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## Who Are the Parents Biotechnological Children?

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## WHO ARE THE PARENTS OF BIOTECHNOLOGICAL CHILDREN?

Larry I. Palmer\*

We do not underestimate the difficulties of legislating on this subject. In addition to the inevitable confrontation with the ethical and moral issues involved, there is the question of the wisdom and effectiveness of regulating a matter so private, yet of such public interest. Legislative consideration of surrogacy may also provide the opportunity to begin to focus on the overall implications of the new reproductive biotechnology—*in vitro* fertilization, preservation of sperms and eggs, embryo implantation and the like. The problem is how to enjoy the benefits of the technology—especially for infertile couples—while minimizing the risk of abuse. The problem can be addressed only when society decides what its values and objectives are in this troubling, yet promising, area.<sup>1</sup>

From 1990-1994, a Special Committee on Biotechnology and the Law of the New York State Bar Association was charged with developing legislative recommendations to deal with the complexities alluded to in the highly publicized *Baby M* case.<sup>2</sup> In that case, the New Jersey Supreme Court held

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1. In re *Baby M*, 109 N.J. 396, 469, 537 A.2d 1227, 1264 (1988).

2. The full text of the committee's charge was:

The Special Committee on Biotechnology and the Law shall examine the impact of advancements in biotechnology on existing laws and constitutional rights and

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that surrogate parenting contracts were void and unenforceable. The committee, which I chaired, developed three specific legislative recommendations. Although none have been approved by the House of Delegates of the New York State Bar Association, some reflections on their content and the process by which they were arrived at may provide insights into what legislation should be enacted in response to the use of *in vitro* fertilization.

My approach to drafting legislation on this subject was guided by an assumption that no piece of comprehensive legislation for any particular form of reproductive technology should emerge from the committee's deliberations. Deep value conflicts existed within the group. Members differed in terms of areas of professional practice, religious beliefs, political affiliations, and views on related issues of abortion. I believed that the differences were socially useful and ought to be presented in any legislative proposals. So the committee's process sought to find areas of commonality within a diverse group.

My thinking, enriched by the debates within the committee, evolved by asking three questions about *in vitro* fertilization. After sketching these questions and the committee's general response, I shall examine each issue and the related proposals in more detail.

First, I asked whether the existing legislative approach to the use of another reproductive technology—artificial insemination—should provide a model for developing a legislative approach to *in vitro* fertilization. In this regard, our 1990 report concluded that for legislative purposes the two biotechnologies are similar.

The biological differences in the reproductive capacities of men and women led me to the next question, whether gestation of a child should make a woman a parent even when the genetic material of the embryo is provided by another woman. In 1992, the committee recommended that there be explicit legislative recognition that the practice of embryo implantation could

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prohibitions, specifically in relation to *in vitro* fertilization, surrogacy, patenting medical processes, donor insemination, gamete donation, genetic manipulation, cryopreservation, and all other related issues pertaining to the right to procreate, and to render a report and recommendations to the President, Executive Committee, and House of Delegates of the New York State Bar Association.

Although I rely heavily on three of the Committee's written reports, of which I was the principal draftsman, the views expressed here are my own. See REPORT ON GAMETE DONATION AND *IN VITRO* FERTILIZATION OF THE SPECIAL COMMITTEE ON BIOTECHNOLOGY AND THE LAW (1990); THIRD REPORT ON THE LEGAL SIGNIFICANCE OF GESTATION OF THE SPECIAL COMMITTEE ON BIOTECHNOLOGY AND THE LAW (1992); FOURTH REPORT ON THE PARENTS OF CHILDREN BORN THROUGH ASSISTED REPRODUCTION OF THE SPECIAL COMMITTEE ON BIOTECHNOLOGY AND THE LAW (1993).

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lead to the situation where a child born of the practice of *in vitro* fertilization would have two legal mothers.

Shortly after our 1992 report, New York enacted legislation prohibiting “surrogate parenting contracts” as contrary to public policy. As a result, I asked if our *two-legal-mothers* solution could not lead implicitly to a new definition of children within the law—“biotechnological children.” Although the committee could not agree on a legislative solution to the two-mothers problem, we agreed that our proposal had created still another problem: how to handle inheritance. The final recommendation contained in our 1993 report was that where the issue was determining relationships for purposes of inheritance law, the genetic as opposed to the gestational or birth mother was the parent.

The degree of indeterminacy in some of the recommendations that follow may be a function of the cautious approach I believe law should adopt towards technology, particularly reproductive technology. Or, it may be an example of how the use of various technologies has forced law to develop new implicit legal and social constructs such as “biotechnological children” in order to permit an evolution of values around various conceptions of family formation.

### **I. ARE ARTIFICIAL INSEMINATION AND *IN VITRO* FERTILIZATION SIMILAR TECHNOLOGIES?**

After months of debate, the committee relied upon the statutory framework used to resolve what had become a less controversial biotechnology—artificial insemination. The committee recommended a modification of that portion of the Domestic Relations Law which deals with artificial insemination, to provide children born with the help of *in vitro* fertilization with the same protection—legitimacy—as children born with the help of artificial insemination. We proposed that the pertinent statute, § 73(1) of the Domestic Relations Law, be expanded to encompass *in vitro* fertilization. As modified, the statute would read:

Any child born to a married woman by means of artificial insemination or *in vitro* fertilization performed by persons duly authorized to practice medicine and with the consent in writing of the woman and her husband, shall be deemed the legitimate, natural child of the husband and his wife<sup>3</sup>

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3. The existing statute reads:

§ 73 Legitimacy of child born by artificial insemination.

(1) Any child born to a married woman by means of artificial insemination performed by persons duly authorized to practice medicine and with the consent in writing of the woman and her husband, shall be deemed the legitimate, natural child of the husband and his wife for all purposes.

Early legal controversies over the use of artificial insemination arose first in the context of marital dissolution, and then in the context of adoption. A variety of legal theories were used to resolve these cases prior to the enactment of § 73 of the Domestic Relations Law.<sup>4</sup> Then, in 1974, the New York Legislature passed § 73, which provided a single framework for resolving the issues related to custody, visitation, child support, and adoption. In declaring that a child born with the assistance of this biotechnology was legally the child of a married couple for all purposes, the legislature seems to have recognized that a process which allows for the separation of what we might call "genetic" parentage from "social" parentage is best dealt with through legal recognition of the social parentage in the context of preexisting legal obligations to children. While this approach has not resolved all issues associated with the process of artificial insemination,<sup>5</sup> it does provide a way of thinking about legal responses to new issues that may arise in regard to the use of this procedure.

The committee agreed that the approach to artificial insemination should be used as a framework for *in vitro* fertilization as well. The committee had long, intense discussions on the ethical dilemmas associated with the process of *in vitro* fertilization, such as balancing the desires of infertile couples against the fear of the social consequences of separating fertilization from the sexual conduct of the man and woman who intend to raise a child. The committee concluded that neither the total prohibition of *in vitro* fertilization, nor legislative action to encourage and expand the use of *in vitro* fertilization, is appropriate at this time.

A total ban on the use of *in vitro* fertilization is inappropriate for at least two reasons. First, the constitutionality of a total prohibition of *in vitro* fertilization that includes married couples is questionable. In *Griswold v. Connecticut*,<sup>6</sup> the Supreme Court granted to married couples a constitutional right to use contraceptive devices to *prevent* them from having children. Married couples ought to have a constitutional right to use biotechnology to *assist* them in having children.<sup>7</sup>

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(2) The aforesaid written consent shall be executed and acknowledged by both the husband and wife and the physician who performs the technique shall certify that he had rendered the service.

N.Y. Dom. Rel. Law § 73 (McKinney 1988).

4. See *Strnad v. Strnad*, 109 Misc. 786, 78 N.Y.S.2d (Sup. Ct. (1948)); *Gursky v. Gursky*, 39 Misc.2d 1083, 242 N.Y.S.2d 406 (Sup. Ct. 1963); *In re Adoption of Anonymous*, 74 Misc.2d 99, 105 345 N.Y.S.2d 430, 435 (Sur. Ct. 1973).

5. See *Mother Accuses Sperm Bank of a Mix-up*, N.Y. TIMES, Mar. 9, 1990, at B1 (describing a malpractice suit for an alleged mishandling of a husband's sperm preserved at a sperm bank for later impregnation of his wife).

6. 381 U.S. 479 (1965).

7. The analysis used in resolving abortion disputes also would be relevant to

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Second, some infertile married couples have been and are using *in vitro* fertilization. Given the capacity of medicine to perform certain techniques such as cryopreservation of fertilized embryos, there might be conflicts that will have to be resolved. In our view, the most important anticipated conflicts for the legislature to resolve will be those that relate to the welfare of children born of this process. As to any such children, regardless of genotype, our proposed statute would provide a means of resolving any anticipated disputes about children involving married couples, who are now the most common users of *in vitro* fertilization procedures. Thus our statute provides a framework for resolving issues of responsibilities and obligations to the child in the event of divorce, adoption, or death of one or both parents. In addition, our proposed statute provides a means of resolving questions that may arise in the not-too-distant future. If, for instance, a married couple with a propensity to produce offspring with a severe genetic defect chose to accept the donation of a "healthy" embryo from another couple with "spare embryos," our proposed statute would help resolve disputes over the child. Under our proposed statute, the child born of the married woman who gave birth to the child under these circumstances would be the child of the married woman and her husband. The gamete donors would have no legal claim to visitation, no right to consent to the adoption of the child, and no right to inherit from the child.

In providing a legal solution for problems that may arise if gamete or embryo donation is used by married couples to have children, I do not mean to suggest that gamete or embryo donation is desirable. Rather, I recognize that the desire to have a child, especially among those who are infertile, is an intense wish that may encourage some couples who are desperate for children to enter legally uncharted waters. Married couples started to use artificial insemination, despite the ethical controversy over the process and the well-known legal risks to the children in the event of divorce. Judges tried to handle the disputes regarding artificial insemination as they arose, by developing theories aimed at protecting children, until the legislature was finally able to adopt a consistent legal framework. In a similar fashion, over the past decade, married couples have started to use *in vitro* fertilization despite the deep ethical controversy over the technique. Like the users of artificial insemination before them, infertile couples, who have usually tried many other techniques before attempting *in vitro* fertilization, are likely to assume that there will be no disputes involving their children, or that the risk

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resolving these constitutional questions. That analysis may be changing. *See Webster v. Reproductive Health Services et al.*, 492 U.S. 490 (1989); *Planned Parenthood of S.E. Penn. v. Casey*, 112 S. Ct. 2791 (1992).

of dispute is worth taking. In this regard, infertile couples are no different than couples who have children through sexual intercourse.

The proposed statute deliberately does not address whether single persons should have access to *in vitro* fertilization or artificial insemination.<sup>8</sup> The issue of whether law should sanction the use of *in vitro* fertilization is distinct from the issue of who should have access to the biotechnology. Our resolution of the first issue allows the use of a biotechnology within the accepted legal framework for procreation and family formation (marriage). Thus, *in vitro* fertilization can be considered an extension of the already accepted use of reproductive technology (artificial insemination) by infertile couples. The second issue, allowing access to single persons, demands an examination of the assumptions which underlie the existing normative framework of marriage, and an analysis of whether and how uses of biotechnology may or should lead to a modification of that framework. This broader and more difficult issue may or may not need to be resolved at this time.<sup>9</sup>

## II. IS GESTATION LEGALLY SIGNIFICANT?

In *Johnson v. Calvert*,<sup>10</sup> the California courts ruled that the genetic mother was the only legal mother of a child born of a surrogate who had been implanted with the embryo from the genetic mother and her husband. In light of this decision, the committee revisited the issues examined in its

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8. During our discussions, it became apparent that a small number of single women have been artificially inseminated in New York, and it is possible that some single and infertile women may seek to use *in vitro* fertilization in the future.

9. The legislature may have greater latitude to regulate the use of *in vitro* fertilization by single persons than by married couples. The present normative structure for raising children, implicit in law, is a woman and a man as a married couple. The greater constitutional latitude in regard to a single person's access to reproductive technology exists even if one believes that a single person enjoys some constitutional protection to engage in voluntary sexual activity with another single person. Although one leading commentator argues that a person has a constitutional right to have access to non-coital means of reproduction, others reject this analysis. See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("If the right to privacy means anything, it is the right of the *individual*, married or single, to be free of unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."); John A. Robertson, *Embryos, Families, and Procreative Liberty: the Legal Structure of the New Reproduction*, 59 SO. CAL. L. REV. 939 (1986); Alexander Morgan Capron & M.J. Radin, *Choosing Family Law Over Contract Law as a Paradigm for Surrogate Motherhood*, 16 LAW, MED. & HEALTH CARE, 34 (1988).

10. 5 Cal.4th 84, 851 P.2d 776, 19 Cal. Rptr.2d 494 (1993).

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first report on surrogate parenting.<sup>11</sup> *Johnson* forced us to confront directly the issue of the legal significance of gestation, and we recommended an addition to the Domestic Relations Law, stating that “[a]ny child born to a woman by means of artificial insemination or *in vitro* fertilization shall be deemed the child of that woman.”<sup>12</sup>

This new recommendation was a logical extension of the recommendations in the committee’s 1990 report. It established gestation as a legal determinant of maternity and provided guidance for judges who might be called upon to settle surrogacy disputes before the legislature had enacted explicit legislation regarding surrogacy. It also put the committee clearly in conflict with the approach in *Johnson v. Calvert*. While I will explain shortly why New York courts should not follow *Johnson*, we were unable at this stage to do more than recognize the difficulties of our legislative solution.

When our 1992 report was originally presented to the Executive Committee and the House of Delegates in June, 1992, both bodies asked for clarification. The Executive Committee approved the report and its statutory recommendations, but the House of Delegates did not. Apparently, many delegates, who of course did not participate in our multi-year process of debate, were disturbed by the idea that a child could have “two mothers.” This led to a number of interactions with others outside the committee whose professed interest in the welfare of the child with two mothers led me to ask whether there are in fact new categories of children.

### III. ARE THERE BIOTECHNOLOGICAL CHILDREN?

At this juncture, the committee realized that it needed to provide a fuller explanation of the uncertainties created by *in vitro* fertilization. Our 1992 report was written prior to a new statute governing surrogate parenting

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11. Report on Surrogate Parenting of the Special Committee on Biotechnology and the Law (1989).

12. For comparison, 1990 recommendations are underlined and 1992 recommendations are in bold and underlined:

§ 73. Parents of child born by artificial insemination or *in vitro* fertilization

**(1) Any child born to a woman by means of artificial insemination or *in vitro* fertilization shall be deemed the child of that woman.**

**(2) Any child born to a married woman by means of artificial insemination or *in vitro* fertilization performed by persons duly authorized to practice medicine and with the consent in writing of the woman and her husband, shall be deemed the legitimate, natural child of the husband and his wife for all purposes.**

**(3) The aforesaid written consent shall be executed and acknowledged by both the husband and wife and the physician who performs the technique shall certify that he had rendered the service.**



contracts.<sup>13</sup> The 1993 report argued that our proposed legislative modification was necessary because it would resolve issues left unanswered by the new surrogate parent contracting law. In addition, since our 1992 report had failed to consider how our statutory proposal for two mothers might affect New York trusts and estates laws, we recommended a modification of the New York Estates, Powers and Trusts Law. This final recommendation explicitly recognizes the female gamete donor as a parent when issues of lineage arise and in cases where uncertainty about legal parentage is created by the use of *in vitro* fertilization.<sup>14</sup>

The new statute on surrogate parenting contracts declares that “[s]urrogate parenting contracts are . . . contrary to the public policy of this state, and are void and unenforceable.”<sup>15</sup> With this declaration, the legislature resolved many of the issues raised in various New York cases<sup>16</sup> and in *Johnson v. Calvert*. Thus, judges in New York have clear legislative guidance about what *not* to do both in situations similar to the *Baby M* case in New Jersey and to the *Johnson* case in California. Since an agreement has no legal effect, courts may not establish parental status by reference to written or oral agreements entered into prior to the child’s birth.

While the statute definitively supports the birth mother’s claim to parental status, it gives no such guidance as to the status of the genetic mother. Section 124 refers to disputes “between the birth mother and (i) genetic father, (ii) genetic mother, (iii) both the genetic father and mother.”<sup>17</sup> It instructs courts not to consider the birth mother’s participation in a surrogate parenting contract as adverse to her parental rights, status, or obligations. But it falls short of stating that the genetic mother is a parent.<sup>18</sup> Since the

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13. Article 8-Surrogate Parenting Contracts, N.Y. Dom. Rel. Law §§ 121-124.

14. And when such uncertainty has not been resolved through a formal adoption proceeding, a judicial decree, or some other explicit legislative provision.

15. N.Y. Dom. Rel. Law §§ 121-124, effective July 17, 1993. § 121(4) defines a “surrogate parenting contract” to mean “any agreement, oral or written, in which:

(a) a woman agrees either to be inseminated with the sperm of a man who is not her husband or to be impregnated with an embryo that is the product of an ovum fertilized with the sperm of a man who is not her husband; and

(b) the woman agrees to, or intends to, surrender or consent to the adoption of the child born as a result of such insemination or impregnation.”

16. For a discussion of the New York cases, see THIRD REPORT OF THE NEW YORK STATE BAR ASSOCIATION SPECIAL COMMITTEE ON BIOTECHNOLOGY AND THE LAW: THE LEGAL SIGNIFICANCE OF GESTATION IN ASSISTED REPRODUCTION 6-10 (1992).

17. Under § 121, “genetic mother” is defined as “a woman who provides an ovum for the birth of a child pursuant to a surrogate parenting contract.” A “birth mother” is defined as “a woman who gives birth to a child pursuant to a surrogate parenting contract.”

18. The practice commentary to § 124 notes the unresolved issue, stating that

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statute does not confer parental status on the donor of the ovum, under existing principles it would appear that the genetic mother is not a parent.

Of course, formal adoption proceedings would permit the genetic mother to be the legal mother,<sup>19</sup> but what happens when parties do *not* proceed with formalized adoption, either because they believe it unnecessary or because they are fighting over the child? A widely publicized case illustrates that people might believe it unnecessary to proceed with a formal adoption. A 53-year-old woman gave birth to a child from an embryo created with sperm from her son and an ovum from her daughter-in-law.<sup>20</sup> There was no mention in the news story of any formal adoption proceedings by the daughter-in-law.

In the bliss of the birth of a child, few of us think about the social dynamic set in place when the “genetic grandmother” is also the “gestational mother.” What happens if there is a death, say, of the grandmother? Does this child born via assisted reproduction share equally with its genetic father (and the father’s siblings, if any) if there is no will? If there is a will with certain provisions for the grandmother’s “children” and other provisions for her “grandchildren,” does this child inherit under both provisions or only one? From the perspective of family law principles, what status, if any, would the daughter-in-law have in a custody dispute if she and her husband divorce? If the husband sought primary custody on the grounds that he could provide for the young child with the assistance of the child’s grandmother-birth mother, would a judge have to rule that the genetic contribution made the wife a parent before deciding the custody issue?

Most media discussion of assisted reproduction focuses on various notions of the biotechnological child’s “best interests.” But before one can consider the “best interests” question in a judicial proceeding, one must first determine who is a legal parent and thus able to seek custody. Our proposed legislation answers that question of parentage in such a way that courts and parties to a potential dispute, with the assistance of conscientious lawyers, can understand and take action to resolve the uncertainty inherent in the use of assisted reproduction. In effect, those using assisted reproduction may have to take some affirmative steps to insure that children receive the full

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“[w]hile the statute includes the genetic mother as a potential party to such a custody proceeding, it does not go so far as to grant the genetic mother standing to assert a custody claim.”

19. The commentary to the statute indicates that the legislature saw surrogate parenting agreements as specialized adoption proceedings. As such, the manner in which issues of parental status *ought* to be resolved by conscientious and ethical parties involved with assisted reproduction is through formalized adoption.

20. When ‘Mom’ and ‘Grandma’ are One and the Same, N.Y. TIMES, Feb. 16, 1993, at B1.

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protection that the law can provide. Parents of biotechnological children have different responsibilities than parents of children from non-assisted reproduction. While all parents have the same legal obligations, the parents of biotechnological children have the responsibility of removing the legal uncertainties surrounding their birth that society is unable to resolve at the present time.

Our 1993 report suggested that the legislature modify § 73 of the Domestic Relations Law to read as follows:

(1) Any child born to a married woman by means of artificial insemination or *in vitro* fertilization performed by persons duly authorized to practice medicine and with the consent in writing of the woman and her husband shall be deemed the legitimate, natural child of the husband and his wife for all purposes.

(2) Except as provided in paragraph (1) above, any child born to a woman by means of artificial insemination or *in vitro* fertilization shall be deemed the child of that woman, and any child born by means of *in vitro* fertilization shall be deemed also the child of the woman who provided the ovum.

(3) The aforesaid written consent shall be executed and acknowledged by both the husband and wife, and the physician who performs the technique shall certify that he had rendered the service.<sup>21</sup>

The proposed section contemplates that there will be two legal mothers in some situations. To cope with children born as a result of surrogacy arrangements and without subsequent adoption, the committee also proposed that § 2-1.3 of the Estates, Powers and Trusts Law should include the following new provision:

For all purposes under the Estates, Powers and Trusts Law, the sole mother of any child born through the process of *in vitro* fertilization shall be deemed to be the woman who donated the ovum, unless either

- (1) the creator expresses a contrary intention,
- or

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21. For comparison, the new language is underlined:

**§ 73 Parents of child born by artificial insemination or *in vitro* fertilization**

(1) Any child born to a married woman by means of artificial insemination or *in vitro* fertilization performed by persons duly authorized to practice medicine and with the consent in writing of the woman and her husband shall be deemed the legitimate, natural child of the husband and his wife for all purposes.

(2) Except as provided in paragraph (1) above, any child born to a woman by means of artificial insemination or *in vitro* fertilization shall be deemed the child of that woman, and any child born by means of *in vitro* fertilization shall be deemed also the child of the woman who provided the ovum.

(3) The aforesaid written consent shall be executed and acknowledged by both the husband and wife, and the physician who performs the technique shall certify that he had rendered the service.

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(2) the mother who gave birth to the child is determined to be the sole mother of the child through formal adoption or judicial decree or pursuant to Section 73(1) of the Domestic Relations Law.<sup>22</sup>

This addition gives a clear rule for estate and trust planning that takes into account documents drafted many years prior to the passage of the surrogate parenting contract law. It strikes a balance between the views of those who believe that genetic birth should be determinative and the views of those who give priority to gestational birth. In our view, those individuals who created documents many years ago most likely were thinking of their lineage in terms of genetic connection. Couples who use reproductive biotechnological processes will be on notice through these provisions, the surrogate parenting contract law, and our proposed modification of § 73 of the Domestic Relations Law that they may have to take affirmative steps to ensure that their intentions in regard to their child are executed. As mentioned above, if the parties are in agreement, the intended mother should adopt the child in order to clearly extinguish the parental obligations and

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22. For comparison, new language is underscored:

**§ 2-1.3 Adopted children, posthumous children, children born through assisted reproduction as members of a class**

(a) Unless the creator expresses a contrary intention, a disposition of property to persons described in any instrument as the issue, children, descendants, heirs, heirs at law, next of kin, distributees (or by any term of like import) of the creator or of another, includes:

(1) Adopted children and their issue in their adoptive relationship. The rights of adopted children and their issue to receive a disposition under wills and lifetime instruments as a member of such class of persons based upon their natural relationship shall be governed by the provisions of subdivision two of section one hundred seventeen of the domestic relations law.

(2) Children conceived before, but born alive after such disposition becomes effective.

(3) Nonmarital children. For the purposes of this paragraph, a nonmarital child is the child of a mother and is the child of a father if the child is entitled to inherit from such father under section 4.12 of this chapter. The provisions of this paragraph shall apply to the wills of persons dying on and after September first, nineteen hundred ninety-one, to lifetime instruments theretofore executed which on said date are subject to the grantor's power to revoke or amend, and to all lifetime instruments executed on or after such date.

**(b) For all purposes under the Estates, Powers and Trusts Law, the sole mother of any child born through the process of *in vitro* fertilization shall be deemed to be the woman who donated the ovum, unless either**

**(1) the creator expresses a contrary intention,**

**or**

**(2) the mother who gave birth to the child is determined to be the sole mother of the child through formal adoption or judicial decree or pursuant to Section 73(1) of the Domestic Relations Law.**

rights of the other woman. Married couples using assisted reproduction with their own gametes or with donated gametes would not have to pursue an adoption because of the operation of proposed § 73(1). In the absence of a voluntary adoption, when the ovum of another woman is used, lawyers should draft trusts and wills with the understanding that genetics defines who is the mother of the child.

Even though the legislature gave a clear preference to the birth mother in resolving custody disputes under § 124 of the Domestic Relations Law, we believe that the preference should shift to the genetic mother under Estate, Powers and Trusts Law. Parental status for the purpose of custody is distinct from parental status for the purposes of trusts and estates law, and the claims of the genetic mother and the birth mother are equally powerful:

One claim is symbolized by the infertile couple who seek technological assistance and the help of another human being, usually a woman, in order to have genetically related offspring. As a general matter, this desire, not for "rights" in children but for the opportunity to assume important social and legal obligations to genetically related children, is a desire that law should encourage in all adults who choose to have children. On the other hand, biotechnological means of reproduction should not allow us to ignore the powerful claim and significance of the act of giving birth, not only in law, but also in our collective (perhaps Western) consciousness.<sup>23</sup>

The committee's legislative proposals build upon the legislative policy prohibiting surrogate parenting contracts in two ways. First, the proposed modifications of § 73 address the consequences of the use of the procedures of assisted reproduction which we believe people will continue to use. Sections 121-124 address the process of making agreements about the transfer of parental responsibility, i.e., the process of surrogate contracting. Making explicit the parental status of both the genetic mother and the birth mother does not conflict with the policy statement in § 124 that the birth mother will not be disadvantaged by her participation in an agreement. Second, our proposed modification to the Estate, Powers and Trusts Law protects the intentions of most creators of trusts and wills (who, prior to the passage of the §§ 121-124, saw their future lineage in terms of genetic connections).<sup>24</sup>

Beyond this, our proposed modifications avoid the constitutional problems that might arise from a definitive legislative policy that uniformly favored either genetic or gestational birth. Our more cautious approach of dealing

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23. Second Report on the Legal Significance of Gestation of the Special Committee on Biotechnology and the Law 18 (1992).

24. *See In re Park*, 15 N.Y.2d 413, 207 N.E.2d 859, 260 N.Y.S.2d 169 (1965) (Van Voorhis, J., dissenting).

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with issues one at a time while remaining child-centered is more likely to help society and the legislature resolve the many ethical and legal issues presented by assisted reproduction.

### CONCLUSION

While the recommended legislation did not win the endorsement of the New York State Bar Association, the approach suggested here on a matter that has captured the public imagination since the celebrated *Baby M* surrogate parenting case is noteworthy.

First, rather than pursuing a “rights” approach and considering every possible stakeholder as a rights holder, it asks institutional as opposed to individual rights questions. For example, I have asked if the approach of law—clearly an institution—to artificial insemination should be used to address *in vitro* fertilization. While constitutional doctrines supporting the right of a woman to an abortion are important in this inquiry, the committee did not begin with constitutional rights in mind. Our approach allows for a variety of conceptions of families within the law so that the parents of “biotechnological children” might have the same legal obligations as parents of coitally created children. The institutional inquiry assumes that families, however conceived, should be viewed as a private institution subject to a minimum of legal intervention.

Second, and perhaps more important, our suggested approach, in general, proceeds with small—baby—steps towards regulations of reproductive technology. Medical practices will change rapidly, while legislative reform—where the basic legal structure of “family” is at stake—will proceed very slowly. We developed our questions from legislative solutions to earlier reproductive technologies and from judges working to resolve cases involving new reproductive technology. That our legislative recommendations were in conflict with the result reached by the California courts demonstrates the advantages of a wide variety of views on legal approaches to technology. Perhaps the views expressed here will help all states to examine their own approach to assisted reproductive biotechnology.