judge ordered genetic testing under Family Code section 7551,⁵⁵ which authorizes such testing upon request by a party to a paternity action.⁵⁶ Where no marital presumption identifies the father, as here, section 7630 names those who may bring a paternity action, limiting the list to the child, the mother, a man presumed to be the father, an “interested party” seeking to establish a presumed father’s paternity, the Department of Child Support, and a man “alleged or alleging himself to be the father.”⁵⁷ The principal purpose of section 7630 seems to be to allow those most motivated to do so to seek money from a man whose sexual relations with the mother make him a likely progenitor. It also reciprocally allows the same parties (again within two years of the child’s birth) to prove that a given man is *not* the biological father and thus does not owe support or have other rights.

The trial judge allowed Robert to seek paternity under section 7630(c) which includes among those with standing “a man alleged or alleging himself to be the father.”⁵⁸ This is the *only* category in the parentage statutes under which Robert could conceivably have fit.⁵⁹ It

54. Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 563 (1991).

55. Robert B. v. Susan B., 135 Cal. Rptr. 2d 785, 786 (Cal. Ct. App. 2003).

56. California Family Code section 7551 provides for genetic testing. CAL. FAM. CODE § 7551 (West 2004). Section 7630 governs the filing of paternity actions. *Id.* § 7630 (West 2004 & Supp. 2005).

57. *Id.* § 7630 (West Supp. 2005). Section 7630(c) only allows a man “alleging himself to be the father” to bring a paternity action when the child has no presumed father under section 7611. *Id.* § 7630(c). Representatives of the identified parties may also act on the parties’ behalves. *Id.*

58. *Id.*; *Susan B.*, 135 Cal. Rptr. 2d at 786.

59. “[T]his court believes [7630 (c)] is the only applicable section to this case” Reporter’s Transcript on Appeal, *supra* note 1, at 43. Robert was not a presumed father under section 7611. CAL. FAM. CODE § 7611 (West 2004 & Supp. 2005). He had no past, present or attempted marital relationship with Susan. *Id.* § 7611(a)-(c). He did not know about Daniel until the child was ten months old; after he knew, Robert could not publicly hold Daniel out as his son because he could have no contact with Daniel until the court gave him access. *Id.* § 7611(d). Robert was also not named as Daniel’s father by a voluntary declaration or on

is the same subsection that gives standing to the Department of Child Support to bring an action.⁶⁰ It is also the subsection regarding which subsection (d) cross references section 7664,⁶¹ revealing that in addition to ordering child support, another ordinary use of this provision is to terminate a natural father's paternal rights so that a child can be adopted or relinquished for adoption. The question is whether Robert should have been allowed to proceed under the only thinly connected odd lot collection of parties and purposes lumped together into section 7630(c).

Before the advent of ARTs,⁶² there was *no way* that a man could win paternity under the statutory provisions unless the mother had had *some* consensual connection to him. That connection might have been as brief as a few minutes or as long as a long-established committed relationship, but a woman could not conceivably have had a man declared her child's father without her having had some voluntary involvement with him.⁶³ Where paternity was presumed because of past, present or attempted marriage, the mother had entered a social, legal and likely a sexual relationship with the man. If a man claimed paternity based on "holding out" the child as his own, the mother must have allowed him access to the child.⁶⁴ If the man acquired paternity through a voluntary declaration at the time of birth, the mother must also have signed the document.⁶⁵ If the man was "alleging" that he was the child's father, he could not possibly have won parental status unless he had prior sexual relations with the

Daniel's birth certificate. *Id.* § 7571 (West 2004).

60. *Id.* § 7630(c) (West 2004 and Supp. 2005).

61. *Id.* § 7630(d); *Id.* § 7664.

62. This article discusses initial claims to parental rights. Adoption is a legally authorized *transfer* of parental rights that involves different factual and legal considerations. Here, unlike the *Baby M* case, *supra* notes 4–7 and accompanying text, the parties did not argue an analogy to adoption.

63. Voluntariness is a many-layered concept. It can connote minimal volition or can be defined in light of complex and sophisticated notions of free will, social, economic or cultural coercion, etc. A more robust notion of voluntariness is a contested matter, as illustrated by Catharine MacKinnon's view of marital sex. *See* CATHERINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989). The many facets and nuances of choice are important. However, in this context, I use the simpler meaning of the word because the court's indifference to the absence of even that simple level of choice by Susan is shocking to me.

64. This is, of course, unless the child was kidnapped, a situation which, like rape, *see infra* note 66 and accompanying text, involves criminal behavior distinct from the facts here.

65. CAL. FAM. CODE § 7574(b)(1) (West 2004).

mother, which, barring rape,⁶⁶ meant that there was at least one instance of consensual sex.⁶⁷

Under ARTs techniques, however, gametes, embryos and gestational services are acquired through contract. Those contracts frequently involve persons who have no marital, sexual or socially intimate contact with the other contracting party (or parties). Using such techniques, individuals can procreate with the intent to be a legal parent and to rear the child that is created without there having been any of the above-described relationships—not marital or quasi-marital, not voluntary affiliation, not intimate or sexual. Assisted reproductive techniques do rest on a consensual link, but that link is typically an impersonal contractual agreement either directly between the procreative collaborators, or indirectly through a professional intermediary.

This possibility of procreative collaborators who have no marital, sexual or social connection other than a contract was, for the most part, not envisioned at the time the statutes presently governing paternity and “blood” or “genetic” tests were enacted. The first, and so far only, statutory exception reflected in California law was adopted to sort out the legal consequences of artificial insemination (“AI”), the only assistive technique widely used when the 1973 Uniform Parentage Act was promulgated.⁶⁸ The very name “artificial” underscores the lack of personal contact between the

66. Women do become pregnant via rape, but quite different policy considerations should govern such situations. *See Id.* § 7611.5 (West 2004) (proscribing the application of the presumption of paternity where a child is conceived as a result of rape). *But see In re Jesusa V.*, 85 P.3d 2, 61 (Cal. 2004) (Chin, J., dissenting) (noting that section 7611.5 prohibits “rapists from becoming presumed fathers *only if they do not qualify under § 7611 . . . but father[s] [who are rapists are presumptively] unfit to have custody or control*”). During oral argument a member of the Sixth District panel asked whether Susan’s situation was analogous to rape. In both situations, there is lack of consent to the adults’ connection. However, there is no culpability in Susan’s situation, making this quite distinct from rape. *See infra* note 76 and accompanying text.

67. Theoretically, the child or child’s representative could initiate an action to name a father, but as a practical matter, children do not bring such actions when they are very young or newborn. Provisions allowing representatives of various persons with standing to bring an action create a theoretical possibility of a father being named (“alleged”) without the child’s mother having acquiesced. It is unlikely, however, that such an action could succeed unless the biological connection was established or unless the mother consented.

68. *See* CAL. FAM. CODE § 7613 (West 2004). Not until 1978 was the first child born through in vitro fertilization, the second ART procedure developed. *See infra* note 166.

parties that is a hallmark of the procedure. Legislatures accepted the social need for such a procedure and enacted statutes to govern parental status after AI. These AI laws embraced the technique when carried out under the auspices of a licensed physician.⁶⁹ They separated parenthood from biology or marriage and protected the integrity of the new family unit from outside intrusion. I will discuss these AI provisions in more detail in Part IV.

Aside from its AI provision, the California paternity statutes were enacted when both medical techniques and social arrangements of reproduction *in fact* required some form of consensual relationship with the child's mother before a man could be declared a child's legal father. There was no need to explicitly state this requirement because no other possibility existed. But in Susan's case, there was no such consensual relationship—no marriage, no cohabitation, no sexual relations, no voluntary access to her child that resulted in Robert "holding out" the child as his own, no naming on a birth certificate, and no signing of a voluntary declaration of paternity.⁷⁰ Yet, taken literally and in isolation, the sections of the paternity statutes could *seem* to include Robert because he "alleges" that he is Daniel's father. This allegation stemmed from the doctor's belated admission of a mistake nearly nineteen months after it occurred and more than ten months after Daniel's birth, during which time Susan was the only family Daniel had ever known. Until that moment, there had been no question about Susan's sole parenthood and the integrity of her family unit. Despite the absence of any consent, volition or acquiescence by Susan, the literal language of section 7630(c) seems to allow Robert to bring a paternity action. In turn, if Robert could bring an action under section 7630(c), he could also seek an order for genetic tests under section 7551.

The trial judge's insistence on taking this case "step by step"⁷¹ and on applying the statutes' literal and plain meaning⁷² was reinforced by the Court of Appeal.⁷³

69. UNIF. PARENTAGE ACT § 5 (1973), 9B U.L.A. 407 (2001).

70. There was also no contract between Robert and Susan to engage in collaborative reproduction.

71. *See supra* note 53.

72. "[W]hat this court has decided to do is to apply a literal interpretation of both code sections." Reporter's Transcript on Appeal, *supra* note 1, at 43.

We need not go beyond the language of section 7613(b) to resolve Susan's claim. . . . As the trial court recognized, the plain meaning of the statutory language does not permit the application Susan urges. . . .

Because the language of section 7613(b) is clear, we will not engage in statutory construction to determine the intended purpose and scope of this provision. Susan's appeal to the "clear social policy supporting single parenthood" would more appropriately be directed to the Legislature.⁷⁴

There is nothing remarkable about these observations by the two courts. Indeed, the legislature *should* act. Absent such action, the words of the statutes, read literally, seem to allow the paternity action and the genetic testing ordered by the trial court and upheld by the appellate courts. Nor do the statutes make any explicit provision for the kind of mistake that occurred here. But at the time the basic statutory architecture was adopted from the 1973 Uniform Parentage Act, there was, quite literally, no possibility for someone in Robert's shoes to fit within the categories of those allowed to seek paternity. Because it was impossible for such a person to emerge, there was no perceived need for the statutes to rule him out. Such a situation was literally *unthinkable*.⁷⁵ But the courts' nose to the ground approach in 2003 prevented them from seeing that it was their literal application of obsolete statutes to an ARTs reality that produced a radical departure from legal experience.

Would California law allow a man who was an absolute stranger to the mother to file for paternity and to impose DNA testing on her

73. Robert B. v. Susan B., 135 Cal. Rptr. 2d 785, 787 (Cal. Ct. App. 2003).

74. *Id.* (citation omitted).

75. The only "thinkable" instance of such a non-consensual claimant to fatherhood would arise from the sole ARTs part of parentage statutes, the section governing AI. If there were a mix-up in sperm used for AI, a situation akin to Susan's case could have arisen. If the man whose sperm was mistakenly used was an anonymous donor, he would be unlikely and unable to assert paternity under the AI statute. Possibly the woman inseminated would have a malpractice action against the professional intermediary if donor sperm other than that she had selected had been used, but she would not likely pursue a paternity action. If the man whose sperm was mistakenly used was not a donor, and provided sperm only for insemination of an identified partner, then the situation would be analytically similar to Susan's case, and would raise analogous issues. A variant might be that the gestator might have also been the genetic mother. Thanks to Professor Susan Appleton for pointing out this issue.

child? It is hard to imagine that a court would have so ordered if the mother conclusively proved the lack of any consensual contact with that man.⁷⁶ It is even harder to imagine that a court would have ordered child support to be paid by a man who reluctantly found himself in Robert's shoes after this kind of mistake. The unimaginable nature of these outcomes underscores the wrongness of the outcome here.

A statutory scheme constructed to take better account of ARTs⁷⁷ might not have ordered such genetic testing. The latest revisions of the Uniform Parentage Act suggest as much. This version of the UPA has only been in existence for a short time. So far, only a few states have adopted it; California is not one of them.⁷⁸ Although the new version's text does not directly speak to the issues in Susan's case, it nevertheless offers useful guidance for the resolution of such issues. Articles 7 and 8 of the revised Uniform Parentage Act wrestle with problems of parentage in ARTs disputes.⁷⁹ Because Susan and Robert had no gestational agreement, Article 8 would not apply. The provisions of Article 7 largely parallel those of the original Uniform Parentage Act governing artificial insemination by donor ("AID")⁸⁰ except that the revised provisions expand and clarify the rules under which "intending" parties, and not those who agree to be "donors," become the legal parents of children created through various types of assisted reproductive arrangements.⁸¹ Because they had separate and conflicting intentions and because neither met the statutory definition of a donor, Susan and Robert's situation would not be resolved by the new Article 7 either. The much expanded Article 5 governing genetic testing, however, would dictate a different resolution than the

76. A rapist does not receive parental rights even if he is the genetic father. CAL. FAM. CODE § 7611.5 (West 2004).

77. *See, e.g.*, UNIF. PARENTAGE ACT Prefatory Note (amended 2002), 9B U.L.A. 5 (Supp. 2005) (noting the "incredible scientific advances in parentage testing since 1973" and the need to clarify parentage for children born through ARTs).

78. Four states have adopted the Uniform Parentage Act, as amended in 2002. For a list of adopting states, see *supra* note 8.

79. *See supra* note 11.

80. *See* UNIF. PARENTAGE ACT §§ 701–07 (amended 2002), 9B U.L.A. 354–59 (Supp. 2005).

81. *See* UNIF. PARENTAGE ACT § 702 cmt. (amended 2002), 9B U.L.A. 355 (Supp. 2005).

California courts reached in Susan's case.⁸² Unlike the 1973 Uniform Parentage Act's predecessor provision on blood testing, Article 5 of the most recent amended version would not have allowed the court to order testing in Susan's case. Section 502 provides in relevant part that

the court shall order the child and other designated individuals to submit to genetic testing if the request for testing is supported by the *sworn statement* of a party to the proceeding: (1) alleging paternity and stating facts establishing a reasonable probability of *the requisite sexual contact* between the individuals⁸³

California updated its original UPA-based testing provisions in 1997, but mainly for purposes of changing the name from "blood" to "genetic" testing.⁸⁴ At this time, the above-mentioned UPA requirement of a sworn statement alleging sexual contact had not yet been promulgated. Under the existing statute, Robert could use his status as a party to the paternity action to insist on genetic testing by simply filing a declaration about the doctor's belated confession of error and "alleging himself" to be Daniel's father.⁸⁵ Nothing more was required for him to turn Susan's life upside down.⁸⁶

Although the new UPA does not explicitly contemplate the kind of mistake that occurred in Susan's case, the commissioners'

82. There was only one section in the 1973 UPA discussing biological testing. UNIF. PARENTAGE ACT § 11 (1973), 9B U.L.A. 445 (2001). However, there were eleven sections in the amended version. UNIF. PARENTAGE ACT §§ 501–511, 9B U.L.A. 329–37 (2001).

83. UNIF. PARENTAGE ACT § 502(a)(1) (amended 2002), 9B U.L.A. 329 (2001) (emphasis added).

84. California Family Code section 7551 provides for genetic testing. CAL. FAM. CODE § 7551 (West 2004). The word "blood" was replaced with "genetic" in 1997. *Id.* at amends.

85. The 1973 Uniform Parentage Act and California's 1997 revisions required nothing more than status as a party in an action where paternity was an issue to allow the court to order biological testing. UNIF. PARENTAGE ACT § 11 (1973), 9B U.L.A. 445 (2001); CAL. FAM. CODE § 7551 (West 2004). Current statutory sections that authorize orders for biological testing require a "declaration under oath submitted by the moving party *stating the factual basis* for placing the issue of paternity before the court." *See, e.g.*, CAL. FAM. CODE § 7541(d) (West 2004) (emphasis added).

86. *See* Chiang, *supra* note 21 (noting that Susan "called the custody fight an 'on-going nightmare'"); Mary Anne Ostrom, *Mom Speaks Out on Embryos Mix-Up, Campbell Woman in Legal Nightmare After S.F. Lab Error*, SAN JOSE MERCURY NEWS, Aug. 3, 2004, at 1A ("[Susan's] days are filled with nightmarish fears that she still could lose her son.").

familiarity with modern techniques of assisted reproduction and their effort to grapple with the legal consequences of such disputes may have caused them to add the requirement of a sworn statement of sexual relations as a predicate for court-ordered genetic testing.⁸⁷ Had such a requirement been in place in California, Robert could not, of course, have made such a declaration. He also could not have asked the court to order genetic testing under any other provision. Without genetic tests, Robert's allegation of paternity would likely have been insufficiently supported to have allowed him to be designated as the Daniel's legal father.

The courts' literal application of the paternity statutes makes their treatment of Susan's case utterly indistinguishable from situations where a child had been born as a result of a one night stand or a long term non-marital relationship. However, the only similarities between the dispute here and disputes between such unwed progenitors are that each party has a biological connection to the child at issue and that there is an intense conflict between them. The statutes and the analogies drawn from them are inappropriate because they ignore the many differences between these situations—differences in the procreative method, in factual and legal expectations and intentions, in the presence or absence of consensual relationship, and even in the causal source of the current predicament. These differences, and the legislature's and courts' failure to recognize them, are part of the reason that the "resolution" here is not a solution. The courts imposed a long-term family relationship on total strangers, and created a high probability of continuing conflict in Daniel's life for years to come. The outcome suggests a lack of empathy from the judges and dramatizes how the statutory template assumes and addresses a radically different reality than the one that brought these parties into court.

87. Alternatively, the commissioners may not have recognized that Articles 7 and 8 might not resolve some ARTs disputes, and that in such instances, genetic testing issues might arise under Article 5. As Susan's counsel, we did not raise the Article 5 argument under the 2002 Uniform Parentage Act amendments. Because no part of the proposed law had been enacted in California and because of the narrow statutory inclinations of the judges, we feared that such an argument would waste space and time in an already multi-issue case.

IV. THE ROLE OF MARITAL STATUS

Marc Gradstein, my co-counsel in Susan's case, commented on the first day he met with Susan that if there were any possible way to do so, she should marry someone, anyone, quickly. Although the observation was mainly ironic, Marc foresaw that Susan's having been, or perhaps arranging to become, married would be the most likely route to keeping Daniel. His advice turned out to be prescient. It is less clear that the law should reward status or create such an incentive.

A. *The Marital Presumption*

Had Susan been married when this reproductive mistake occurred, she would have been able to block Robert's claim to paternity from the outset.⁸⁸ California's "conclusive" marital presumption directs that the husband of a woman who gives birth is the legal father of any child born during the marriage.⁸⁹ The irony in Marc's advice, of course, was that Susan could not retrospectively "be married." But the legislature's concern with marital status also spawned other (rebuttable) marriage-related presumptions. By marrying after Daniel's birth, Susan might have been able to cobble together a presumption of paternity under Family Code section 7611(c), which would have prevented Robert's paternity action under section 7630(c). Reasonably enough, Susan did not and therefore could not.

In Susan's case, Robert emphasized that the conclusive presumption applied only in a *marital* family unit, and was therefore unavailable to Susan who was single.⁹⁰ But *Michael H.*'s holding that a genetic father could be denied paternity and even visitation with his child could perhaps have provided some comfort to Susan. In *Michael H.*, the biological father's exclusion from the child's life was

88. Robert's briefs virtually conceded this and made a point of distinguishing her unmarried status as a radically different circumstance. Respondent's Opening Brief, *supra* note 20, at 16, 19–20, 22–23, 37, 39.

89. See *supra* note 28. The presumption was upheld by the U.S. Supreme Court in 1989 against constitutional attack by a non-marital biological father. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

90. Respondent's Opening Brief, *supra* note 20, at 23–24.

upheld despite his having lived with the child and her mother for a period of time, his having provided partial financial support for the child, and his having had a positive relationship of several years duration with the child.⁹¹ He, and indeed all four individuals involved, openly acknowledged that he was the child's biological father. His was, therefore, a far stronger connection than any Robert could claim.⁹²

Despite the support that *Michael H.* might have offered to Susan's position, we did not argue the case, partly because the marital status issue that cut against us was so central to the Supreme Court's decision, and partly because of the complex and varied way that several subsequent California cases have treated *Michael H.* In *Brian C. v. Ginger K.*,⁹³ Judge Sills concluded that *Michael H.* "has almost no application beyond its peculiar facts, if only because the holding of Justice Scalia's lead plurality opinion was expressly repudiated by a majority of five of the court's justices."⁹⁴ In *Dawn D. v. Superior Court of Riverside County*,⁹⁵ the California Supreme Court observed that at least seven of the nine justices in *Michael H.* rejected the assertion that a biological link alone was a sufficient basis to trigger due process protection for a non-marital genetic father.⁹⁶ In seeking review of Susan's case by the California appellate court, we judged that arguing these cases would create more problems than benefits. Like many strategic decisions in a complex case, whether our

91. *Supra* note 37 and accompanying text.

92. Robert argued that he was comparatively better situated than Michael to make such a claim because, according to Robert, five justices in *Michael H.* agreed that the biological father's plea had fallen short because his commitment to parenthood had not been sufficiently established. Respondent's Opening Brief, *supra* note 20, at 19–20. This assertion misreads the alleged fifth justice, Justice Stevens', opinion, which says only that Michael might have been granted visitation as an "interested person" rather than as a father. *Michael H.*, 491 U.S. at 133–34, 136 (Stevens, J., concurring) (concluding Michael's due process rights were therefore satisfied). Justice Stevens says nothing suggesting that Michael's commitment to the child was insufficient.

93. *Brian C. v. Ginger K.*, 92 Cal. Rptr. 2d 294 (Cal. Ct. App. 2000).

94. *Id.* at 304. In his opinion, Judge Sills details the assorted conflicts and incongruities of the five opinions in *Michael H.*, putting a distinctive California slant on the much debated decision.

95. *Dawn D. v. Superior Court*, 952 P.2d 1139 (Cal. 1998).

96. *Id.* at 1144–45 (holding that a biological father had no rights to paternity because he did not have an existing personal relationship with his child born to a woman that was married to another man).

judgment was correct is impossible to determine. After *Michael H.* was decided, the California legislature amended the statute to somewhat weaken the marital presumption.⁹⁷ Although the change did not help Robert because he was not a presumed father under Family Code section 7611, it was of no help to Susan either.

B. A Normative Preference for Two Parent Families?

The rule that marriage should conclusively and uniquely protect a family unit from intrusion by an outside claimant to parenthood has a number of possible justifications. The marital presumption expresses the state's historical normative preference for marriage as the socially sanctioned context for both adult-adult and parent-child intimacy.⁹⁸ But family configurations have been changing. Conventional family morality viewed marriage and parenthood as inextricably interwoven; neither was desirable without the other. Today, this merger of roles and tasks is far less dominant.⁹⁹ There are many marriages that

97. See *supra* note 61.

98. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 119–20 (1989) (Scalia, J., plurality opinion) (suggesting that California's marital presumption is the implementation of a substantive rule of law). Justice Scalia notes:

The conclusive presumption is actually a substantive rule of law based upon a determination by the Legislature as a matter of overriding social policy, that given a certain relationship between the husband and wife, the husband is to be held responsible for the child, and that the integrity of the family unit should not be impugned.

Id. (quoting *Michael H. v. Gerald D.*, 236 Cal. Rptr. 810, 816 (Cal. Ct. App. 1987)). Justice Scalia continues, “[o]f course the conclusive presumption not only expresses the State's substantive policy but also furthers it, excluding inquiries into the child's paternity that would be destructive of family integrity and privacy.” *Michael H.*, 491 U.S. at 120.

99. For theoretical and policy-based discussions of parenthood, see generally Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293 (1988); Shultz, *supra* note 5, at 337–46. For statistical information, see *infra* note 100. Marriage and child-rearing are even less tightly linked in some American subcultures. See FIELDS, *supra* note 39, at 9 (noting that black single-mothers are more likely to never be married than non-Hispanic White or Hispanic single-mothers). African-American mothers face special issues regarding marriage because America's racial inequality effectively removes many black males from the marriage market. For example, African-American males have a shorter life expectancy than whites or than African-American females. See generally MICHAEL K. BROWN ET AL., *WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* (2003). They also have higher rates of unemployment, lower income levels, and higher rates of imprisonment. *Id.*

remain “child-free,” some by design and others by fate.¹⁰⁰ Conversely, there are many parent-child relationships that function outside the context of marriage for all or part of a child’s minority. Some marital families place parenting responsibilities almost exclusively in one of the two adults. Non-marital parents are sometimes single parents and sometimes combine child-rearing roles with another or several other adults. Blended and step-families include some characteristics of both dual parent and single parent family units.

Family law has adapted in various ways to equalize the treatment of children born within and outside a marriage,¹⁰¹ and to more fully accept the greater variety of family and parenting arrangements,¹⁰²

100. See FIELDS, *supra* note 39, at 16. Married couples without children represented 28.2% of all households in 2003. *Id.* at 4. 33% of all births in 2002 were to unmarried women. BARBARA DOWNS, U.S. CENSUS BUREAU, FERTILITY OF AMERICAN WOMEN: JUNE 2002, at 5 (2003), <http://www.census.gov/prod/2003pubs/p20-548.pdf>. Single-mother families increased from three million in 1970 to ten million in 2003; single-father families grew from less than half a million to two million in the same time period. FIELDS, *supra* note 39, at 7. Of married mothers, six of the seven million mothers who were out of the labor force throughout 2003 said that the primary reason was to care for the home and family. *Id.* at 11–12. Note also that in 2003, 4.6 million households were classified as unmarried partner households, of which 41% included children under the age of eighteen. *Id.* at 16–17; see also Nancy E. Dowd, *Stigmatizing Single Parents*, 18 HARV. WOMEN’S L.J. 19, 21–23 (1995) (estimating that 60% of children will spend some time in a single-parent family before reaching the age of eighteen).

101. *Levy v. Louisiana*, 391 U.S. 68 (1968) (distinguishing between legitimate and illegitimate children constitutes invidious discrimination for purposes of wrongful death recovery after the death of a parent); see *infra* note 134 and accompanying text (discussing the Uniform Parentage Act’s goal of eliminating such recovery).

102. For a discussion of second-parent lesbian adoption cases, see *infra* notes 113–15 and accompanying text. For a discussion of grandparents’ rights, compare *Moore v. City of East Cleveland*, 431 U.S. 494, 504–06 (1977) (preventing the state from “forcing all to live in certain narrowly defined family patterns” and noting especially that the tradition of grandparents raising children deserves constitutional recognition), with *Troxel v. Granville*, 530 U.S. 57 (2000) (denying visitation to grandparents where granting visitation would result in unconstitutional infringement on parents’ fundamental right to rear children). For a recognition of *de facto* and psychological parents, see *Guardianship of Phillip B.*, 188 Cal. Rptr. 781 (Cal. Ct. App. 1983) (awarding guardianship custody to a couple who developed a *de facto* parent-child relationship with child despite the genetic parents’ opposition). For a discussion of stepparent adoption without termination of same sex parents’ rights, see *In re M.M.D. & B.H.M.*, 662 A.2d 837 (D.C. 1995) (holding that the “stepparent exception” prevented the termination of the adoptive parent-child relationship when the same sex partner subsequently adopted the child). For a discussion regarding the elimination of distinctions based on the marital status of a child’s parents, see *Johnson v. Calvert*, 851 P.2d 776, 779 (Cal. 1993) (noting that the parent-child relationship depends on that relationship alone, not on the marital status of the child’s parents).

including marriages that are shorter and more contingent.¹⁰³ Hard and fast rules either preferring marriage over all other family forms or insisting that a particular pattern of parenthood is always better for a child would be difficult to defend with concrete evidence, as opposed to predilection.¹⁰⁴ Given the many changes in family configurations, arguments based on social context or stigma that might traditionally have distinguished between marital and single parent families now seem comparatively weak. This is especially so if one believes, as I do, that the critical component of parenting is the quality of the parent(s) rather than their number, gender, or marital status. Nevertheless, many people remain convinced that two parents are always better than one (at least when they are of different genders).¹⁰⁵ The proposition that, all other things being equal, it is better for a child to have two sources of economic and emotional support is unremarkable.¹⁰⁶ The thorny issue is whether in any given instance,

103. In 1969, California enacted Civil Code section 4506 regarding “no fault divorce.” CAL. CIV. CODE § 4506 (current version at CAL. FAM. CODE § 2310 (West 2004)). The U.S. divorce rate, as reported in 2003, was 3.8 per 1000 of the total population, while the marriage rate was 7.5 per 1000. Thus there were about half as many divorces as marriages in any given year. See National Center for Health Statistics, Fast Stats A-Z: Marriage and Divorce, <http://www.cdc.gov/nchs/faststats/divorce.htm> (last visited Sept. 4, 2005). The U.S. Census Bureau reports that 50% of first marriages for men under age forty-five may end in divorce; between 45% and 52% of first marriages for women of the same age group may end in divorce. ROSE M. KREIDER & JASON M. FIELDS, U.S. CENSUS BUREAU, NUMBER, TIMING, AND DURATION OF MARRIAGES AND DIVORCES: 1996, at 18 (2002), <http://www.census.gov/prod/2002pubs/p70-80.pdf>.

104. See Bartlett, *supra* note 99, at 294 (exploring non-marital parenthood and advocating that the law focus on responsibility and relationship in parenting).

105. Many states object to a child having two parents when they are of the same sex. See, e.g., MISS. CODE ANN. § 93-17-3(2) (2004) (specifically barring adoption by gay couples and *a fortiori* prohibiting a same-sex partner from adopting the biological child of a partner); *In re Adoption of Doe*, 719 N.E.2d 1071, 1072–73 (Ohio Ct. App. 1998) (holding that a lesbian partner may not adopt her partner’s biological child without termination of the mother’s parental rights). Some states have accepted parenting by gays, including allowing a same-sex partner to adopt the biological parent’s child. See, e.g., *Sharon S. v. Superior Court*, 73 P.3d 554, 568–70 (Cal. 2003) (holding that thousands of same-sex second parent adoptions in California are permissible despite arguments that Family Code section 8617 might imply otherwise and that the statute regarding termination of parental rights prior to adoption can be waived).

106. If the point is “more is better,” it is interesting that there is near-complete resistance to a child having more than two legal parents. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 118 (1989) (“California law, like nature itself, makes no provision for dual fatherhood.”); *Johnson v. Calvert*, 851 P.2d 776, 781 (Cal. 1993) (rejecting the idea that the child had two mothers, stating that “for any child California law recognizes only one natural mother, despite

all other things *are* equal. The differences between ARTs and coital conception have important bearing on that question.

C. Assisted Reproduction, Single Parent Families, and Parentage Law

The California legislature has enacted only one code section that on its face addresses ARTs parentage. That section, Family Code section 7613, governs artificial insemination and also has implications for marital status.¹⁰⁷ Tracking the 1973 UPA, the California code provides incentives for AI users to proceed under the auspices of a state-licensed physician-intermediary.¹⁰⁸ The UPA arranged rights and responsibilities of legal parenthood in ways likely to be favored by traditional users, i.e., marital couples in which the husband is infertile.¹⁰⁹ California's AI statute provides that in this situation, legal paternity will *not* follow biology.¹¹⁰ If the husband of a married woman consents to her insemination as carried out by a licensed physician, the husband becomes the legal father of any resultant child, even though the sperm donor is the source of the biological gamete.¹¹¹ California also enacted the recommended companion provision providing that a sperm donor would not be the child's legal father, but it made one important change. The legislature dropped the word "married" from the language of the 1973 UPA, stating that when a licensed physician performs AI on "a woman," the sperm donor will not be the legal father of any child so conceived.¹¹² This second segment of California's law not only

advances in reproductive technology rendering a different outcome biologically possible"). *But see Sharon S.*, 73 P.3d at 568–70 (holding that the California Code relieves birth parents of parental duties after termination, but that the statute may be waived to allow a same-sex parent to adopt the partner's child); Shultz, *supra* note 5, at 330–33, 344–45.

107. CAL. FAM. CODE § 7613 (West 2004).

108. *Id.* § 7613(a).

109. The Uniform Parentage Act (1973) limited nonparenthood of a donor to situations in which the donor provided sperm for assisted reproduction by a married woman. UNIF. PARENTAGE ACT § 5(b) (1973), 9B U.L.A. 407 (2001).

110. CAL. FAM. CODE § 7613(a) (West 2004) ("If . . . 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.").

111. *Id.*

112. *Id.* § 7613(b).

separates paternity from biology, it also separates parental status from marital status.

Various California appellate courts have addressed the desirability of single, as compared to two-parent, families, including one case decided under the AI statute. In *Jhordan C. v. Mary K.*,¹¹³ the court construed section 7613(b) in a dispute between a lesbian couple and a sperm donor.¹¹⁴ In the court's view, the legislature omitted the word "married" from section 7613(b) because it intended to allow single women to create statutorily protected families through AI.¹¹⁵

In another dispute involving a girlfriend's use of a decedent's sperm to conceive a child, the court rejected the argument that the Family Code "demonstrates the state's recognition that a child is better off with two living parents, whether living apart or living together, rather than with just one parent."¹¹⁶ The court stated that the "parties fail[ed] to cite any pertinent authority which indicate[d] that the state ha[d] a policy of preventing the formation of single-parent families."¹¹⁷

Finally, in *Kelsey S.*,¹¹⁸ a case concerning a contested adoption rather than ARTs parentage, the California Supreme Court discussed the increasing incidence and acceptance of single parent families and observed with approval that "New York's high court also recently rejected the argument that the state has a sufficiently strong interest in providing two-parent families to discriminate against unwed fathers."¹¹⁹

113. *Jhordan C. v. Mary K.*, 224 Cal. Rptr. 530 (Cal. Ct. App. 1986).

114. *Id.* at 531–32. The Court of Appeal of California construed CAL. CIV. CODE § 7005(b), now codified at CAL. FAM. CODE § 7613(b).

115. *Jhordan C.*, 224 Cal. Rptr. at 534, 537 (holding that the removal of the word "married" from (now) 7613(b) created a statutory right for unmarried as well as married women to bear children without fear of the sperm donor's claim to paternity). In *Jhordan C.*, the donor received parental rights because the insemination failed to conform to statutory requirements. *Id.* at 537–38.

116. *Hecht v. Superior Court*, 20 Cal. Rptr. 2d 275, 286 (Cal. Ct. App. 1993).

117. *Id.* The parties cited California Family Code section 4600(a), now section 3020, for this point. *Id.*

118. *Adoption of Kelsey S.*, 1 Cal. 4th 816 (Cal. 1992).

119. *Id.* at 845. The Court continued, "[n]or can we merely assume, either as a policy or factual matter, that [two-parent] adoption is necessarily in a child's best interest. This assumption is especially untenable in light of the rapidly changing concept of family." *Id.* The *Kelsey* court then pointed out that single people now adopt children, and noted "that New York's high court also recently rejected the argument that the state has a sufficiently strong

These comments regarding the state's openness to single parent families are, of course, not dispositive either of the issue in general or in Susan's case. Although stated in rather sweeping terms, these judicial remarks are necessarily embedded in particular circumstances which bear greater or lesser resemblance to the facts of *Robert v. Susan*. In addition, at least one legislative pronouncement on the subject seems to cut the other way. In Family Code section 7570(a), the California legislature declared its finding that "[t]here is a compelling state interest in establishing paternity for all children."¹²⁰ Section 7570 stresses that the concern derives from the view that determining paternity "is the first step toward a child support award."¹²¹ Because economic viability is a major problem for many single mothers,¹²² this legislative pronouncement may have been spurred not solely by concern for children but also by the need to protect public funds. These overlapping financial concerns are likely stronger motives than abstract views of optimal family configuration.¹²³ A policy that rests on moral, empirical, or child development bases might be deemed a one-size-fits-all mandate, at least by way of aspiration. If it rests instead on generalizations about economics, such a policy might appropriately be applied in a more tailored fashion.

interest in providing two-parent families to discriminate against unwed fathers." *Id.* (citing *In re Raquel Marie X.*, 559 N.E.2d 418, 427 (N.Y. 1990)).

120. CAL. FAM. CODE § 7570(a) (West 2004).

121. *Id.*

122. FIELDS, *supra* note 39, at 9 (noting that of the twelve million one-parent family groups, ten million are maintained by women and that single-parent families maintained by women are more likely than single-parent families maintained by men to have incomes below poverty level); see also Dowd, *supra* note 100, at 23. ("Most single-parent families with children are headed by women and a majority of female-headed families (fifty-three percent) are poor.") (footnote omitted).

123. The declaration and subsequent provisions derive from federal requirements that states be proactive in identifying fathers when the child is first born. For instance, Title IV-D of the Social Security Act requires states to establish child support enforcement programs. 42 U.S.C. §§ 651, 666 (2005). Additionally, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) provides for child support enforcement to ensure that families receiving federal public benefits meet obligations. Pub. L. No. 104-190, 110 Stat. 2105 (1996). For further discussion of these requirements, see Alameda County Dep't of Child Support Serv., New Legislation: Government Roles and Responsibilities in the Child Support Process, <http://www.co.alameda.ca.us/css/legislations.html> (last visited Sept. 4, 2005).

If the justification for a two-parent preference is economic, ARTs again diverge from traditional reproduction. On average, single-parent families arising from use of assisted reproduction likely have a somewhat different economic profile than single-parent families arising from divorce or decisions not to marry despite coital reproduction. Both because ARTs themselves are expensive¹²⁴ and because intentions play a much more central role in assisted reproduction, women who avail themselves of ARTs to create a single parent family are less likely to be economically marginal than are other single parents. For example, in Susan's case, money was not a problem *until* a second parent was imposed on her by the courts. Susan owned her home and had a stable, well-paying job until the continuing litigation over Daniel's parentage forced her to give up her job and mortgage her house to pay the escalating legal costs.¹²⁵ Contrary to the standard rationale, in Susan's case it was the insistence on two parents that *created* an economic burden, rather than the other way around.¹²⁶

Intentionality also distinguishes ARTs parenthood disputes from those that occur after traditional procreation. Coital reproduction takes place along a continuum from decidedly unintentional to very purposeful. But people who use ARTs must often arrange for biological assistance from those outside their intimate personal circle (either from a professional or from a reproductive collaborator, or both), and those arrangements require a comparatively high level of intentionality. Typically, agreements between the collaborators, as

124. See *infra* note 135.

125. See *supra* note 22.

126. The economic burden on Susan has been further increased by the fact that as of February 2005, Robert had still paid no child support to Susan. In November 2004, more than a year after Robert was designated Daniel's legal father, Susan filed a restitution action against Robert. She claimed that Robert had been unjustly enriched in that he now enjoyed the companionship and the right to joint legal custody of Daniel, but that she had undergone the medical and financial burdens of pregnancy without any assistance from him. In response Robert filed a Special Motion to Strike Susan's complaint under the anti-SLAPP code, CAL. CIV. PROC. CODE § 425.16(b)(1) (West 2004), claiming that her restitution action was an effort to chill exercise of his right to petition the court for parental status. Remarkably enough, the court granted Robert's motion on April 20, 2005, ordering Susan to pay costs and Robert's attorney's fees. *Robert B. v. Susan B.*, No. 1-04-CV-030291 (Cal. Super. Ct. Apr. 20, 2005) (order signed by Judge William F. Martin). Although she felt the decision was wrong, Susan also felt she could not afford to appeal the order.

well as contracts between ARTs users and the professional intermediaries they hire, express the parties' reciprocal and/or compatible intentions and provide for their attainment. Both Susan on the one hand, and Robert and Denise on the other, had reproductive intentions and expectations. Both had purchased biological components from donors and both had retained the services of fertility professionals. However, these three individuals had absolutely *no joint or reciprocal intentions with each other*.¹²⁷ Rather, an error by the professionals whose services they had separately retained actually destroyed any possibility of fully realizing their independent original intentions. That error unexpectedly thrust these parties together in ways that made at least some of their original expectations incompatible and unattainable.

Even though their original intentions were incompatible, examining the separate intentions of each party will assist further analysis. After reflecting about her options and rejecting adoption because she feared the possibility of biological parents changing their minds, Susan decided IVF offered her the best chance to have a child. Like many who turn to assisted reproductive techniques, she arranged to purchase gametes, planning to have the embryos resulting from IVF transferred to her womb so that she could gestate her own child, even though she would not be its genetic mother.¹²⁸ Because section 7613(b) was the legal provision that best approximated her ARTs method and intentions, Susan believed that adherence to the requirements of that statute would protect the parent-child family unit she hoped to create against paternity claims by a sperm donor.

Although Susan acted in scrupulous accord with the statute that should have protected her from competing parentage claims, the situation as it actually transpired did not fit neatly into the California AI statute. Susan planned a single parent family with a child born of *in vitro* and embryo transfer using donor gametes, but her embryos were not the ones transferred; instead, Robert and Denise's embryos were implanted in Susan by mistake. Robert did not intend to donate

127. For this reason, neither *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993), nor my proposal in Shultz, *supra* note 5, will resolve this problem.

128. This and the remaining facts in this paragraph can be found in Appellant's Opening Brief in the Sixth District Court of Appeal, *supra* note 20.

sperm for Susan's insemination. He intended only to provide semen for creating embryos that would be implanted in his wife and to birth a child that would be raised by them together. In the language of the AI statute, Robert "provided" sperm, but *not* to impregnate "a woman other than the donor's wife,"¹²⁹ although that is what literally happened. He is also not, in the ordinary use of the term, a "donor."¹³⁰ He did not donate his sperm to the fertility doctors, to a sperm bank, or to Susan. He and Denise intended for Denise to gestate a child or children they would rear together. But within the existing statutory framework, the AI section is the closest thing there is to a regime adopted with assistive techniques in mind. The Code's AI provisions embraced this first ARTs technique, arranged parenthood apart from biology or marital status, and protected the resulting voluntary family units from outside intrusion. If Robert is not treated as *tantamount* to a sperm donor under section 7613(b), his claim, as argued above, fits no better and quite possibly less well under any other aspect of California's statutory paternity scheme.¹³¹

Even if Robert does not fit perfectly into section 7613(b), why should there be a yawning gulf between the legal protection accorded to a marital family unit and that accorded to a single woman's parent-child family? In ordinary reproduction, the conclusiveness of the marital presumption has steadily eroded for the past fifteen years.¹³² The traditional preference for two-parent over single-parent families has also somewhat eroded in various settings, including in paternity determinations for children born out of wedlock as well as in

129. CAL. FAM. CODE § 7613(b) (West 2004).

130. Use of the word "donor" has been slippery in ARTs. For example, "donor" ordinarily connotes a gift-giver, but sperm donors are usually paid. The 2002 revised Uniform Parentage Act defines "donor" as "an individual who produces eggs or sperm used for assisted reproduction, whether or not for consideration," but excludes from that definition "a husband who provides sperm . . . to be used for assisted reproduction by the wife." UNIF. PARENTAGE ACT § 102(8) (amended 2002), 9B U.L.A. 9 (Supp. 2005).

131. See *supra* note 59 and accompanying text.

132. See, e.g., *Craig L. v. Sandy S.*, 22 Cal. Rptr. 3d 606, 607–08 (Cal. Ct. App. 2004) (holding that a biological father who was permitted by the mother and the mother's husband to establish a relationship with his child could qualify as a presumed father and could therefore initiate paternity proceedings). See generally Batya F. Smernoff, Comment, *California's Conclusively Presumptive of Paternity and the Expansion of Unwed Father's Rights*, 26 GOLDEN GATE U. L. REV. 337 (1996) (outlining a California trend to allow unwed fathers to challenge the marital presumption).

adoptive placements.¹³³ Considerable effort has been devoted for many decades to eradicating social and legal distinctions between marital (“legitimate”) and non-marital (“illegitimate”) children.¹³⁴ The general trend has been toward making less distinction between various family forms, including between single or dual parent configurations.

Justifications for a two-parent preference are even less persuasive when ARTs are used than in traditional reproduction. Single mothers utilizing ARTs are generally more economically stable¹³⁵ and their intentions to form a single parent unit are clearer than is true for many single female parents whose children result from sexual relations whether within or outside of marriage. Indeed, the formalized intentions that accompany the use of ARTs would arguably satisfy at least some of the purposes served by marriage—the making of a formal and deliberate intimate commitment in this instance to bear and raise a child. These points suggest that, in a situation like Susan and Robert’s, a less literal threshold than the Sixth District panel required for applying section 7613(b) would have yielded results better aligned with both the factual characteristics of and the policy justifications for determinations of parentage in ARTs disputes.¹³⁶ Susan and Daniel’s family unit should have received the same protection against intrusion by the sperm provider that Susan expected and that other single women would have been accorded

133. Adoption of Kelsey S., 1 Cal. 4th 816, 845–46 (Cal. 1992) (pointing out that single adoptive parents are becoming significantly more common).

134. UNIF. PARENTAGE ACT Prefatory Note (amended 2002), 9B U.L.A. 5–6 (Supp. 2004). The 1973 Uniform Parentage Act shunned the term “illegitimate,” choosing instead to use the term “child with no presumed father.” *Id.* at 5. The 2002 Uniform Parentage Act amendments apply the provisions of Article 7 to non-marital as well as to marital children born as a result of assisted reproductive technologies. *Id.* at 6; *see also* Johnson v. Calvert, 851 P.2d 776, 778–79 (Cal. 1993) (noting that the purpose of the Uniform Parentage Act was to eliminate such distinctions). Although elimination of legitimacy distinctions sometimes led to affirming the rights and responsibilities of unwed biological fathers, they also recognize the rights of single parents, both male and female. *See supra* notes 116–17 and accompanying text.

135. The average cost in the United States in 1998 of an *in vitro* fertilization (IVF) cycle was \$12,400. American Society of Reproductive Medicine, Frequently Asked Questions About Infertility, <http://www.asrm.org/Patients/faqs.html> (last visited Sept. 4, 2005). Success with IVF increases with the number of cycles attempted, up to four cycles. *Id.*

136. In representing Susan, we argued that despite the lack of perfect fit between section 7613(b) and the facts at hand, this code section was the most appropriate statutory guidance available for the resolution of this dispute.

under section 7613(b). Even in the face of the mistaken transfer, if Susan had been married when she used IVF, her family would have received such protection under section 7613(a).¹³⁷

If Susan were accorded the protection of section 7613, Robert and Denise would lose an embryo that became a child that was genetically Robert's progeny, but about whom they knew nothing until disclosure of the doctors' mistake over ten months after Daniel was born. Their loss is certainly substantive and painful and they are in no way to blame for the events that ensnared all the parties to this conflict. The more Robert and Denise view embryos as akin to unborn children and the less able they are to have the additional children they wanted, the more their loss is magnified. But theirs is, in my view, a lesser loss than the disruption of a family unit that Susan, with equal innocence, had planned, established and enjoyed during the months of her pregnancy and for almost a year after Daniel was born. Even under the resolution imposed by the courts, Robert did not get what he wanted. Instead of receiving full custody and having Denise declared Daniel's legal mother, Robert received legal parenthood, but only a portion of Daniel's time and rearing. Susan, too, received legal parental status, but she must also share her and her child's next eighteen years with a complete stranger, and will likely bear continued frequent conflict, criticism, and litigation over making such an uncomfortable situation work.

V. BEST INTERESTS OF THE CHILD

The use of assisted reproductive techniques may matter in determining parental status, but procreative methods seem less likely to have relevance when the focus shifts to the best interests of the child. Elsewhere, I have argued that, in many ways, the interests of children converge with the interests of the parents who rear them.¹³⁸ Where those interests do not converge, dependency laws are as applicable to problems of deficient parenting of children of assisted

137. California Family Code section 7541(e)(2) prevents a biological father from challenging parental status assigned under section 7613. CAL. FAM. CODE § 7541(e)(2) (West 2004).

138. See Shultz, *supra* note 5, at 341–46.

reproduction as they are to deficient parenting of children brought into the world in any other fashion. Where conflict arises during the child's minority regarding education, health care, or custody and visitation, the dominant standard courts rely on to resolve such conflict is the best interests of the child.¹³⁹ Recently, the question arose in California as to whether or not the best interests of the child should be a formal and significant factor in determining initial parental status.

A. The Dispute over Best Interests in Johnson

In *Johnson v. Calvert*,¹⁴⁰ a dispute over maternity arising from the birth of a child to a gestational surrogate, the California Supreme Court engaged in a brief but heated exchange over this issue.¹⁴¹ In a footnote to the majority opinion, Justice Panelli observed that:

The dissent would decide *parentage* based on the best interests of the child. Such an approach raises the repugnant specter of governmental interference in matters implicating our most fundamental notions of privacy, and confuses concepts of parentage and custody. Logically, the determination of parentage must precede, and should not be dictated by, eventual custody decisions.¹⁴²

This footnote was provoked by dissenting Justice Kennard's insistence that the best interests of the child should have been considered in determining parentage.¹⁴³ Justice Kennard rejected what she saw as the majority's claim that the UPA would not consider a child's best interests in an initial determination of

139. See, e.g., CAL. FAM. CODE §§ 3020, 2040-43 (West 2004) (child custody provisions).

140. *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993), was the first modern ARTs dispute to reach the California Supreme Court. *But see* *People v. Sorensen*, 437 P.2d 495 (Cal. 1968) (holding a husband who consented to his wife's artificial insemination with another man's sperm to be the lawful father of the child in a criminal action for child support).

141. *Johnson*, 851 P.2d 776. The "temperature" was likely raised by Justice Kennard's use of the rather extreme example of a parent selling a child into slavery in her attack on the majority's adoption of an intent-based standard to determine legal motherhood. *Id.* at 779 n.4 (Kennard, J., dissenting).

142. *Id.* at 782 n.10 (Kennard, J., dissenting).

143. *Id.* at 789, 799 (Kennard, J., dissenting).

parentage. She pointed out that the best interests test is relevant whenever a minor's welfare is at stake, including not only adoption, temporary placement, and custody or visitation, but also when termination of parental rights is adjudicated. She urged that the minor's welfare is relevant to the determination of parental status because "[f]actors that are pertinent to good parenting, and thus that are in a child's best interests, include the ability to nurture the child physically and psychologically, and to provide ethical and intellectual guidance."¹⁴⁴

Those accustomed to reading parental status cases may find it somewhat odd that this issue sparked conflict. Justice Panelli's note outlined the usual approach; what was unusual was the need to spell it out. Best interests is ordinarily the standard when questions not about parental status but about the placement or life circumstances of a child are in dispute. The counter-examples Justice Kennard noted in dissent do not really involve the original assignment of parental status. Custody, visitation and temporary placement turn on the child's best interests, but they are not determinations of parenthood. Adoption may occur very early in a child's life, but it is a legal *re*-assignment of parentage. Termination of parental rights does involve parenthood, but it usually operates either as a prelude to adoption or as a consequence of *de facto* abandonment or deficient parenting. In other words, initial determinations of parenthood establish who has a starting seat at the table. Decisions about the child's future, on the other hand, are made by those at the table, and are reviewed under a best interests standard.

Judicial dispute about something so seemingly ordinary suggests that the Justices sensed something unusual in *Johnson*. That something may not have been so much a matter of ordinary doctrine as it was the product of unarticulated differences between coital and assisted reproduction. As outlined above, determining parental status in coital reproduction involves assessing the adult parties' marital relationship to each other and/or the biological connections between parent and child that stem from sexual relations between the adults.¹⁴⁵

144. *Id.* at 800 (Kennard, J., dissenting) (citations omitted).

145. *See supra* Part II. Decisions jointly made by mother and father regarding a child's parentage, such as a voluntary declaration or a "holding out," may also establish paternity. *See*

Such disputes usually concern paternity because birth itself ordinarily sufficiently signifies the genetic and gestational relationship between a woman and a child. Except when paternity is assigned on the basis of the (eroding) marital presumption, determining initial parental status is essentially a matter of proving the *identity* of the man who was the source of the genetically identifiable sperm. Considerations of the child's best interests are essentially irrelevant to this question of identity.

When techniques of collaborative reproduction are used, however, more than simple identity of a parent is at issue. As is true in coital reproduction, biology and marriage (or other committed intimate connection) may well be *motivators* to engage in ARTs. But people turn to ARTs not only to assure biological connection or to enhance an intimate relationship (marital or otherwise). Rather, they turn to ARTs precisely because ARTs allow substitution for or repair of biological and/or social elements of reproduction that are absent or broken. To govern this significantly different context with rules developed to govern coital reproduction is wrong-headed. The Justices disputing the applicable standard in *Johnson* may have intuited that a broader and somewhat different array of considerations should affect the way ARTs parentage disputes are resolved. A framework is needed that places the overall situation in perspective, one that looks not just at individual genetic identity but also at the nature of the claims and the relationships of the claimants. I suspect that this widened perspective is what Justice Kennard was seeking when she urged the application of a best interests standard in *Johnson*. But in resisting her urging, the majority rightly recognized that most of the examples she gave were more about parental fitness than about issues distinctive to initial assignment of parental status.

In my view, the *Johnson* majority was right to adopt an intent-based standard of parentage that gave effect to the ARTs agreement between the parties.¹⁴⁶ The *Johnson* dispute arose because one of the

supra note 59.

146. The majority cited my earlier article, Shultz, *supra* note 5. *Johnson*, 851 P.2d at 782–83. Justice Kennard commented that “[t]he intent of the genetic mother to procreate a child is certainly relevant to the question of the child's best interests; alone, however, it should not be dispositive.” *Id.* at 800 (Kennard, J., dissenting).

parties to a surrogacy agreement wanted to change her mind after the birth. Intentions, as expressed in voluntary agreements, should matter. The agreement between the three adults was what caused the child to be conceived. I would give effect to those expressed intentions in assigning parental status. Like Justice Panelli in footnote ten, I would not inquire into issues of personal or individual fitness that are the typical focus of custody or dependency hearings most akin to Justice Kennard's examples. Dependency statutes are the most appropriate way to protect a child from major *failings or incapacities* of their *individual parents*.

Although I disagree with Justice Kennard's analysis of *Johnson*,¹⁴⁷ I share her concern that a broader set of issues should sometimes be considered in determining parental status. For me, the category to which such a widened perspective is essential is parentage disputes that occur in the context of ARTs. The vital factual differences between coital and assisted reproduction require differences in legal response. Had the *Johnson* majority been inclined to follow the approach adopted by the Court of Appeal in Susan's case, it could have literally followed the code section stating that the woman who gives birth is the legal mother.¹⁴⁸ Instead, the court recognized that the separation of genetic and gestational roles under ARTs raised new issues not envisioned by the existing statutes. Relying partly on gender-neutral readings of other parentage code sections, the court first determined that both the gestator and the woman who provided the ovum could claim maternal status. To resolve the resulting conflict, the majority based important parts of its decision on factors such as intentionality that differentiate assisted reproductive techniques from traditional coital procreation.¹⁴⁹

Justice Kennard's label for broader considerations was the best interests. Best interests is not the only principle that courts could use to expand what they take into account in deciding ARTs parentage. It

147. Although I disagree with her application of that broader perspective in *Johnson*, we might reach more similar conclusions in Susan's case. Justice Kennard voted to grant Susan's petition for review. Because the Court did not grant review, I cannot, of course, predict what her views about Susan's case might have been.

148. *Johnson*, 851 P.2d at 780 (citing CAL. CIV. CODE § 7003 (current version at CAL. FAM. CODE § 7610 (West 2004))).

149. *Id.* at 780–82.

is simply the most familiar one. The broadened inquiry itself is more important than the name it goes by. Calling it best interests, however, would likely be problematic. It would legitimize a wider inquiry, but because of the differing contexts in which that standard is typically applied, it might also muddy the waters. The best interests standard is famously porous, allowing judges to consider an unrestrained array of factors not relevant for assigning initial parental status when conception occurred through typical coital means. What is needed is more precise. Deliberations in ARTs parentage cases should include factors that reflect the differences inherent in these procreative processes and arrangements. The *Johnson* majority properly rejected the best interests standard *per se*, but its analysis thoughtfully considered the important factors that distinguish ARTs procreation from traditional coital reproduction. That consideration is crucial to fair resolution of ARTs disputes.

B. Susan's Case and Best Interests

Unlike *Johnson*, there was no agreement between Susan and Robert that could resolve their dispute on the basis of an intent standard. But the judges weighing Susan's case should have taken into account distinctive features of the dispute that derived from the parties' use of ARTs. In various ways, Susan asked the court to consider those aspects of the situation. Robert's attorneys countered that best interests evidence was inappropriate, citing *Johnson*.¹⁵⁰ As the case unfolded, the narrow and literal approach prevailed. Differences stemming from ARTs were omitted from the deliberation.

As already noted, both the trial and appellate courts held that section 7613, the only code section directly relevant to an ARTs procedure, did not apply because its language did not exactly fit this situation. They held that statutes governing ordinary paternity actions and biological testing should be narrowly and literally followed

150. See, e.g., Reporter's Transcript of Proceedings, *supra* note 31, at 4; Respondant's Answer to Petition for Review at 27, *Robert B. v. Susan B.*, 135 Cal. Rptr. 2d 785 (Cal. Ct. App. 2003) (No. 1-02-CP-010574).

without consideration of factual or policy differences.¹⁵¹ Other judicial choices by the judges in Susan’s case are also illustrative. Susan’s briefs called attention to the disruption of Daniel’s constitutional right to a stable placement,¹⁵² but the court was not responsive. Narrowing the focus both legally and factually, the Sixth District first cited the practice of addressing constitutional questions only when no other grounds are available.¹⁵³ It then scolded Susan for “speculating,” saying that “much of Susan’s appellate argument is a misdirected attack on any *future* effort Robert and Denise *might* make to obtain custody.”¹⁵⁴ With its jab about “speculation,” the court ruled out as premature Susan’s efforts to place the dispute in its distinctive context. It also disregarded prior statements and pleadings showing that Robert and Denise believed they should have sole custody of Daniel, leaving on the table only Robert’s later, more moderate and strategic assertions. The court also ignored Susan’s observation that Denise’s concurrent appeal of the dismissal of her maternity action was incompatible with the couple’s purported “acceptance” of Susan’s role as Daniel’s mother.¹⁵⁵

Just prior to oral argument before the Court of Appeal, Susan submitted and urged the court to consider a psychological/custody evaluation, which had been ordered by the trial court, but just then received. Susan’s request was premised on the fact that Daniel’s best interest “hangs in the balance.”¹⁵⁶ Robert responded emphatically, citing footnote ten in *Johnson*, and calling the report “an inappropriate attempt to confuse the issues and prejudice Robert’s right to a decision on the merits of her parentage challenge.”¹⁵⁷

151. See *supra* note 72 and accompanying text.

152. Appellant’s Opening Brief in the Sixth District Court of Appeal, *supra* note 20, at 19–20. For a similar argument, see *In re Bridget R.*, 49 Cal. Rptr. 2d 507, 523–24, 533–34 (Cal. Ct. App. 1996) (emphasizing a child’s individual rights to stable placement in a dispute over the validity of an adoption challenged under the Indian Child Welfare Act).

153. Robert B. v. Susan B., 135 Cal. Rptr. 2d 785, 788 (Cal. Ct. App. 2003).

154. *Id.*

155. Appellant’s Opening Brief in the Sixth District Court of Appeal, *supra* note 20, at 24.

156. Susan B.’s Motion to Take Additional Evidence at 2, Robert B. v. Susan B., 135 Cal. Rptr. 2d 785 (Cal. Ct. App. 2003) (No. 1-02-CP-010574). Susan’s request for appointment of a guardian ad litem for Daniel was likewise refused.

157. Robert B.’s Opposition to Susan B.’s Motion to Take Additional Evidence at 6, Robert B. v. Susan B., 135 Cal. Rptr. 2d 785 (Cal. Ct. App. 2003) (No. 1-02-CP-010574).

Without comment, the Sixth District refused to consider the evidence.¹⁵⁸

Especially when combined with its narrow and literal construction of statutes, the court's exclusion of any broader evidence placed Susan in a double bind. Instructed that her principal concerns were premature or speculative with no legitimate bearing on the paternity action, Susan also found it difficult to be heard in the next phase concerning custody. As if faced with a dispute over parentage after traditional reproduction, the courts initially focused solely on whether a genetic link existed between Robert and Daniel.¹⁵⁹ Once the genetic connection was established, they saw the paternity determination as routine. Once the paternity determination became final, Robert's undisputed *personal* fitness as a parent was sufficient to earn him substantial legal and physical custody.¹⁶⁰

The cumulative effect of these judicial choices was to ignore the distinctiveness of ARTs and the appropriateness and effect of giving Robert a permanent role in Daniel's life. The reduced role of genetics, the mistake that could not even have occurred in coital procreation, the nineteen month delay before discovery of that mistake,¹⁶¹ the disregard for the legislative intention to allow

158. The court also refused motions by Robert to take judicial notice of documents (regarding a dispute over mediation) that were filed after the trial judgment became final, to take notice of documents obtained after oral argument regarding the medical malpractice cases against the fertility doctor, and to strike certain assertions by Susan that Robert claimed to be unsupported. It refused a motion by Denise to take judicial notice of matters regarding Susan's physician-patient confidentiality that were disputed during discovery and that Denise claimed adversely affected the court's ruling as to her standing.

159. *Robert B. v. Susan B.*, 135 Cal. Rptr. 2d 785, 786 (Cal. Ct. App. 2003). The trial court ordered genetic testing. *Id.* Susan challenged the order for genetic testing by writ petition, which the appellate court summarily denied. *Id.* at 786 n.3.

160. The trial court has gradually increased Robert's contact with Daniel, awarding him considerable physical and joint legal custody.

161. The longer a child is reared (and gestated) by someone else, the weaker the relevance of genetic connection should be. Because a very young child is developing so quickly, and because his or her attachment needs are so great, units of time are more important early in life rather than later. A balancing test of factors that includes some concept of time-based estoppel seems appropriate in determining parentage. This is especially so given that neither Robert nor Susan was responsible for the error or for the delay in revealing it. Although Robert has no culpability for the delay, Susan's equal innocence should allow her to cite the delay as a legitimately relevant factor. In this respect, the situation is distinguishable from instances where a mother has *prevented* a biological father from knowing he has a child or from having contact with that child. In such a situation, a mother's conduct might arguably reduce the salience of a

unmarried women to create a protected family unit, the imposition of a *de facto* family on total strangers who had no prior consensual relationship whatsoever¹⁶²—all these elements deserved the court’s attention and concern. Instead, the courts’ narrow interpretations and sharp separation of parentage and custody deprived Susan’s principal arguments of relevance either in the parentage determination or in subsequent custody decisions. In a real sense, the issues that were most important from Susan’s vantage point simply disappeared from the case.

The quality of legal analysis is not all that suffered. Judicial failure to grapple with the real difficulties in this dispute imposed costs on the child at its center. Persistent and disturbing conflict has already dominated not only the adults’ lives but also the child’s for the more than three years since this case began. Although emotional and economic support from two sources might, as a general and theoretical matter, be better for a child, the actual need for two sources in this case is far from established. Although the future is always unknown, facts at the time of this dispute suggested little likelihood of a need for a second parent’s economic support.¹⁶³ By

father’s delay in establishing a relationship with the child. *See* *Lehr v. Robertson*, 463 U.S. 248 (1983) (allowing an adoption to proceed because the biological father’s failure to register as a putative father foreclosed his further claim to notice of the pending adoption of his child). In dissent, Justice White urged that the biological father should not be deprived of his rights to object if the mother prevented him from seeing his child. *Id.* at 271. *But see In re Jerry P.*, 116 Cal. Rptr. 2d 123, 140 (Cal. Ct. App. 2002) (holding that paternity and dependency codes violate a man’s constitutional rights, despite his not being the biological father, to the extent that they permit a mother to unilaterally deny presumed father status by preventing him from receiving the child into his home).

162. The *Baby M* outcome had certain similarities in that it named the surrogate as the child’s mother and the intending parent-husband as the father, forcing them to share the child. *In re Baby M*, 537 A.2d 1227, 1234 (N.J. 1988). The *Baby M* case was less egregious, however, in that the surrogate and the intending husband at least had a connection through their pre-conception agreement, even though the New Jersey Supreme Court ignored that agreement. *Id.* at 1236, 1240.

163. Based on Susan’s circumstances before the dispute, and in view of nearby availability of members of her family, the likelihood is that Daniel would only need to rely on a second parent if something drastic, like Susan’s death or disability, occurred. For that matter, Susan might enter a new relationship that would consensually bring a second adult into Daniel’s life. Perhaps single parents should be required to designate a second person (their own parent, sibling or friend) to become responsible for the child were the single parent to become unable to care for him or her. A person in Robert’s shoes might even be so designated, although there would be objections to such a designation. Evaluation of this idea is beyond the scope of this article. Another possibility would have some points in common with Justice Stevens’

contrast, the odds of disruptive conflict between two strangers unwillingly entwined for eighteen years by court order seem quite high. This factor, too, was effaced by the courts' approach to this dispute.

The broadened analysis I recommend for ARTs disputes would not solely have favored Susan. Beyond the genetic link that so entranced the judges, Robert had other points that weighed in his favor. In particular, the intensity of his commitment to parenting is compelling. For courts that too often deal with men fitting the "deadbeat dads" stereotype, it must have been difficult for the judges to turn their backs on a ready, willing, and able father who both asserts and demonstrates that he wants to actively parent his child. Robert's paternal instincts stretch far beyond being a father in name. He reportedly has good relations with his step-children and is apparently a good father to the daughter born of his and Denise's fertility treatment. Certainly, he has spent significant amounts of money and time seeking paternity of Daniel,¹⁶⁴ and he and part of his family have endured the hardship of relocating for extended periods of time so that he can become acquainted with Daniel at the slow and deliberate pace set by the court in order to protect the child from abrupt dislocation.

These factors speak well of Robert. They are, however, largely matters of individual fitness. Susan, too, is unquestionably a fit parent. Individual fitness is not what I have called "ARTs-specific" and is the kind of evidence that *will* be adequately addressed in the ordinary assignment of custody. Leaving such evidence for custody hearings is, therefore, entirely appropriate. By contrast, the elements that should not have been left out of the calculus are those that are context-dependent, rather than person-dependent. They are, in other words, factors that are derived from the use of ARTs rather than from the personal qualities of the individuals involved. It is these "ARTs-

suggestion that a genetic father excluded from legal parenthood might gain visitation by showing that this would serve the best interests of the child. *Michael H. v. Gerald D.*, 491 U.S. 110, 133 (1989) (Stevens, J., concurring). For general California provisions regarding visitation rights, see CAL. FAM. CODE § 3100 (West 2004).

164. One can be reasonably confident of this based on the duration of the litigation and the number of lawyers involved in representing both Robert and Denise.

specific” elements that are my focus in recommending a broadened analysis of parentage.

Another possible solution would be for courts to assign legal paternity to someone in Robert’s shoes on the basis of genetic connection, but then to weigh the ARTs-specific elements as perhaps dictating that the child’s interests would best be served by denying that genetic parent custody or any visitation not voluntarily agreed to by the person in Susan’s shoes. Such an approach would have the advantage of allowing the child to know the biological parent’s medical and genetic history, and also of permitting the child and genetic parent to develop a relationship once the child was grown if they so chose. However, such a solution might create too much cognitive dissonance. It might also require unusual clear-sightedness for a court to adopt or for the parties to accept such an arrangement. Identifying someone as a genetic parent and recognizing that person as a fit or even good parent, but nevertheless denying contact, would be difficult for the judge and the excluded parent alike.

C. Other Relevant Factors in Robert v. Susan

Several other factors are what I have called “ARTs-specific” and are in my view relevant in determining parentage. For example, Robert and Denise are also the parents of a child born at approximately the same time as Daniel through the transfer of embryos whose genetic progenitors were the same as Daniel’s. They contend that Daniel and their child are genetic twins who have a right to enjoy a robust relationship with each other.¹⁶⁵ Susan’s claims rested heavily on her right to the legal protection of her intact family unit. Some would see the separation of these two children as implicated, especially from the child’s eye view, in the completeness of the family unit. But the children would be fraternal rather than identical genetic twins, as they are the product of two different fertilized ova. Whether it is appropriate to characterize two children gestated in different women’s wombs as twins is debatable.

165. I am indebted to Susan Appleton, Lemma Barkeloo and Phoebe Couzins Professor of Law, Washington University in St. Louis School of Law, for calling my attention to this point.

Questions regarding the relation between two children gestated by different women could only arise when ARTs were used. They would, then, be appropriate for consideration under my proposal for a broadened review of ARTs differentiated factors in parentage disputes. In my view, the “sibling” relationship between these two children would not outweigh Susan’s arguments for denying Robert’s paternity, but reasonable others might differ. The parties might also be willing to allow such a relationship to develop on a voluntary rather than a court-imposed basis. Again, once the children were grown, they might themselves choose to build a connection with one another.

Another ARTs-derived issue involves Denise’s role as a claimant to parental status. Full discussion of her legal standing is beyond my scope here, but I believe that in some circumstances a claim like Denise’s might have greater validity than it did on these facts. Denise claimed that, as the wife of a man whose reproductive capacities played a role in the creation of a child through ARTs, she should stand in the same position as the husband of a woman who consents to her artificial insemination with donor sperm and thereby becomes the legal father. Although gestation and sperm production differ greatly in effort, risk, and bonding, Family Code section 7613(a) should arguably allow for gender reversal in the statutorily assigned roles. Consequently, where a wife’s ova may be incapable of fertilization, but her husband is fertile, the couple should be able to use donor ova and embryo transfer to enable the wife to bear a child the couple intends to parent and the law should recognize them as the child’s legal parents.

Susan’s claim to maternity is even stronger than this hypothetical variant of Denise’s situation because although neither she nor Denise had a genetic relation to Daniel, Susan gestated and for a number of months exclusively reared Daniel. Those facts, together with others noted above in the paternity analysis, cement Susan’s claim to be Daniel’s mother. However, had there been an agreement with a willing gestational surrogate who changed her mind and wanted to keep the child, or if the ova donor had sought parental rights as against Denise as gestator, Denise’s theory under section 7613(a) should carry some weight, even though the statute on its face speaks only to the reversed genders. Because these situations involve a

voluntary agreement that one party subsequently seeks to abandon, such cases would be resolved by the intent-based approach employed in *Johnson*. Moreover, although I am unaware of any actual facts that precisely parallel the hypothetical just put forth, decisions in cases such as *Marriage of Buzzanca*¹⁶⁶ incorporate elements akin to my suggested analysis of these Denise-variant hypotheticals.

VI. CONCLUSION

The dispute between Robert and Susan arose from a mistake that could only have occurred where assisted reproductive techniques were used to solve biological and interpersonal barriers to procreation. Tragic as this mistake is for both of these innocent parties, I believe that given the length of time before the mistake was disclosed, the better outcome in Susan's case would have been for the courts to prevent Robert from establishing paternity. It would be better to ask Robert to face the loss of an embryo, who has now become a child, whose very existence was unknown to him before this belated dispute, than to permanently impose a stranger into the planned and harmonious family unit of an already-situated and treasured child.¹⁶⁷ The courts' literal analysis of isolated sections of a code adopted to govern a different time and a different reality was myopic and overly rigid. It produced troubling and perverse results.

Assisted reproduction dilutes the ordinary importance of genetics because those procedures are employed in ways that segment, repair and otherwise alter the biological process of reproduction. Those methods, as well as the family configurations and plans of the people who employ them, do not map neatly onto categories designed for ordinary procreation methods and relationships. Assisted reproductive techniques are legal and widely used. The problems they raise require a different calculus than the problems of parenthood

166. *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998). Writing for the court, Judge Sills directly addressed the ARTs-specific nature of the case and stressed the importance of the parties' intentions despite the absence of a genetic or gestational connection. *Id.* at 290. His discussion includes a consideration of gender equity as well. *Id.* at 285.

167. *Cf. Johnson v. Calvert*, 851 P.2d 776, 781 n.8 ("To recognize parental rights in a third party with whom the Calvert family has had little contact since shortly after the child's birth would diminish Crispina's role as mother.").

addressed by a statute written in 1973 before most of those methods emerged.¹⁶⁸

Problems that arise from the lack of an appropriate modern statute are further exacerbated when courts apply existing statutes in a narrow and literal way, closing their eyes to factual context and congruent policy. The difficulty and novelty of ARTs disputes understandably pulls courts eager to avoid judicial adventurism toward literal interpretation of legislation and causes them to avoid explicit policy considerations. But in the absence of statutes that contemplate the altered set of issues that assisted reproduction presents, that is exactly the wrong instinct.

The differences between “standard” parenthood disputes and those arising from ARTs demand that courts expand the range of factors and evidence that they will entertain. It is no accident that the dispute about whether to address best interests in parentage actions arose in *Johnson*, California’s first significant state supreme court decision regarding an ARTs dispute. Until legislatures establish the principles that should regulate these distinctive parentage disputes, judges will be deciding what policies to adopt even if they purport to simply adopt the plain meaning of existing statutes. As applied to ARTs disputes, those statutes are obsolete in all but a technical sense. Susan and Daniel, Robert, Denise, and their children were all victims of this judicial short-sightedness.

168. Louise Brown, the first “test tube baby,” was born in 1978 in England. See Carol Lawson, *Celebrated Birth Aside, Teen-Ager Is Typical Now*, N.Y. TIMES, Oct. 4, 1993, at A18. A number of years passed before IVF and other techniques came into the widespread use that they enjoy today.