AN EMERGING CONSENSUS: REPRODUCTIVE TECHNOLOGY AND THE LAW

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INTRODUCTION

The advent and swift expansion of reproductive technology beginning in the late 1970s accelerated the transformation of the family by undermining sacred assumptions about the reproductive process. *In vitro* fertilization, embryo transfer, surrogacy, and the cryopreservation of gametic and embryonic material have challenged deeply internalized assumptions about the character and social implications of human reproduction. In addition, reproductive technology has placed third parties—doctors, lawyers, egg or sperm donors, and gestational or "traditional" surrogates—directly at the center of the reproductive process. Inevitably, disputes have developed about the nature and parameters of parenthood and about the rights and duties of the various new participants in the reproductive process.

Courts, faced with disputants demanding concrete solutions to these novel arrangements, have been compelled to respond. As they have considered these disputes, judges have almost invariably pleaded for legislative direction.[1] Nevertheless, in the United States, legislatures have responded slowly, if at all.[2]

Ironically, the hesitancy of American legislatures to take on the task of regulating reproductive technology may well prove to have been more beneficial than detrimental. In effect, American law has had a few decades to try various approaches, to discard those that did not work, and to elaborate

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1. *See, e.g.*, R.R. v. M.H., 689 N.E.2d 790, 797 (Mass. 1998); *In re* Marriage of Moschetta, 30 Cal. Rptr. 2d 893, 903 (Cal. Ct. App. 1994); *In re* Adoption of Baby Girl L.J., 505 N.Y.S.2d 813, 818 (N.Y. Surr. Ct. 1986).

2. In contrast, legislatures in other countries, including England, France, and Germany, established official state policies early on. In Britain, the Human Fertilisation and Embryology Act of 1990 established detailed rules about the uses and consequences of reproduction technology. *See* Elizabeth Ann Pitrolo, Comment, *The Birds, the Bees, and the Deep Freeze: Is There International Consensus in the Debate Over Assisted Reproductive Technologies?*, 19 HOUS. J. INT'L L. 147, 173-77 (1996) (giving history of British Act). France promulgated a strict regulatory law in 1994. *See id.* at 190. The law, which grew out of a report prepared by a governmental committee—the Committee on Genetic, Procreation and Law (Procreation Genetique et Droit) (1993)—places sharp limits on the use of reproductive technology. *See id.* at 190-91. German law prohibits surrogacy and limits embryo cryopreservation. *See id.* at 192.

those that did. As a result of judicial trial and error, a consensus, though still tentative and incomplete, has begun to emerge.

The shape of this consensus is indicated by three decisions, rendered by different state courts in 1998.[3] Taken as a group, the three decisions indicate how the law is resolving practical disputes occasioned by reproductive technology. They implicate the developing cultural assumptions which underlie the responses of society and law to central questions about the scope and meaning of family in general, and about the parent-child relationship in particular. The consensus represents a reconstruction of the ideology of family.[4] This reconstruction generally refrains from expressly abandoning traditional understandings of the family. Instead, it invokes traditional images of family while augmenting the variety of images through which families and familial relationships can be understood (and thus regulated). Thus, traditional understandings of family have been preserved. But insofar as they compete with, and are evaluated in comparison to, entirely new understandings, the old understandings are significantly transformed. In short, parentage, and familial relations more generally, continue to be grounded on a set of truths formulated during the early years of the Industrial Revolution. But a new set of truths, significantly different from the old truths, also determines the creation and shapes the operation of familial relationships. The result is a more complicated and more malleable ideological conception of family than existed even a few decades ago.[5]

In short, American courts have laid the groundwork for an evolving consensus about reproductive technology. That groundwork, which reflects a new configuration of truths on which society premises understandings of

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3. *See In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (Ct. App. 1998); *R.R.*, 689 N.E.2d at 790; Kass v. Kass, 696 N.E.2d 174 (N.Y. 1998).

4. By "ideology" this article does not mean a system of political beliefs. Rather, following the French anthropologist, Louis Dumont, it means the pervasive system of underlying beliefs which anchor people's lives. Dumont wrote:

> Our definition of ideology thus rests on a distinction that is not a distinction of matter but one of point of view. We do not take as ideological what is left out when everything true, rational, or scientific has been preempted. We take everything that is socially thought, believed, acted upon, on the assumption that it is a living whole, the interrelatedness and interdependence of whose parts would be blocked out by the a priori introduction of our current dichotomies.

LOUIS DUMONT, FROM MANDEVILLE TO MARX: THE GENESIS AND TRIUMPH OF ECONOMIC IDEOLOGY 22 (1977).

5. The social and cultural parameters of the American family have never been stable. Certainly, during the nineteenth century, the family changed broadly. *See* STEVEN MINTZ & SUSAN KELLOGG, DOMESTIC REVOLUTIONS: A SOCIAL HISTORY OF AMERICAN FAMILY LIFE 243 (1988) (describing American family as continuously changing). However, contemporary changes may be different in kind insofar as they completely challenge the ground on which family relationships were premised during the nineteenth and most of the twentieth centuries.

parentage, can be studied in a few dozen cases decided during the last two decades, and summarized accurately through reliance on the three referenced decisions rendered in 1998.[6]

The first case, *In re Marriage of Buzzanca*, decided in California, concerns the parentage of a toddler declared parentless by a state trial court.[7] That court found that none of the child's many potential parents could be adequately characterized as a parent.[8] The second case, *R.R. v. M.H.*, concerns a relatively unproblematic surrogacy arrangement gone awry.[9] In *R.R.*, Massachusetts' highest court refused to recognize and enforce a contract transferring parenthood from a surrogate to the intending parents.[10] Finally, in *Kass v. Kass*, New York's highest court ordered the disposition of five frozen embryos, relying on consent agreements the progenitors had entered into with the clinic treating them for infertility.[11]

The three cases resulted in very different resolutions, each premised on assumptions that contrast with those undergirding the others. However, read as a group, the decisions are harmonious and can be explained in terms of one broad theory of familial relationships. The differences in the three holdings do not represent different views of family or of reproductive technology. Rather, the holdings correlate with differences in the character, and thus with differences in the implications for families, of the specific reproductive technologies involved.

The assumptions on which these three decisions were grounded reflect a new pattern in social and legal responses to familial matters.[12] Broadly, three paradigms are discernable. Each paradigm is connected to, and in at least some regard dependent on, the other two. One view (delineated in *Buzzanca*) retains a traditional rhetoric of family compelled on sentimental grounds by the allure of traditional, enduring familial relationships. Still, this view belies that rhetoric with a set of conclusions firmly attached to the world of contract and autonomous individuality. A second view (delineated in *R.R.*)

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6. *See Buzzanca*, 72 Cal. Rptr. 2d at 280; *R.R.*, 689 N.E.2d at 790; *Kass*, 696 N.E.2d at 174.

7. *See Buzzanca*, 72 Cal. Rptr. 2d at 280.

8. *See id.* at 282 (describing trial court decision).

9. *See R.R.*, 698 N.E.2d at 791.

10. *See id.* at 797. More accurately, the contract at issue in *R.R.* provided for the transfer of custody, not parentage. *See id.* at 792. Presumably, the parties expected this approach to create fewer legal hurdles than a contract providing for a transfer of parentage. The court in *R.R.* treated the contract as if it provided for a transfer of parentage. *See id.* at 796.

11. *See Kass*, 696 N.E.2d at 182.

12. The pattern is evident in earlier cases: *R.R.* resembles *In re Baby M*, 537 A.2d 1227 (N.J. 1988) (prohibiting traditional surrogacy in New Jersey); *Buzzanca* stems from *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) (relying on intentions to establish parentage in gestational surrogacy case); and *Kass* resembles *Davis v. Davis*, 842 S.W.2d 588 (Tenn. 1992) (approving enforcement of contracts in cases involving disputes about cryopreserved embryos).

observes family matters in traditional terms, though clearly with the implicit understanding that those terms and the relationships they define are no longer inevitable. The third view (delineated in *Kass*) perceives family matters as essentially indistinguishable from matters of the marketplace, and legitimizes the application of contract law to define and regulate relationships between family members.

Section I of this Article explains how American families were understood during the nineteenth and first two-thirds of the twentieth centuries and suggests how those understandings have been transformed in the last several decades. Section II examines *Buzzanca* and two related California cases to indicate the law's concern with mediating the appeal of tradition on the one hand, and of modernity on the other. In Section III, the Article compares the approach of the California courts in *Buzzanca,* a gestational surrogacy case, with that of Massachusetts' highest court in *R.R.*, a traditional surrogacy case. The approaches in *Buzzanca* and *R.R.*, though significantly different, are then contrasted with a third approach, defined in Section IV. Reflected in the decision of New York's highest court in *Kass*, a case involving frozen embryos, this approach relies unreservedly on contract.

Finally, this Article explores some of the socio-cultural motives that prompted judicial choices in these cases, and suggests that the three cases, taken as a group, present the outline (though not yet the details) of a model on which legislatures might successfully rely.

I. IN WHAT TRUTH OR SET OF TRUTHS IS PARENTHOOD GROUNDED?

During the last several decades, the demography of the American family has changed broadly and the ideology[13] of family has been dramatically reconstructed.[14] The "traditional" nuclear family of the 1950s has been largely displaced, if not completely replaced, by a wide variety of family forms.[15] Some involve married parties; some do not. In some, children live with one adult parent or with two adult parents of the same gender. Some involve more than two generations, step-relationships, or foster children. And in some, children and adults live together as families, though the parties are not "related" biologically. Indeed, a central component of the traditional ideology of family—that family relationships stem from and reflect biogenetic

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13. *See supra* note 4 (defining ideology).

14. *See* MINTZ & KELLOGG, *supra* note 5, at 243. Contemporary changes may be different in kind, however, insofar as they challenge completely the ground on which family relationships were premised during the nineteenth and most of the twentieth centuries.

15. The term "traditional" family is used to refer to the family that developed in the early years of the Industrial Revolution, and that was most intensely and widely glorified in the middle decades of the twentieth century. *See infra* notes 18-19 and accompanying text (describing such traditional families).

unity—has been widely supplanted by understandings of family grounded in notions of choice.

In addition, the biological truths which once firmly anchored familial relationships have been challenged through the startling development and acceptance of assisted reproductive technology beginning in the late 1970s. The use of this technology combines new social choices related to the creation and operation of families with new understandings of the reproductive process. As a result, familiar social and biological anchors have been simultaneously disrupted, making it impossible to comprehend either social change in light of biological certainties, or conversely, biological change in light of social certainties. This new technology has compelled courts—in startling new contexts with little precedent—to decide whether, and how conclusively, to sanction reconstructions of the ideas of the family and familial relationships.

A. Changes in Families and in the Ideology of Family

A modern conception of family became firmly institutionalized in the middle decades of the nineteenth century and expanded during the succeeding century. This conception developed simultaneously with express contrast to the world of the marketplace. In the marketplace—the world of work and contractual negotiation—autonomous individuals (a categorization that excluded women and children as defined) were expected to define and re-define their relationships. Relationships within the marketplace were limited in character and in duration by the terms of specifically defined goals. In contrast, the family was defined as a unit of enduring loyalty and commitment. At home, women were expected to provide sanctuary to men from the harsh realities of the marketplace[16] and to love and nurture children who, as never before in history, became the treasured center of family life.[17]

This traditional family ideally consisted of two married parents living in a household with their biological children. Anthropologist David M. Schneider described such families during the middle of the twentieth

16. *See* MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 51-54 (1994) (describing developing "cult of motherhood" during nineteenth century). A concomitant "internal preference" developed in nineteenth century custody law. MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 253 (1985).

17. While middle-class children were becoming the raison d'etre of the nineteenth century family, poor children were being systematically exploited in mills and factories. Child labor was essential, for example, to the development of the nineteenth century textile industry. *See* VIVIANA A. ZELIZER, PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN 59 (1985). Moreover, the labor of children was essential to the survival of many poor urban families. *See id.* at 58-59.

century—just before they were widely challenged by alternative constructions—as units of love characterized by "enduring, diffuse solidarity"[18] and "defined in terms of sexual intercourse as a reproductive act, stressing the sexual relationship between husband and wife and the biological identity between parent and child, and between siblings."[19]

This model of family, developed in the early years of and in clear response to the Industrial Revolution, was widely institutionalized by the start of the twentieth century.[20] Ironically, the model was most widely defended and seemed almost irreversibly entrenched in the middle decades of the twentieth century, just before alternative forms of family arose to challenge those forms described as "traditional."[21]

Within the traditional family, roles were premised on relationships defined in terms of status, not contract.[22] Moreover, family relationships as compared with relationships in the marketplace, were (and in significant part still are) understood as grounded in, and thus as reflecting, inexorable biological truths. Family relationships, as David M. Schneider explained, were understood to "arise out of the processes of human sexual reproduction."[23] Thus, for example, parents were expected to love and care for their children not because they entered into agreements to do so, but because the "nature" of the parent-child relationship compelled, or at least convinced, them to do so.[24] More broadly, the assumption that "blood is

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18. DAVID M. SCHNEIDER, AMERICAN KINSHIP: A CULTURAL ACCOUNT 59 (David M. Schneider ed., 1968).

19. *Id.* at 51-52.

20. *See* JANET L. DOLGIN, DEFINING THE FAMILY: LAW, TECHNOLOGY, AND REPRODUCTION IN AN UNEASY AGE 24-28 (1997).

21. *See* MASON, *supra* note 16, at 121-22 (describing vast changes in family life that accompanied the divorce revolution).

22. In 1861 Sir Henry Maine described nineteenth century English society as "distinguished from that of preceding generations by the largeness of the sphere which is occupied in it by contract." SIR HENRY MAINE, ANCIENT LAW 179 (Peter Smith ed., 1970). Maine describes the world that preceded his own as one in which relations of status "fixed a man's social position irreversibly at his birth." *Id.* at 99.

Although Maine intended the characterization of the move from a universe based in status to one based in contract as an historic description, the characterization more accurately represents one nineteenth-century solution to the startling social disruption brought about by the Industrial Revolution. *See* DOLGIN, supra note 20, at 70.

23. DAVID M. SCHNEIDER, A CRITIQUE OF THE STUDY OF KINSHIP 175 (1984).

24. Although the ideology of family herein described is still important, it is no longer exclusive. Thus, it is described throughout in the past tense.

thicker than water" has long defined familial relationships.[25] That assumption represented and sustained the assumption that kinship, in David Schneider's words,

> is a strong solidary bond that is largely innate, a quality of human nature, biologically determined, however much social or cultural overlay may also be present. It is the biological character and the innateness in human nature and not the sociocultural overlay that largely accounts for the characteristics of the kinship bond.[26]

Despite the presumed inexorability of familial relationships, the specific structure and scope of American families has never been static. As social change has occurred, its assimilation has depended upon, or stimulated, shifts in the popular significance of various biological truths in understanding reproduction and kinship.[27] For instance, children, understood in earlier centuries as belonging exclusively to fathers (whose seed was credited with initiating the reproductive process),[28] were understood by the first half of the nineteenth century as belonging to both their fathers and mothers, both of whom were then viewed as having contributed "substance" to the reproductive process.[29] More important, co-existing, alternative biological truths have explained different aspects of familial relationships. Thus, while biological parentage has been presumed to follow from the substantial connection between parents and their children (understood as a genetic or "blood" bond),

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25. SCHNEIDER, *supra* note 23, at 165.

26. *Id.* at 166 (emphasis omitted). Schneider was describing the assumptions anthropologists have brought to the study of kinship. The description applies far more generally within Western culture.

27. The concern here is with popular understandings of biological truths. These understandings seem to harmonize with expert understandings within a broad frame. *See* Rayna Rapp, *Heredity, or: Revising the Facts of Life*, *in* NATURALIZING POWER: ESSAYS IN FEMINIST CULTURAL ANALYSIS 69 (Sylvia Yanagisako & Carol Delaney eds., 1995) [hereinafter NATURALIZING POWER]. In concluding an anthropological consideration of amniocentesis, Rapp comments:

> Normative descriptions of heredity that are developed inside of science can never be completely aligned with popular understandings of relatedness. Scientific descriptions naturalize a terrain on which power is continuously negotiated in social life beyond the consulting room. Scientific discourse about biogenetic links provides powerful resources that appear neutral. . . . In this essay, I have tried to illustrate how unitary scientific norms are continuously constructed, imposed, challenged, and sometimes resisted in popular understandings of both prenatal diagnosis and disability.

Id. at 83-84.

28. *See, e.g.*, Carol Delaney, *Father, State, Motherland and the Birth of Modern Turkey*, *in* NATURALIZING POWER, *supra* note 27, at 183 (noting presence in both *Qur'an* and Bible of notion of man as generative agent, contributing "seed").

29. *See* Katha Politt, *Checkbook Maternity: When Is a Mother Not a Mother?*, THE NATION, Dec. 31, 1990, at 825.

woman's gestational role has been invoked to underscore and explain woman's "natural" propensity to nurture.[30] Similarly, society and law have assumed that women "respond to the biological component more strongly and with a different quality of relationship than men."[31] Thus mothers, who, like fathers, contribute gametes to the reproductive process, can also be distinguished from fathers.[32] As a result, although gestational and genetic maternity were assumed to be inseparable until the 1980s, mothers could at least in theory be imagined through metaphors emphasizing either their gestational (sustaining, nurturing) aspects, or their genetic ("blood") contribution to parentage.[33] Thus, kinship remained grounded in notions of biological truth, despite significant transformations in actual families and in cultural conceptions of family.

These transformations, though constant for at least the previous two centuries, accelerated and emerged as an issue of intense public debate in the 1970s. By that time, alternative visions of family life were competing openly with a more traditional vision.[34] The most basic change involved a broad challenge to an understanding of families as holistic, hierarchically organized units by an alternative understanding of families that prized individual autonomy *within familial* contexts.[35] In addition, actual families changed. By

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30. This understanding became especially significant in the nineteenth century as courts for the first time began to grant custody of minor children to mothers rather than fathers in cases of parental divorce and separation. *See, e.g.*, Mercein v. People *ex rel.* Barry, 25 Wend. 64, 106 (N.Y. 1840) (giving custody of child to mother because "the law of nature has given to her an attachment for her infant offspring which no other relative will be likely to possess in an equal degree"); Prather v. Prather, 4 S.C. Eq. 33, 43-44 (4 Des.) (1809) (giving custody of minor girl to mother rather than father).

31. SCHNEIDER, *supra* note 23, at 174.

32. By the second half of the twentieth century, a mother's gestational role was clearly distinguished from a mother or father's genetic role as productive and reflective of a mother's social role. In *Caban v. Mohammed*, Justice Stevens referred to a "symbiotic relationship" between mother and child that provided "a physical and psychological bond . . . not then present between the infant and the father or any other person." Caban v. Mohammed, 441 U.S. 380, 405 n.10 (1979) (Stevens, J., dissenting). Four years later, in *Lehr v. Robertson*, 463 U.S. 248 (1983), the Court's majority, in an opinion authored by Justice Stevens, suggested that the gestational bond (but not the genetic bond) conditions biological mothers to be social mothers. *See* DOLGIN, *supra* note 20, at 106-09 (analyzing Court's view of maternity and paternity in several cases involving the rights of unwed fathers including *Caban* and *Lehr*).

33. By the nineteenth century, emphasis on women's "natural" propensity to nurture provided the theoretical justification for maternal custody in divorce cases. *See* GROSSBERG, *supra* note 16, at 250-53. However, that same emphasis limited mothers as compared with fathers. Biology gave men the opportunity to become social fathers. Biological maternity was understood as synonymous with social maternity. *See* Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415, 1460 (1991) (characterizing fathers as "volunteer" parents and mothers as "draftee" parents).

34. *See, e.g.*, Kath Weston, *Forever Is a Long Time: Romancing the Real in Gay Kinship Ideologies*, *in* NATURALIZING POWER, *supra* note 27, at 93 (describing gay families in the 1980s and 1990s to include "gay and heterosexual friends as well as lovers, ex-lovers, and children who might or might not be biogenetically connected to the gay person doing the parenting").

35. *See* Janet L. Dolgin, *The Family in Transition: From* Griswold *to* Eisenstadt *and Beyond*, 82

the 1970s, fifty percent of American marriages ended in divorce, and only about one-third of families contained two parents and their minor children.[36] Twelve percent of mothers of preschool children worked outside the home in 1950. Almost one-half did so by 1980.[37]

B. The Advent of Assisted Reproductive Technology

By the last several decades of the twentieth century, American society and law were engaged in an active, often acrimonious debate about the proper parameters of family life. Within this cultural environment, the appearance and rapid development of reproductive technology provided a remarkable arena in which the law was expressly required to delineate, consider, and perhaps cement alternative approaches to parentage and to familial connections more generally.[38] More specifically, courts were compelled for the first time to evaluate a series of pressing challenges to accepted understandings of the reproductive process on which familial relationships had long been predicated. American courts were thus forced to participate in the reconstruction of maternity, paternity, and the parent-child relationship.

The appearance of new reproductive technology in the last two decades of the twentieth century compelled society to reconsider the biological truths on which familial relationships were predicated, and the implications of those truths. In cases occasioned by "traditional" surrogacy—gestational surrogacy, cryopreserved embryos and gametes—courts began to focus on and then to question the strength and continuing significance of long-standing assumptions about the implications of biological reproduction for familial relationships.[39]

GEO. L.J. 1519 (1994) (analyzing differences between *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972)). These sources reflect the increasing readiness of society and law to predicate family relations on autonomy of individual actors within family settings rather than on holism of familial units.

36. *See* Elaine Tyler May, *Myths and Realities of the American Family*, *in* 5 A HISTORY OF PRIVATE LIFE 539, 583 (Antoine Prost & Gerard Vincent eds., Arthur Goldhammer trans., 1991).

37. *See id.* at 587.

38. Within the last two decades, cases occasioned by reproductive technology primarily have involved disputes about the consequences of surrogacy arrangements and disputes about cryopreserved (frozen) gametes and embryos. Of those cases involving disputes about surrogacy arrangements, some have involved the artificial insemination of surrogate mothers. *See, e.g.*, *In re* Baby M, 525 A.2d 1128 (N.J. Super. Ct. Ch. Div. 1987), *aff'd in part, and rev'd in part*, 537 A.2d 1227 (N.J. 1988). This case could be termed a "traditional" surrogacy case—with the goal of creating a baby to be raised by the genetic father and his wife. Other so-called traditional surrogacy cases have involved surrogates entering into agreements with single people, unmarried heterosexuals, or same-sex cohabitants as the intending parents. Still other surrogacy cases, termed "gestational" rather than "traditional" have involved surrogates gestating embryos created from donated ova. *See, e.g.*, Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).

39. *See supra* note 38 and accompanying text.

Courts have spearheaded and sustained the law's response to reproductive technology in the United States. Legislatures have been slow to respond, and when they have responded, they have rarely created comprehensive regulatory schemes.[40] As a result, case law constructed in the context of particular disputes has directed the legal response to reproductive technology in the United States. Despite the repeated call of courts and commentators for a fuller statutory response to the dilemmas created by reproductive technology, the comparative weakness of the legislative response has resulted in a more flexible judicial response.[41] In contrast, in Britain or France, quick, comprehensive national legislation effectively curtailed judicial experimentation relatively early.[42]

Faced with disputes between mothers and fathers, mothers and other mothers, and parents or potential parents and third parties (including fertility clinics) some courts invoked, and thus reaffirmed, traditional understandings of family. Thus, in *In re Baby M*, the trial court and the New Jersey Supreme Court reached different holdings, yet based them in the same traditional ideological assumptions about family.[43] The decision of the Massachusetts court in *R.R. v. M.H.* categorized traditional surrogacy as a form of adoption, and consequently refused to enforce traditional surrogacy agreements. In that regard the decision resembles *Baby M*[44] which remains the best known surrogacy case harmonizing with traditional understandings of family.

Other courts have moved tentatively, however, onto new terrain in recognizing the "intent" to parent as one ground on which to predicate

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40. Less than two-fifths of the states have statutes that regulate surrogacy. *See* HARRY D. KRAUSE ET. AL., FAMILY LAW: CASES, COMMENTS AND QUESTIONS 390 (4th ed. 1998). Only a few states have statutes regulating more complicated reproductive options such as egg donation. *See* D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW: CASES AND MATERIALS 1258-59 (1998).

In addition, a few relevant federal statutes exist. Section 263a-2 of the Assisted Reproductive Technology Programs Act requires infertility clinics to report success rates accurately. *See* 42 U.S.C. § 263a-2 (1994). The Act also set up a model certification program, but participation was not made mandatory. *See id.* § 263a-2(I); *see also* Meena Lal, *The Role of the Federal Government in Assisted Reproductive Technologies*, 13 SANTA CLARA COMPUTER & HIGH TECH. L.J. 517, 533-36 (1997) (delineating federal responses in the United States).

41. *See* Judith F. Daar, *Regulating Reproductive Technologies: Panacea or Paper Tiger?*, 34 HOUS. L. REV. 609, 646-51 (1997) (describing state statutory responses); Lal, *supra* note 40, at 533-42 (summarizing extant and proposed federal regulatory schemes).

42. *See generally* Pitrolo, *supra* note 2, at 173-77, 181-91.

43. *See generally* Baby M, 525 A.2d. 1128 (N.J. Super. Ct. Ch. Div. 1987). *See also* Janet L. Dolgin, *Status and Contract in Surrogate Motherhood: An Illumination of the Surrogacy Debate*, 38 BUFF. L. REV. 515 (1990) (analyzing cultural assumptions underlying opinions of both courts that entertained the case). The trial court granted parentage to the genetic, intending father and terminated the parental rights of the surrogate who was both the genetic and the gestational mother. *See Baby M*, 525 A.2d at 1176. The state supreme court allowed custody to rest with the father, but restored the surrogate's legal maternity. *See Baby M*, 537 A.2d at 1244.

44. *See generally Baby M*, 525 A.2d 1128.

"natural" parentage. In *Johnson v. Calvert*, the California Supreme Court granted parentage to the intending, genetic parents in a dispute with a gestational surrogate.[45] The court stated that in cases in which genetic and gestational maternity "do not coincide in one woman, she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law."[46] And still other courts, resolving disputes occasioned by reproductive technology, have expressly enforced contractual agreements into which the disputing parties entered. In *Kass v. Kass*, the New York Court of Appeals resolved a dispute between a divorcing husband and wife about the fate of five cryopreserved embryos created from their gametes.[47] The court relied on dispositional agreements signed by the couple before the cryopreservation of their pre-zygotes.[48]

The law today expressly recognizes not one or two central truths on the basis of which it grounds parentage, but rather a diverse set of truths. A set of contrasting assumptions that ground parentage in conscious, deliberate decisions and agreements, i.e., in intentions and in contracts, have appeared alongside traditional assumptions about parentage that ground the parent-child relationship firmly on biological truths. These new assumptions, for example, that intention can weigh as heavily as biology in determining "natural" maternity, contrast almost completely with understandings of parentage, especially of maternity, that were forged early in the Industrial Revolution and were subsequently safeguarded and relied upon for most of the next two centuries.

II. A NEW MODEL OF PARENTAGE: *JOHNSON, MOSCHETTA,* AND *BUZZANCA*

The far reaching implications of the law's increasing readiness to premise parentage on a wide set of assumptions about human relationships, rather than more exclusively on assumptions about the nature of the reproductive process, become clear in a set of cases all decided in California in the 1990s. In the first case, *Johnson v. Calvert*, decided in 1993, California's supreme court premised parenthood on intention.[49] That result

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45. *See* Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993).

46. *Id.* (footnote omitted).

47. *See* Kass v. Kass, 696 N.E.2d 174, 175 (N.Y. 1998); *see also infra* Part IV for further consideration of *Kass*.

48. *See Kass*, 696 N.E.2d at 176-77. Relying on the progenitors' signed consent forms, the court ordered that the cryopreserved pre-zygotes be "donated to the IVF program for approved research purposes." *Id.* at 182. The term "pre-zygote" is used to refer to the fused egg and sperm following fertilization. *See id.* at 175 n.1.

49. *See* Johnson v. Calvert, 851 P.2d 776 (Cal. 1993), *cert. dismissed sub. nom.* Baby Boy J. v.

followed from the court's recognition that neither statutory law nor assumptions about biological maternity identified the "natural" mother of a child created as the result of a gestational surrogacy agreement.[50] In the second case, *In re Marriage of Moschetta*, decided in 1994, the California Court of Appeals refused to apply the *Johnson* intent-model to a case involving not a gestational, but a traditional surrogacy agreement.[51] Thus, *Moschetta* suggested the limits of *Johnson* in asserting that some sort of biological maternal connection between mother and child is essential to the identification of "natural" maternity. Finally, in 1998, *In re Marriage of Buzzanca* tested the limits of *Johnson* once again, and expanded *Johnson's* reach beyond that suggested by *Moschetta*.[52] In *Buzzanca*, the California Court of Appeal was compelled to select between the model of maternity constructed in *Johnson* and that constructed in *Moschetta* in order to determine the parentage of a child with five (or arguably eight) potential parents.[53] *Buzzanca* is an important decision, not so much for the specific holding, but because the appellate court extended the holding in *Johnson* that "natural" maternity can be predicated on intention to a woman who bore no biological connection to the child involved.[54] *Buzzanca* reaffirmed the applicability of non-biological criteria to the identification of maternity. But in doing that, the decision sacrificed consistency. Thus, *Buzzanca* is as important for the questions it raised but left unanswered, as for the questions it entertained and settled.

A. Intentional Parentage: Johnson v. Calvert[55]

1. The Decision

Johnson arose in 1990 as a dispute about a child's parentage between genetic, intending parents, Crispina and Mark Calvert, and a gestational mother, Anna Johnson.[56] The Calverts, a married couple, were unable to have

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Johnson, 510 U.S. 874 (1993).

50. *See id.* at 779-81.

51. *See In re* Marriage of Moschetta, 30 Cal. Rptr.2d 893 (Ct. App. 1994).

52. *See In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (Ct. App. 1998).

53. *See id.* at 288-89. At least five people could have cognizable claims to the child whose parentage was at issue: the egg donor, the sperm donor, the gestational surrogate, the intending father, and the intending mother. This number rises to eight if the spouses of the egg donor, the sperm donor, and the gestational surrogate are included. *See id.* at 282.

54. *See id.* at 288, 294.

55. Johnson v. Calvert, No. X-633190 (Cal. App. Dep't Super. Ct. Oct. 22, 1990), *aff'd sub. nom.* Anna J. v. Mark C., 286 Cal Rptr. 369 (Ct. App. 1991), *aff'd sub. nom.* Johnson v. Calvert, 851 P.2d 776 (Cal. 1993), *cert. dismissed sub. nom.* Baby Boy J. v. Johnson, 510 U.S. 938 (1993).

56. *See Johnson*, 851 P.2d at 778. Use of words such as "mother" and "parent" in describing a

a baby without medical assistance because Crispina's uterus had been surgically removed in 1984.[57] Her ovaries remained and continued to produce ova. In 1989, Anna, a co-worker of Crispina, learned of the Calverts' search for a gestational surrogate and offered to serve in that role.[58]

The parties entered into a surrogacy agreement in January 1990 that provided Anna would gestate an embryo created from Crispina and Mark's gametes and would give birth to the resulting baby.[59] Anna further agreed that, at the baby's birth, she would surrender maternal rights to the Calverts.[60] The agreement further provided that the Calverts would pay Anna $10,000 in a series of installments.[61] Anna became pregnant that month.[62] Six months later, still pregnant, she informed the Calverts in writing that unless they paid the entire balance due she would refuse to surrender parental rights upon the child's birth.[63] As a result, several months before the birth of baby Christopher in September 1990, his genetic parents and gestational mother were in court disputing his "natural" and legal parentage.[64]

Throughout history, judges have distinguished between "real" mothers and other women. King Solomon decided the most famous custody case almost three thousand years ago.[65] But prior to *Johnson*, a court had never been asked to select the "natural" mother of a child in a case in which the biological facts were certain. And never before had a court been asked to decide the parentage of a child with two biological mothers. There was no doubt that both Anna Johnson and Crispina Calvert were linked biologically to baby Christopher.

Several options were available to the California courts. Arguably, the genetic mother was the real (and thus legal) mother. Or, perhaps the gestational mother was. State statutes gave some, though only limited support

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case such as *Johnson* may prejudge relevant issues. However, one of the most confusing aspects of discussions about parentage in cases occasioned by reproductive technology is terminological. Inevitably, the terms used to describe parties such as Crispina Calvert, Mark Calvert, and Anna Johnson reflect their relationships and roles. This Article uses the terms "parent" and "mother," rather than other, more neutral terms, to emphasize the weight of each party's claim to parentage.

57. *See id.*

58. *See id.*

59. *See id.*

60. *See id.*

61. *See id.*

62. *See id.*

63. *See id.*

64. *See id.*

65. King Solomon resolved a dispute between two women, each of whom claimed to be the mother of a baby. The other mother's baby had died. Although Solomon depended on a social/psychological test to identify the baby's mother, there was no question but that the baby had only one biological mother. *See* 1 *Kings* 3:23-28.

to each of these possibilities.[66] In the view of some, these were the *only* sensible possibilities. The appellate court, for instance, framed the case to require identification of the baby's one "natural," and thus "legal," mother.[67] In order to do that, the court concluded it was necessary to choose "[t]he woman who nurtures the child in her womb and gives birth or the otherwise infertile woman whose egg is implanted into the woman who gives birth."[68]

The choices were broader still. The courts could have decided that both women, each having demonstrated a biological connection to the baby, were "natural" (real) mothers and that as a consequence, the baby had two legal mothers.[69] Alternatively, the courts could have concluded that the baby had *no* "natural" mother because no woman performed all the essential tasks of "natural" maternity. Finally, the courts could have relied—as the state supreme court did rely—on non-biological indices in order to identify the baby's natural, and thus legal, mother (or mothers).

All three state courts that heard the case established parentage in the Calverts.[70] Unsurprisingly, in a case raising so many startlingly novel questions, each court grounded its holding in a different set of conclusions about the facts of the case and about the law. The trial court premised the Calvert's parentage on genetics by concluding that Crispina Calvert was the child's "genetic, biological and natural mother" while Anna Johnson was but a "gestational carrier," a "host," and a "genetic hereditary stranger[]" to the child.[71] Judge Parslow for the trial court, comparing Anna Johnson to a foster parent and a wet nurse, defined her role as social rather than biological.[72] The court agreed that Anna's help in the creation of the child was essential. She provided "nurturing, feeding, [and] protect[ion] of the child during the period of time that Crispina Calvert was unable to do so."[73] But that assistance could not be taken to constitute Anna's maternity.

The California Court of Appeal affirmed, though its decision was premised on a reading of state statutory law, rather than on the trial court's

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66. *See Johnson*, 851 P.2d at 780. The intermediate appellate court relied on statutory law to find that Crispina Calvert's genetic connection to the child constituted her natural maternity. *See infra* note 74 and accompanying text.

67. *See Anna J.*, 286 Cal. Rptr. at 371. The court explained the importance of identifying the baby's "natural" mother: "[That] is important because, except in cases of adoption, the 'legal' mother of a child is the 'natural' mother." *Id.*

68. *Id.*

69. In an amicus brief presented to the state supreme court, the American Civil Liberties Union argued that the court should find the child to have two legal mothers. The court rejected that suggestion. *See Johnson*, 851 P.2d at 781 n.8.

70. *See, e.g., Johnson*, 851 P.2d at 778.

71. *Johnson*, No. X-633190, slip op. at *5.

72. *See id.*, slip op. at *5-6, *17.

73. *Id.*, slip op. at *7.

less mediated conclusion that parentage is, and should be, grounded in genetic connection. Relying on the Uniform Parentage Act, promulgated in California in the mid-1970s, the appellate court declared Crispina Calvert to be the baby's natural, and thus legal, mother.[74]

Finally, the state supreme court affirmed, but on entirely different grounds. Concluding that neither the parties' biological relationships to the child nor state statutory rules provided clear direction, the court relied on the intentions of the parties to parent in determining that the Calverts were the child's natural and legal parents.[75] The court explained that "[b]ecause two women each have presented acceptable proof of maternity, we do not believe this case can be decided without enquiring into the parties' intentions as manifested in the surrogacy agreement."[76] Moreover, the court concluded:

> [A]lthough the Act recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law.[77]

2. Remaining Questions

The replacement of biogenetic links with links of choice and intention as the ground of parentage raises a series of important questions. The court answered some in *Johnson*. Others remain unaddressed.[78]

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74. Under section 7004 of the California Civil Code a man was "presumed to be the natural father of a child if he meets the conditions as set forth in section 621 of the Evidence Code." *Anna J.*, 286 Cal. Rptr. at 374 (citing CAL. CIV. CODE § 7004 (West 1983)). Section 621 of the Evidence Code provided in turn that

> if the court finds that the conclusions of all the experts, as *disclosed by the evidence based upon blood tests performed pursuant to Chapter 2 (commencing with Section 890)*, of Division 7, are that the husband is not the father of the child, *the question of paternity of the husband shall be resolved accordingly.*

Id. at 375 (alteration in original). Moreover, section 7015 of the California Civil Code provided that provision of the act applicable to definitions of the father-child relationship could be applied to demonstrate the existence of a mother-child relationship as well. *See id.* at 374 (citing CAL. CIV. CODE § 7015 (West 1983)).

In addition, section 7003 (1) of the Parentage Act provided that a parent-child relationship may be established "[b]etween a child and the natural mother . . . by proof of her having given birth to the child." *Id.* at 377.

75. *See Johnson*, 851 P.2d at 782.

76. *Id.*

77. *Id.*

78. Among the questions raised by *Johnson* are the following: Is there a difference between parentage that stems from biology and parentage that stems from choice ("intention")? In what sorts of

The *Johnson* court relied on the surrogacy contract into which the parties had entered to discern intentions, and in doing that declared that the agreement was not "on its face, inconsistent with public policy."[79] Beyond that however, the court did not delineate the potential legal consequences of contractual arrangements in surrogacy cases and in other cases involving reproductive technology.[80] Yet, the court was more certain and explicit about its resolution of other questions raised by its reliance on intentional parentage.[81]

First, the court explicitly precluded the likely misunderstanding that its holding determined custody, but not parentage.[82] Indeed, the court criticized the dissent's suggestion that maternity be established by ascertaining the "best interests" of the child because that approach would "confuse[] concepts of parentage and custody."[83] "Logically," the court continued, "the determination of parentage must precede, and should not be dictated by, eventual custody decisions."[84] Second, the court defined Crispina's maternity as "natural," thereby precluding the need for her to adopt baby Christopher.[85] Finally, the court asserted clearly that its preference for the genetic parents in *Johnson* depended on their parental intentions and did not imply a judicial preference for genetic over gestational maternity.[86] In a situation of ova donation in which a woman gestates and gives birth to a baby with the intention of raising the child, the court proclaimed, "the birth mother is the natural mother under California law."[87]

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situations will the law look to parental intention in determining parentage? Will parental intentions govern in more complicated and startling cases spawned by reproductive technologies than those considered to date? Must some biological connection exist before the law will determine parentage based on intention? When, that is to say, can parentage be premised on intention, and when, in the absence of biological links, must parentage be premised on adoption thus necessitating compliance with a comprehensive scheme of statutory rules? How will the law determine parental intentions? What evidence is adequate? How will the law handle contradictory or transitory intentions? Is intentional parentage distinguishable from "natural" parentage? And, does the recognition of intentional parentage prefigure the recognition and enforcement of contracts to determine parentage, at least in cases occasioned by certain types of reproductive technology?

79. *See Johnson*, 851 P.2d at 783.

80. *See* Malina Coleman, *Gestation, Intent, and the Seed: Defining Motherhood in the Era of Assisted Human Reproduction*, 17 CARDOZO L. REV. 497, 510-14 (1996) (comparing contract-approach with intent-approach to determining parentage); Janet L. Dolgin, *The "Intent" of Reproduction: Reproductive Technologies and the Parent-Child Bond*, 26 CONN. L. REV. 1261 (1994) (identifying limits and inconsistencies of the intent-approach to determination of parentage).

81. *See* Coleman, *supra* note 80, at 510-14.

82. *See Johnson*, 851 P.2d at 782 n.10.

83. *Id.*

84. *Id.*

85. *See id.* (footnote omitted).

86. *See id.* at 783.

87. *See id.* at 782 n.10.

Thus, some of the implications of the judicial reliance on intention in cases such as *Johnson* are made clear. Others are not. Among the pressing practical questions left open in *Johnson* is the extent to which the intent-approach would be deemed applicable in other sorts of cases. This question, and several others left unanswered in *Johnson* are addressed either expressly or implicitly in *Moschetta*[88] and *Buzzanca*,[89] when read together with *Johnson*.

B. Limits on Intentional Parentage: In re Marriage of Moschetta

After *Johnson*, it was almost inevitable that a state court would be asked to apply *Johnson's* intent-analysis to a case occasioned by a traditional surrogacy arrangement. In *Johnson*, the supreme court explained its reliance on intention as a tie breaker: "Because two women each have presented acceptable proof of maternity, we do not believe this case can be decided without enquiring into the parties' intentions as manifested in the surrogacy agreement."[90] It was not clear, however, whether intentions, having been identified as a ground of "natural" parentage, could establish parentage in the absence of a biological connection. Perhaps the *Johnson* court assumed that Crispina Calvert's and Anna Johnson's biological connection to the child were sufficiently alike to establish either woman's maternity, and therefore parental intentions were invoked only to select between two "natural" mothers.[91] In contrast, the court read more into intentional parentage, and would, in a future case, be willing to premise maternity on intention in the absence of a biological link between child and intending mother. This approach is suggested by the assertions that intending parents "are the first cause, or the prime movers, of the procreative relationship"[92] and that "intentions that are voluntarily chosen, deliberate, express and bargained-for ought presumptively to determine legal parenthood."[93]

A year after *Johnson*, the California courts considered the limits of intentional parentage in a case involving a traditional surrogacy agreement. *Moschetta* involved a dispute between an intending genetic father, Robert Moschetta, and a traditional surrogate, Elvira Jordan.[94] As a social though not

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88. *See Moschetta*, 30 Cal. Rptr. 2d 893.

89. *See Buzzanca*, 72 Cal. Rptr. 2d 280.

90. *Johnson*, 851 P.2d at 782.

91. This is the view most clearly suggested by the text of *Johnson*. However, the opinion of the California appellate court in *Buzzanca*, *see infra* notes 151-57 and accompanying text, relies on an alternative reading of *Johnson*.

92. *Johnson*, 851 P.2d at 782 (quoting John L. Hill, *What Does it Mean to Be a "Parent"?: The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 415 (1991)).

93. *Id.* at 783 (quoting Marjorie Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 323).

94. *See generally Moschetta*, 30 Cal. Rptr. 2d 893.

a biological matter, the case differed from the best known modern surrogacy case, *In re Baby M.*[95] In *Baby M*, the intending parents, William and Elizabeth Stern, argued for parentage together, opposing the genetic and gestational surrogate mother, Mary Beth Whitehead.[96] In contrast, in *Moschetta*, the surrogacy case arose as the marriage between Cynthia and Robert Moschetta disintegrated.[97]

Cynthia, sixteen years Robert's senior and already a mother when she married Robert at age 40, had had a tubal ligation.[98] The parties knew that Cynthia was unlikely to have more biological children, but several years after their marriage they decided they wanted children.[99] They attempted fertility treatment, but without success.[100] Then, in 1989, the Moschettas turned to surrogacy.[101] A surrogacy broker introduced the Moschettas to Elvira Jordan.[102] The parties negotiated a surrogacy contract without the aid of counsel.[103] Jordan agreed to be artificially inseminated with Robert's sperm, to gestate and give birth to the resulting baby, to then terminate her parental rights, and finally to assist[104] in the adoption process that would make Cynthia the baby's legal mother.[105] The Moschettas agreed to pay Jordan $10,000.[106] The artificial insemination was performed privately, without medical assistance.[107]

Before the birth of baby Marissa in May 1990, the Moschettas marriage began to deteriorate, and they considered divorce.[108] Elvira, learning of the couple's marital problems while she was in labor, reconsidered the surrogacy agreement.[109] Soon after Marissa's birth in May 1990, Cynthia went to court seeking a dissolution of her marriage to Robert and parental rights to and custody of Marissa.[110] As part of the Moschetta's divorce action, the trial

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95. *See In re* Baby M, 525 A.2d 1128 (N.J. Super. Ct. Ch. Div. 1987), *aff'd in part, rev'd in part*, 537 A.2d 1227 (N.J. 1988).

96. *See id.*

97. *See Moschetta*, 30 Cal. Rptr. 2d at 895.

98. Moschetta v. Moschetta, No. D. 324349, slip op. at 3 (Super. Ct. Orange County Mar. 9, 1993).

99. *See Moschetta*, 30 Cal. Rptr. 2d at 895.

100. *See Moschetta*, No. D. 324349, slip op. at 3.

101. *See Moschetta*, 30 Cal. Rptr. 2d at 895.

102. *See id.*

103. *See Moschetta*, No. D. 324349, slip op. at 3.

104. *See Moschetta*, 30 Cal. Rptr. 2d at 895.

105. *See id.*

106. *See id.* The payment was described as being "in 'recognition' of Robert's 'obligation to support [the] child and his right to provide [Jordan] with living expenses.'" *Id.*

107. *See Moschetta*, No. D. 324349, slip op. at 3.

108. *See Moschetta*, 30 Cal. Rptr. 2d at 895.

109. *See id.*

110. *See id.*

court determined that Robert Moschetta and Elvira Jordan were the parents of the baby born pursuant to the surrogacy contract and granted them joint legal and physical custody.[111] Later, Cynthia dropped the request that she be named Marissa's mother.[112] She filed a brief with the appellate court supporting the trial court's declaration of Elvira's maternity.[113] Robert continued to argue for Cynthia's legal motherhood in order to preclude Elvira's maternity and his having to share custody of Marissa with Elvira.[114]

Johnson was decided between the time the trial court in *Moschetta* rendered a decision and Robert's appeal of that decision. Robert thus argued on appeal that, on either of two grounds, *Johnson* necessitated overturning the trial court's holding:

> Certainly, the decision in *Johnson v. Calvert* has affected Robert's presentation of some of his legal arguments on appeal. Most notably, Robert argues that because the Uniform Parentage Act . . . provides contradictory conclusions concerning maternity, this case should be decided with reference to the parties' intentions as manifested by the surrogacy contract . . . . Alternatively, Robert urges enforcement of the contract, noting that *Johnson v. Calvert* held that surrogacy contracts are not inconsistent with public policy.[115]

More specifically, Robert premised Cynthia's maternity on two provisions of California law. First, he argued that California Evidence Code, section 621 presumed the husband of a child's mother—assuming that the husband was neither impotent or sterile—to be that child's father.[116] Robert argued the provision was applicable through California Civil Code Section 7015, which provided for application of provisions relevant to the establishment of paternity to the determination of maternity.[117]

The appellate court rejected Robert's argument declaring that the presumption can be rebutted by genetic testing.[118] Indeed, blood testing

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111. *See id.*

112. *See id.* at 895-96 (supporting judgment precluding her maternity).

113. *See id.* at 896.

114. *See id.* at 897.

115. Reply Brief of Appellant Robert Moschetta at 2, *Moschetta* (Nos. G013880, G014430).

116. *See Moschetta*, 30 Cal. Rptr. 2d at 896.

117. *See* Reply Brief of Appellant Robert Moschetta at 12, *Moschetta* (Nos. G013880, G014430). In *Johnson*, the supreme court noted that a provision of Evidence Code Section 621 that allowed the determination of paternity through blood testing could be applied to argue in favor of Crispina Calvert's maternity. *See Johnson*, 851 P.2d at 780-81.

118. *See Moschetta*, 30 Cal. Rptr. 2d at 896.

ordered by the trial court had established Elvira's genetic maternity.[119] Further, the court noted the statute's inapplicability on the clear facts of the case; Cynthia was, in fact, sterile.[120]

Second, Robert argued that Cynthia "received" the child into her home and should therefore, on equal protection grounds, be deemed the mother.[121] He relied on the California presumption that a man is presumed to be the natural father of a child if he "receives the child into his home and openly holds out the child as his natural child."[122] The appellate court disagreed, declaring that Cynthia had, in fact, "never held Marissa out as her 'natural' child. There never was any doubt that Marissa has no biological, natural or genetic connection with Cynthia."[123] In short, the court re-affirmed Elvira's maternity by concluding that presumptions about natural maternity are inappropriate to a case such as *Moschetta* in which there is "no question about biological parenthood to settle."[124]

Finally, the court directly considered Robert's reliance on the surrogacy contract into which the parties had entered.[125] Here, the court clearly outlined its understanding of the legal ground on which parentage in California could be determined.[126] In the absence of natural maternity, the court proclaimed, a woman could establish a mother-child relationship only by complying with procedures outlined in the state's adoption law.[127] The agreement at issue in *Moschetta* did not substitute for such compliance.[128]

In sum, the *Moschetta* court premised maternity on either nature or adoption. It limited "natural" maternity to women with some biological connection to the child involved.[129] Before *Johnson*, this conclusion would have been entirely unremarkable. After *Johnson*, however, with its reliance on intentionality to determine parentage, the limits of that reliance had to be established. By distinguishing between intentional-biological mothers and

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119. *See id.* at 897.

120. *See id.*

121. *See id.*

122. *Id.* (quoting CAL. FAM. CODE § 7611(d) (1994)). *See also* Reply Brief of Appellant Robert Moschetta at 18, *Moschetta* (Nos. G013880, G01443).

123. *Moschetta*, 30 Cal. Rptr. 2d at 897. The court's delineation of *three* grounds on which to predicate maternity—"biological, natural or genetic"—is suggestive. Although the appellate court in *Moschetta* refused to rely on the parties' intentions to establish parentage, the court's differentiation of "natural" from genetic and biological (presumably, gestational) maternity, suggests that in some cases "natural" parentage might be found apart from any biological or genetic relationship between a putative parent and a child. *Buzzanca*, *see infra* notes 150-56 and accompanying text, is such a case.

124. *Moschetta*, 30 Cal. Rptr. 2d at 897 (emphasis omitted).

125. *See id.* at 900.

126. *See id.*

127. *See id.*

128. *See id.*

129. *See id.* at 897.

other biological mothers and by designating members of only the first group as "natural" mothers, *Johnson* raised the possibility that *natural* maternity might exist even in the absence of a biological connection. While *Moschetta* seemed to settle this issue in the context of a traditional surrogacy arrangement,[130] *Buzzanca*[131] reopened the issue in the context of another, still more complicated set of reproductive facts.

C. Re-examining the Limits of Intentional Parentage: In Re Marriage of Buzzanca

Buzzanca resembles *Moschetta*. However, one major fact—found determinative by the California Court of Appeal—and several less essential facts differentiate the two cases. As in *Moschetta*, *Buzzanca* involved a surrogacy arrangement between intending parents, a married couple, Luanne and John Buzzanca, and a surrogate, Pamela Snell.[132] As in *Moschetta*, the marriage of the intending parents dissolved before the birth of the child produced as a result of the surrogacy agreement.[133] *Buzzanca* differed from *Moschetta* in that neither intending parent in *Buzzanca* was a genetic parent to the baby involved, a girl named Jaycee, born in 1995.[134] Rather, the Buzzancas had arranged for Snell to become pregnant through use of an embryo created from the sperm and ovum of anonymous donors at an infertility clinic in California.[135]

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130. The appellate court decision in *Moschetta* did not settle law for the entire state. California's highest court denied review. *See* Moschetta v. Moschetta, No. S041098, 1994 Cal. LEXIS 5623 (Oct. 13, 1994).

It is possible that a future court, especially with *Buzzanca* as precedent, *see infra* note 150 and accompanying text, might determine maternity through reliance on intentions in a traditional surrogacy case. The facts of *Moschetta* were especially inhospitable to such an interpretation, since the intending mother was uninterested in being the child's legal mother or custodial parent.

131. *See Buzzanca*, 72 Cal. Rptr. 2d 280; notes 132-77 *infra* and accompanying text.

132. *See Buzzanca*, 72 Cal. Rptr. 2d at 282. The Buzzancas had attempted to become parents through fertility treatments before turning to surrogacy. *See* Donna Foote, *Family: And Baby Makes One: In a Bizarre Clash of the Law and Fertility Techniques, Jaycee is a Child Without a Parent*, NEWSWEEK, Feb. 2, 1998, at 68. John was diagnosed with a low sperm count, and Luanne suffered from endometriosis. The couple were unsuccessful with both artificial insemination and *in vitro* fertilization. *See id.*

133. *See Buzzanca*, 72 Cal. Rptr. 2d. at 282.

134. *See id.*

135. *See 48 Hours: The Family Tree; Child Born to In-vitro Fertilization May Have Been Created From Stolen Embryo* (CBS television broadcast, May 14, 1998), *available in* LEXIS, News Library [hereinafter *48 Hours*]. Although the Buzzancas and Snell all apparently believed that Jaycee's genetic parents were unidentifiable, they may well have been identified in May 1998. *See id.* Jaycee was conceived at a fertility clinic connected with the University of California-Irvine. *See id.* The clinic, headed by Drs. Ricardo Asch and Jose Balmaceda, was closed in 1995 after the revelation of a scandal involving the donation of embryos to clinic patients from other patients who had not consented to such donation. *See id.* In 1998, a lawyer, tracing the clinic's stolen embryos, identified Jaycee's genetic parents and informed them of Jaycee's existence. *See id.* The sperm donor and his wife (who wish to remain anonymous)

Several less crucial facts also distinguish *Buzzanca* from *Moschetta*. In *Buzzanca*, unlike most surrogacy cases leading to disputes that have been resolved in court, the surrogate did not seek parental rights.[136] Several months after the baby's birth, Luanne, who had brought the child home from the hospital, sought child support from John as part of the action to dissolve their marriage.[137] John admitted he had signed the surrogacy contract, but denied paternity of the resulting child.[138] Among other things, he argued that because he signed the surrogacy agreement after the baby's conception, he was not a party to the contract.[139] Luanne, free to initiate adoption proceedings, chose instead to press for a declaration of her own—and therefore presumably, of John's—natural parentage.[140]

The case thus differed from virtually all previously litigated disputes occasioned by reproductive technology in that only one (Luanne) of the baby's six to eight potential parents requested parentage. Another (John) actively denied and rejected parentage, and as part of that effort, argued against the parentage of the one willing parent.[141]

In March 1997, almost two years after the baby's birth, the trial court concluded that neither Luanne nor John was a lawful parent of baby Jaycee.[142] The court further accepted a stipulation that Pamela Snell, the gestational surrogate, was not the child's lawful mother.[143] In a holding reminiscent of

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became the parents of twins through use of eggs donated to the clinic. *See id.* In the aftermath of their successful fertility treatments, they apparently consented to use of the remaining thirteen embryos created from the husband's sperm and the donor's eggs. *See id.* One of those embryos apparently implanted in Pamela Snell, led to the birth of Jaycee. *See id.* If the allegations are correct, Jaycee is the full genetic sibling of the twins born to the sperm donor and his wife.

Both the apparent sperm and egg donors are married, as is Pamela Snell. As a result, eight adults might present a cognizable parental interest in the case: Luanne Buzzanca, John Buzzanca, gestational surrogate Pamela Snell and her husband, the sperm donor and his wife and the egg donor and her husband.

136. Snell did file for custody during the course of the dispute between the Buzzancas apparently because she was concerned about handing the child over to a divorcing couple. Later, however, she withdrew her claim. *See* Davan Maharaj, *Case May Redefine Fatherhood in State*, L.A. TIMES, September 14, 1997, at B1.

137. *See* Jaycee B. v. Superior Court of Orange County, 49 Cal. Rptr. 2d 694 (Ct. App. 1996) (declaring trial court had jurisdiction to force John Buzzanca to pay temporary child support pending decision on question of his parenthood).

138. *See id.* at 696.

139. John argued that the child was not born pursuant to a surrogacy agreement since he signed the alleged agreement on August 25, 1994, two weeks after the embryo was implanted in the surrogate. The court concluded that an agreement in fact existed before August 25. Before that date, the contract was oral. *See Buzzanca*, 72 Cal. Rptr. 2d. at 283.

140. *See id.* at 282.

141. *See id.*

142. *See id.* at 283.

143. *See id.* at 282.

traditional laws defining and regulating bastardy, the court declared Jaycee a child without parentage. Trial court Judge Robert Monarch declared:

> So I think what evidence there is, is stipulated to. And I don't think there would be any more. One, there's no genetic tie between Luanne and the child. Two, she is not the gestational mother. Three, she has not adopted the child. That, folks, to me, respectfully, is clear and convincing evidence that she's not the legal mother.[144]

John was thus relieved of the $386 a month he was paying in child support,[145] and Luanne's potential maternity was made dependent on her willingness and ability to comply with state adoption procedures.[146] It was not, however, perfectly clear from whom Luanne was to adopt the child since, in the law's view, the child was without a natural parent.[147]

On appeal, the court described the trial court's conclusion as "extraordinary,"[148] and reversed:

> Jaycee had no lawful parents. First, the woman who gave birth to Jaycee was not the mother . . . . Second, Luanne was not the mother. According to the trial court, she could not be the mother because she had neither contributed the egg nor given birth. And John could not be the father, because, not having contributed the sperm, he had no biological relationship with the child.
>
> We disagree. Let us get right to the point: Jaycee never would have been born had not Luanne and John both agreed to have a fertilized egg implanted in a surrogate.[149]

The court rejected what it described as the trial court's "adoption default" model and concluded that the Buzzancas' parentage was established at the baby's birth by reason of their parental intentions.[150]

Reversing the trial court's decision that no one offered a cognizable claim to Jaycee's parentage, the appellate court offered a novel view of the ties that bind parent and child. That view enabled the court to conclude that

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144. *Id.* at 283.

145. *See* Maharaj, *supra* note 136, at B1.

146. *See Buzzanca*, 72 Cal. Rptr. at 283.

147. *See* Ann Davis, *High-Tech Births Spawn Legal Riddles*, WALL ST. J., Jan. 26, 1998, at B1 (quoting Jeffrey Doeringer, court-appointed lawyer for Jaycee, asking from whom Luanne was to adopt the child in light of trial court opinion).

148. *Buzzanca*, 72 Cal. Rptr. 2d at 282.

149. *Id.* (emphasis omitted).

150. *See id.* at 288-89.

establishing natural parentage under the law need not depend on proof of any biological relation between mother and child.[151] Thus, the court was able to reject the "adoption default model" of parentage in cases occasioned by reproductive technology.[152] The court declared:

> The "adoption default" model is . . . inconsistent with both statutory law and the Supreme Court's *Johnson* decision. As to the statutory law, the Legislature has already made it perfectly clear that public policy (and, we might add, common sense) favors, whenever possible, the establishment of legal parenthood with the concomitant responsibility.[153]

In place of a model that would require Luanne to adopt baby Jaycee, the appellate court grounded her maternity first on the state's statutory scheme for regulating parentage in cases of artificial insemination, and second, on an expansive reading of the state supreme court's decision in *Johnson*.[154] In fact, both conclusions—that Luanne's maternity could be grounded on artificial insemination statutes, and that it followed clearly from *Johnson*—are premised on the expansion of the explicit assumptions undergirding state artificial insemination laws and *Johnson's* holding.

The *Buzzanca* court concluded that Luanne, having consented to the conception and birth of baby Jaycee, presented a cognizable claim to be that baby's mother.[155] "The same rule," the court asserted, "which makes a husband the lawful father of a child born because of his consent to artificial insemination should be applied here . . . to both husband and wife."[156] Moreover, declared the court, the circumstances of Jaycee's birth resembled those of a birth resulting from artificial insemination because "[i]n each instance, a child is procreated because a medical procedure was initiated and consented to by intended parents."[157]

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151. *See id.* at 290 (citation omitted).

152. *Id.* at 289 (citation omitted).

153. *Id.*

154. *See id.* at 288-90.

155. *See id.* at 288.

156. *Id.* at 282.

157. *Id.* Lawmakers have stressed the involvement, or lack of involvement, of medical professionals in delineating parental rights in reproductive technology cases. For instance, the Uniform Parentage Act provides that the consenting husband of a woman who becomes pregnant through heterologous artificial insemination under the supervision of a doctor is treated "as if he were the natural father of a child thereby conceived." UNIF. PARENTAGE ACT § 5(a), 9b U.L.A. 301 (1987). Furthermore, a donor who provides semen "to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived." *Id.* § 5(b), 9b U.L.A. 301 (1987). Thus, with regard to the sperm donor and to the mother's husband, the legal consequences depend on the parties having had medical supervision.

Artificial insemination statutes may well provide a reasonable model for the regulation of gestational (or traditional) surrogacy.[158] That conclusion, however, depends on a set of assumptions about familial, especially parent-child, relationships that go beyond the express assumptions undergirding artificial insemination statutes. These statutes, widely promulgated beginning in the 1960s, explain a mother's husband's paternity by reference to the man's position as "mother's husband"—as spouse to the biological mother.[159] Certainly, Luanne's maternity cannot be predicated on her spousal relationship to baby Jaycee's biological father since the biological father was an anonymous sperm donor. John, like Luanne, had no biological link to the child. Thus in *Buzzanca*, parental *consent* grounds parentage, without apparent regard for the character of the relationship, if any, between two potential parents. More specifically, the consent requirement in *Buzzanca* is not grounded in an assumption comparable to the traditional assumption that paternity can be predicated upon a man's relation to his child's mother.[160]

The *Buzzanca* court did not directly ground Luanne's maternity on her consent. Rather, the court used that consent to establish Luanne's *claim* to maternity and thereby to provide grounds for applying the intent-standard defined in *Johnson* to Luanne.[161] In *Johnson*, both Crispina Calvert and Anna Johnson presented a cognizable claim to maternity.[162] That court declared that two women have "each. . . presented acceptable proof of maternity."[163] Only in light of those initial proofs did the *Johnson* court select between the women

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Beyond the health concerns generally invoked to explain that rule, the involvement of medical professionals serves to differentiate such conception as a social matter from conception through sexual intercourse. If a pregnancy can be defined as the consequence of a *medical* procedure, it is easier for the law to deny, or at least to ignore, the actual or potential social relations—the social history—among the parties themselves. Thus, it can seem reasonable to differentiate paternal rights and obligations in cases involving donated semen (referred to as "surrogate fatherhood" in *R.R. v. M.H.*, 689 N.E.2d 792, 795 (Mass. 1998)) from paternal rights and obligations in cases in which a woman desiring parenthood becomes pregnant through sexual intercourse with an otherwise uninvolved man. *See* Jhordan C. v. Mary K., 224 Cal. Rptr. 530 (Ct. App. 1986) (predicating sperm donor's paternal rights on fact that artificial insemination was not supervised by licensed doctor).

158. Several states have promulgated legislative schemes for allowing and regulating surrogacy that resemble statutes regulating artificial insemination. *See, e.g.*, ARK. CODE ANN. § 9-10-201 (Michie 1993); FLA. STAT. ch. 742.15 (1994); NEV. REV. STAT. § 126.045 (1993).

159. Statutes regulating artificial insemination serve to establish paternity in a woman's husband, and to relieve sperm donors from obligations to any resulting child. *See, e.g.*, UNIF. PARENTAGE ACT § 5, 9b U.L.A. 301 (1987). In cases of artificial insemination involving married and unmarried women, the statutes may also, at least under specified circumstances, protect the mother or the mother and her husband from claims of a sperm donor to paternity. *See, e.g., Jhordan C.*, 224 Cal. Rptr. at 534.

160. *See* Michael H. v. Gerald D., 491 U.S. 110, 129 (1989) (right of putative father to develop relationship with biological child did not include right to rebut statute presuming mother's husband to be child's father).

161. *See Buzzanca*, 72 Cal. Rptr.2d at 288.

162. *See Johnson*, 851 P.2d at 782.

163. *Id.*

on the basis of their intentions as reflected in the surrogacy agreement. Similarly, in *Buzzanca*, the court established a basis for Luanne's claim to maternity (her "consent") before it defined her as the intentional, and therefore, legal mother to baby Jaycee.[164]

The approach contrasts with, or at least expands significantly the assumptions undergirding the application of an intent-standard in *Johnson*. In *Johnson*, the supreme court invoked intention to break a tie between two women, each seen as a biological mother.[165] In *Buzzanca*, the appellate court invoked Luanne's intention in order to define a woman with no biological link to the baby as that baby's natural mother.[166]

In sum, the *Buzzanca* court defined Luanne's consent as constituting a ground on which to premise her maternity.[167] It then treated that consent as legally equivalent to a genetic or gestational link between putative mothers and children in other cases. In that regard, *Buzzanca* expands *Johnson*. *Johnson* suggests (or assumes) that intention determines maternity only as

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164. The approach depends on a curious sleight-of-hand. In fact, Luanne's consent to the surrogacy arrangement can be differentiated only in theory from her intent as reflected in the surrogacy agreement. The court could simply have declared Luanne the baby's mother, because she, not the gestational mother, and not the egg donor, had demonstrated the requisite maternal intention. But, reluctant to ground maternity exclusively on intention, the court sought an alternative base on which to identify Luanne's maternity—her "consent." *See Buzzanca*, 72 Cal. Rptr. 2d at 288.

165. *See Johnson*, 851 P.2d at 782.

166. *See Buzzanca*, 72 Cal. Rptr. 2d at 282. The *Buzzanca* court would seem to have misread *Johnson* as having prefigured, and thus as providing for, the situation at issue in *Buzzanca*. The *Buzzanca* court explained:

> As this court noted in *Jaycee B. v. Superior Court* . . . the *Johnson* court had occasion, albeit in dicta, to address "pretty much the exact situation before us." The language bears quoting again: "In what we must hope will be the extremely rare situation in which neither the gestator nor the woman who provided the ovum for fertilization is willing to assume custody of the child after birth, a rule recognizing the intending parents as the child's legal, natural parents should best promote certainty and stability". . . . This language quite literally describes precisely the case before us now: Neither the woman whose ovum was used nor the woman who gave birth have come forward to assume custody of the child after birth.

Id. at 290 (citations omitted). Read in context, the quoted language from *Johnson* speaks of a situation in which no potential parent proves willing to bear the obligations of parenthood. The sentence in *Johnson* immediately preceding the quoted language reads: "Under Anna's interpretation of the Act [an interpretation that would define the birth mother as a child's legal mother], by contrast, a woman who agreed to gestate a fetus genetically related to the intending parents would, contrary to her expectations, be held to be the child's natural mother, with all the responsibilities that ruling would entail, *if the intending mother declined to accept the child after its birth.*" *Johnson*, 851 P.2d at 783 (emphasis added). Furthermore, the *Buzzanca* court, in quoting from *Johnson*, inexplicably omits the phrase "for the child" at the end of the quoted sentence. That sentence ends with the phrase "should best promote certainty and stability *for the child*." *Id.* (emphasis added). Thus, clearly the *Johnson* court was concerned to denominate *either* the unwilling genetic mother or the unwilling gestational mother, depending on intent. The court was not considering a case in which the intending mother was a third party, as in *Buzzanca*.

167. *Buzzanca*, 72 Cal. Rptr. 2d at 288.

between two women, each of whom is connected biologically to the child. In contrast, *Buzzanca* applies the intent-standard to a woman with no biological relation to the child involved. Thus, *Buzzanca*, but not *Johnson*, provides for the "natural" maternity of a non-biological mother.[168]

In order to discern the likely limits of this ruling, it is necessary to revisit *Moschetta*. There, four years before *Buzzanca*, the same appellate court that decided *Buzzanca* established maternity in Elvira Jordan, the non-intending "traditional" surrogate.[169] If Jordan's legal maternity was premised on her biological maternity, then *Buzzanca*, like *Johnson* before it, is applicable to cases involving gestational surrogacy, but not to cases involving traditional surrogacy. On the other hand, if *Moschetta* was a practical response to the facts of that case and, in particular, to the abdication of the intentional mother in favor of a surrogate anxious to assume social maternity, then *Buzzanca* might be applicable to cases occasioned by traditional surrogacy agreements.

In *Moschetta* itself, the court assumed that the intent-test employed in *Johnson* was applicable only to cases involving more than one biological mother:

> [T]he framework employed by *Johnson v. Calvert* of first determining parentage under the Act is dispositive of the case before us. In *Johnson v. Calvert* our Supreme Court *first* ascertained parentage under the Act; only when the operation of the Act yielded an ambiguous result did the court resolve the matter by intent as expressed in the agreement. In the present case, by contrast, parentage is easily resolved in Elvira Jordan *under the terms of the Act.* Here, apropos the language in *Johnson v. Calvert* . . . the two usual means of showing maternity—genetics and birth—*coincide in one woman.*[170]

In distinguishing *Moschetta*, the *Buzzanca* court reiterated that conclusion. In addition, the court suggested a different and potentially inconsistent interpretation. First, the court reaffirmed the basic message of its

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168. California statutory law provides for maternity through a relationship grounded in nature, or through adoption. *See* CAL. FAM. CODE § 7610 (West 1994). As courts have constructed definitions of maternity, these have been assimilated to one or the other of the existing models. *See infra* Part III (considering "natural" versus adoption models of parentage).

169. *See supra* Part II.B (describing *Moschetta*). As a practical matter, it made sense in *Moschetta* to name Elvira Jordan, the surrogate, and not Cynthia Moschetta, the biological father's divorcing wife, as baby Marissa's mother. Cynthia had relinquished all claims to, and had no interest in, being declared Marissa's mother. Thus, even if it were possible to establish parentage on the basis of intent alone, that approach would be problematic in a case such as *Moschetta*, in which parental intentions shifted between the conception and birth of the baby.

170. *Moschetta*, 30 Cal. Rptr. 2d at 900 (emphasis in original).

earlier decision in *Moschetta* by declaring that Elvira Jordan, the genetic and gestational surrogate, could not be involuntarily deprived of her legal maternity. The court proclaimed:

> Our decision in *In re Marriage of Moschetta* . . . relied on by John [Buzzanca], is inapposite and distinguishable. In *Moschetta*, this court held that a contract giving rise to a "traditional" surrogacy arrangement where a surrogate was simply inseminated with the husband's sperm could not be enforced against the surrogate by the intended father. In order for the surrogate not to be the lawful mother she would have to give the child up for adoption.[171]

It is hard to imagine a clearer statement about the difference between traditional surrogacy cases—cases involving only one woman with a claim to biological maternity—and other cases involving more than one biological mother.[172] Yet, the court almost immediately suggested an alternative explanation of *Moschetta's* inapplicability: *Buzzanca* was different from *Moschetta* because Cynthia Moschetta, the intending mother, relinquished her interest in maternity and supported the claims of the surrogate (in opposition to the parental claims of Cynthia's divorcing husband, Robert).[173] The *Buzzanca* court explained:

> *Moschetta* is inapposite because this court never had occasion to consider or discuss whether the original intended mother's participation in the surrogacy arrangement, which brought about the child's birth, might have formed the basis for holding her responsible as a parent. She had given up her claim; the issue was not before the court. Unlike the *Johnson* case there was no tie to break between two women both of whom could be held to be mothers under the Act.[174]

Thus, possibly, a court will rely on intention to determine parentage in a future traditional surrogacy case involving a dispute between a surrogate and an intending mother, each anxious to be designated a legal mother. In most

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171. *Buzzanca*, 72 Cal. Rptr. 2d at 288 (emphasis omitted) (citations omitted).

172. At present, it is possible to involve three or more women in the biological reproduction of a child. Cytoplasmic transfer makes it possible to insert the cytoplasm from one woman's ovum into another woman's ova. Moreover, the gestational role could be shared by two or more women over time. Finally, human embryos can in theory, and animal embryos have in fact, been combined to produce one offspring from the gametes of four (or more) people. *See* Thomas D. Mays, *Biotech Incites Outcry*, NAT'L. L. J., June 22, 1998, at C1.

173. *Buzzanca*, 72 Cal. Rptr. 2d at 288.

174. *Id.* at 289.

cases, however, as an *amicus* brief filed in *Buzzanca* by the Certified Family Law Specialists suggests, traditional surrogacy can be, and will likely continue to be, distinguished from gestational surrogacy under existing statutory schemes because a traditional surrogate "carr[ies] her own biological child."[175] The brief argues that *Buzzanca* differed from *Moschetta* in that "[Jaycee's] case involves the recognition of parent-child status *ab initio*, not the *transfer* of that status from one parent to another."[176]

In short, *Buzzanca* answers some of the questions raised in *Johnson.* Most importantly, *Buzzanca* expands the applicability of intentional parentage to at least some women lacking any claim to biological maternity. *Buzzanca*, however, creates other pressing questions. Among these is the opinion's consequence for parentage disputes in cases involving only one biological mother. Neither the California courts nor the state legislature has addressed this issue directly. But elsewhere, courts have consistently assumed the maternity of women serving as traditional surrogates even though they have generally not granted *custody* to traditional surrogates.[177]

III. TRADITIONAL VERSUS GESTATIONAL SURROGACY: *R.R. V. M.H.* AND *BUZZANCA*

In 1998, a Massachusetts court asked to delineate the law's position on traditional surrogacy agreements in that state, relied on an assumption central to virtually all decisions about traditional surrogacy—that a traditional surrogate is the mother of the child she gestates and bears.[178] A few courts have approved and enforced traditional surrogacy agreements,[179] and a number

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175. *Amicus Curiae*, Association of Certified Family Law Specialists (Leslie Ellen Shear), Opening Brief in Support of Appellant/Petitioner Jaycee B. at 32, *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d (1998) (No. 95D002992) [hereinafter Opening Brief in Support of Jaycee B.]. The appellate court appears to have relied heavily on this brief in constructing its view of the case.

176. *Id.*

177. One of the first trial courts to entertain a traditional surrogacy case granted legal maternity to the intending mother. *See generally Baby M*, 525 A.2d 1128. Although the trial court in *Baby M* did not require the intending mother to comply with all the rules of adoption law, the court did order both termination of the surrogate's maternity and adoption of the baby by the intending mother. Thus, the court apparently assumed it was necessary to *transfer* maternity from the birth (and genetic) mother to the intending mother.

178. *See* R.R. v. M.H., 689 N.E.2d 790 (Mass. 1998); *see also infra* notes 187-212 and accompanying text.

179. *See* Surrogate Parenting Assocs., Inc. v. Kentucky *ex rel.* Armstrong, 704 S.W.2d 209, 214 (Ky. 1986) (approving compensated surrogacy agreement); *In re* Adoption of Baby Girl L.J., 505 N.Y.S.2d 813, 818 (N.Y. Surr. Ct. 1986) (approving compensated surrogacy agreement); *In re* Baby M, 525 A.2d 1128, 1175 (N.J. Super. Ct. Ch. Div. 1987) (approving surrogacy agreement, terminated surrogate's maternal rights and ordered adoption of child by biological father's wife; state supreme court reinstated surrogate's legal maternity). The decisions in the Kentucky and New York cases were superseded by legislation. *See* KY. REV. STAT. ANN. § 199.590(4) (Michie 1995) (precluding enforcement of compensated

of states have promulgated statutes providing for and regulating such agreements.[180] Almost nowhere, however, has an intending parent in a traditional surrogacy agreement been understood implicitly or redefined explicitly as a "natural" parent or as a parent *ab initio*.[181] Thus, both judicial and legislative approval of traditional surrogacy has depended upon a *transfer* of parentage from the natural mother to the intending parent or parents. In short, courts and legislatures have assumed that the biological mother is the natural, and thus the legal mother, in cases of traditional surrogacy. Even though the law in some jurisdictions permits such mothers to transfer parentage to others, this statutory permission does not gainsay the biological mother's original and essential maternity.

For instance, in *Baby M*, involving the attempted transfer of parentage of a child from the traditional surrogate, Mary Beth Whitehead, to Elizabeth and William Stern, the New Jersey trial court assumed that Whitehead was the child's mother and that Stern was her father.[182] Thus, the court proclaimed at the start of its long opinion:

> Justice, our desired objective, to the child and the mother, to the child and the father, cannot be obtained for both parents. The court will seek to achieve justice for the child. This court's fact finding and application of relevant law must mitigate against the heartfelt desires of one or the other of the natural parents.[183]

In order to establish William and Elizabeth Stern as the child's legal parents, the court expressly terminated Whitehead's maternal rights.[184]

Similarly, in *Surrogate Parenting Associates v. Kentucky ex rel. Armstrong*, the Supreme Court of Kentucky clearly assumed the surrogate's natural maternity in declaring that traditional surrogacy agreements did not contravene state adoption laws.[185] Consequently, the court assumed that the potential maternity of the "wife of the biological father" depended on her

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surrogacy arrangements); N.Y. DOM. REL. § 123 (McKinney 1995) (imposing civil penalty for entering into surrogacy agreement and defining brokering surrogacy arrangement by third parties as a felony).

180. *See, e.g.*, N.H. REV. STAT. ANN. § 168-B:16 (Supp. 1996) (making uncompensated surrogacy arrangements lawful); VA. CODE ANN. §§ 20-159, 20-160(B)(4) (Michie 1995) (making unpaid surrogacy arrangements lawful).

181. Only Arkansas has come close to defining an intending parent as a parent from the start, and that rule was established by the state legislature, not the judiciary. In Arkansas, statutory law creates a presumption that a child born as the result of a surrogacy agreement is the child of the intending parents. ARK. CODE ANN. § 9-10-201(b) (Michie 1993).

182. *See Baby M*, 525 A.2d at 1132.

183. *See id.*

184. *See id.* at 1171.

185. *See Surrogate Parenting Assocs., Inc.*, 704 S.W.2d at 214.

adopting her husband's child. The court explained that she could "avail herself of the legal procedure available for adoption by a stepparent."[186]

R.R. v. M.H. reflects a similar understanding of the relationships established by traditional surrogacy arrangements. As with *Baby M*, *R.R.* arose as the result of a traditional surrogate's change of mind in a state without relevant statutory rules. In November 1996, Robert and Margaret Rascoe, anxious for a biological child, but unable to have one due to Margaret's infertility, entered into an agreement with a surrogate, Michelle Hoagland.[187] New England Surrogate Parenting Advisors arranged the terms of the surrogacy for a fee of $6,000.[188] The agreement provided for Hoagland to receive $10,000 to conceive, gestate, and bear a child created from her ovum and Robert's sperm.[189] Hoagland further agreed that she would surrender custody to Robert and his wife at the baby's birth.[190] The contract did not provide for the termination of Hoagland's maternity, but only for her relinquishing custody of any child who would be born as a result of the agreement.[191] Hoagland became pregnant in late 1996.[192] Before the baby's birth in August 1997, Hoagland informed the Rascoes that she had decided to retain custody of the child upon its birth.[193] She returned some, but not all of the money the baby's father had paid her.[194] Robert Rascoe filed suit to establish paternity and to clarify his rights under the surrogacy agreement.[195]

The child, a girl, was born on August 15, 1997.[196] Just prior to the baby's

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186. *Id.* at 210. *See also Baby Girl L.J.*, 505 N.Y.S.2d at 814 (describing legal transfer of maternity from surrogate to intending mother as "private placement adoption").

187. *See* Emilie Astell, *Surrogacy Contract Invalidated*, TELEGRAM & GAZETTE (Worcester), Jan. 23, 1998, at A1; H. Joseph Gitlin, *Mass. Court Finds Surrogacy Agreement Unenforceable*, CHICAGO DAILY L. BULL., Feb. 13, 1998, at 5.

188. *See R.R.*, 689 N.E.2d at 791.

189. The contract provided for Hoagland to receive $500 on becoming pregnant, $2,500 at the end of the first trimester, $3,500 at the end of the second trimester, and an additional $3,500 at the baby's birth. *See id.* at 792. The contract stated the payment was not for the right to adopt the child or for the termination of the surrogate's parental rights. *See id.* The surrogate agreed to refund all money received if she had an abortion not necessary for her health, if tests showed Rascoe wasn't the biological father, or if Hoagland refused to surrender the child to the father at the time of its release from the hospital. *See id.*

190. See Astell, *supra* note 187, at A1.

191. *See R.R.*, 689 N.E.2d at 792.

192. *See id.* at 793.

193. *See id.*

194. When, in the sixth month of her pregnancy, Hoagland decided to keep the child, she had received $6,600 and she repaid $3,600 to the Rascoes. *See* Henriette Campagne, *SJC Hears Case of Surrogate Mother*, MASS. LAW. WEEKLY, Oct. 13, 1997, at 2.

195. *See R.R.*, 689 N.E.2d at 793.

196. Michelle Hoagland was listed as the child's mother on her birth certificate. Her husband, Duanne Hoagland, was listed as the father. The couple separated during Michelle's pregnancy, apparently as a result of Duanne's negative response to Michelle's having become a surrogate. *See* George Barnes, *State's Highest Court Takes Athol Surrogate-Mother Case*, TELEGRAM & GAZETTE (Worcester), Sept. 11, 1997, at B4.

birth, a state court granted temporary custody of her to the Rascoes.[197] At the same time, Hoagland received the right to unsupervised visitation amounting to twelve hours in each week.[198] An appellate court affirmed.[199] Before the case reached the state's highest court, the parties entered into a voluntary agreement under which Hoagland promised not to seek custody, and the Rascoes agreed to arrange for periodic visits between Hoagland and the child.[200] The family court approved that arrangement.[201]

As a result, Judge Wilkins' decision for the state's highest court had no practical impact on the immediate parties. The court's concern was not with interpreting the agreement into which Hoagland and the Rascoes had entered, but "with the legal significance, if any, of its provisions."[202] In light of public policy concerns and state adoption laws (which the court interpreted as applicable to an agreement to terminate custodial rights), the court refused to validate compensated surrogacy agreements.[203] Under the state's adoption law, a woman cannot provide binding consent to terminate her parental rights with a view toward adoption of her child by some other party earlier than the fourth day after the child's birth.[204] Furthermore, adoption law prohibits payments to a birth mother beyond expenses of the birth.[205] Finally, Massachusetts law does not provide for private adoptions.[206] In addition, the court concluded that on public policy grounds it was unable to enforce a contractual agreement to transfer custody of a child.[207] "We simply decline," the court declared, "on public policy grounds, to apply to a surrogacy agreement of the type involved here the general principle that an agreement between informed, mature adults should be enforced absent proof of duress, fraud, or undue influence."[208]

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197. *See id.* Judge Ricci for the Probate and Family Court issued a preliminary injunction on the custody and visitation question on August 1, 1997. *See id.* That injunction was upheld by appeals court Judge J. Harold Flannery in mid-August. *See id.* All files were impounded, and lawyers for the parties were ordered not to speak about the case. *See id.*

198. *See* Campagne, supra note 194, at 2.

199. *See* Barnes, *supra* note 196, at B4.

200. *See* Andrea Estes, *SJC: Surrogate Moms May Change Mind*, BOSTON HERALD, Jan. 23, 1998, at 26.

201. *See R.R.*, 689 N.E.2d at 791.

202. *Id.* at 795. Hoagland had moved for clarification as to the legality of surrogacy agreements in Massachusetts. The probate court had concluded that the contract among the parties was enforceable. The state's highest court considered only this issue. *See id.* at 793.

203. *See id.* at 797.

204. *See id.* at 796.

205. *See id.*

206. *See id.*

207. *See id.* at 797.

208. *Id.*

The court further declined to rely on the state's artificial insemination law as a model for deciding whether to approve of traditional surrogacy.[209] The situation of a sperm donor seemed too different from that of a surrogate mother.[210] The court concluded that unlike sperm donation (called "surrogate fatherhood"), "surrogate motherhood is never anonymous and [the surrogate's] commitment and contribution is unavoidably much greater than that of a sperm donor."[211] Thus, unlike the California court in *Buzzanca*, the court in *R.R.* did assume an "adoption default" model. That is, in the absence of relevant legislation, the court assumed that "when intended parents resort to artificial reproduction without biological ties the Legislature wanted them to be screened first through the adoption system."[212]

However, the *Buzzanca* court rejected an "adoption default" model in a gestational, not a traditional, surrogacy case.[213] Whether a future California court or the state legislature will premise the parentage of an intending, non-biological mother on adoption in a traditional surrogacy case remains to be seen. Furthermore, the Massachusetts court in *R.R.* expressly distinguished gestational from traditional surrogacy, and thus left open the possibility that it too would reject an "adoption default" model in a case occasioned by gestational surrogacy.[214] As the court proclaimed in *R.R.*, gestational surrogacy presents "[a] situation which involves considerations different from those in the case before us."[215] Thus, it is reasonable to conclude that the differences between *R.R.* and *Buzzanca* reflect differences in the fact patterns, in particular in the technology employed in the two cases, rather than differences in the basic perspectives of the deciding courts.

If so, *R.R.* and *Buzzanca*, read together, seem to represent an emerging consensus about surrogacy. In fact, since the first "traditional" surrogacy decisions in the mid-1980s, the judiciary's understandings of the familial relationships created by such arrangements—understandings about the truths on which parentage is grounded—have been essentially consistent.[216] Some state courts have enforced traditional surrogacy contracts,[217] while others have not.[218] Some courts have concluded that the public policy concerns raised by traditional surrogacy can be managed.[219] Other courts have found surrogacy

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209. *See id.* at 795.
210. *See id.*
211. *Id.*
212. *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 289 (Ct. App. 1998) (emphasis omitted).
213. *See id.* at 282; *see supra* notes 132-41 and accompanying text (presenting facts of *Buzzanca*).
214. *See R.R.*, 689 N.E.2d at 795 n.10.
215. *Id.*
216. *See supra* notes 43-44 and accompanying text.
217. *See, e.g., Surrogate Parenting Assocs., Inc.*, 704 S.W.2d at 214.
218. *See, e.g., In re* Marriage of Moschetta, 30 Cal. Rptr. 2d 893, 903 (Ct. App. 1994).
219. *See, e.g., Baby M*, 525 A.2d at 1179-71.

agreements void on the basis of those concerns.[220] Despite these differences, however important as a practical matter, virtually every court that has heard such a case has understood the facts to present a "natural" mother voluntarily surrendering parentage or custody to a biological father and/or some third party (often the biological father's spouse).

In contrast, courts considering disputes occasioned by gestational surrogacy and other more complicated arrangements[221] have not been able to identify with certainty a child's "natural" parents—who would presumably have to give their consent to effect an adoption. As a result, courts have depended on an adoption model in traditional surrogacy cases and have been ready to premise parentage on other grounds, such as parental intentions or the best interests of the child,[222] in cases occasioned by gestational surrogacy arrangements.

The California court in *Buzzanca* and the Massachusetts court in *R.R.* assumed that parentage can be established under the law through reliance on either of two models. One model provides for a change in parentage while the other does not. Courts have assumed that the first model (the adoption model) applies to cases in which a "natural" parent agrees to transfer parentage to some other parent or parents. Traditional surrogacy cases fall into this category. In these cases, the status of intending parents depends on some act that expressly *transfers* parentage to them from the surrogate. In other cases, courts have assumed parentage to follow automatically in the "nature" of the case. For instance, the California court in *Johnson* grounded the Calvert's "natural" parentage on their genetic link to baby Christopher *and* on their parental intentions.[223] As *Johnson* suggests and as *Buzzanca* makes perfectly clear, however, intentional parentage is *not* synonymous with biological parentage.[224] The California courts referred to the Calverts and the Buzzancas as "natural" parents.[225] In fact, the Buzzancas' relationship to baby Jaycee was no different than the relationship Margaret, the intending mother in *R.R.*, had with the baby born as a result of the surrogacy arrangement at issue in that case.[226]

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220. *See, e.g., Baby M*, 537 A.2d 1227, 1242 (N.J. 1988).

221. *See Buzzanca*, 72 Cal. Rptr. 2d at 282. In that case, neither the surrogate nor the intending parents had a genetic connection to the resulting child.

222. In *Johnson v. Calvert*, Justice Kennard, in dissent, would have premised parentage on an examination of the child's best interests. *See* Johnson v. Calvert, 851 P.2d 776, 789 (Ca. 1993) (Kennard, J., dissenting), *cert. denied*, 510 U.S. 874 (1993).

223. *See id.* at 782-83.

224. *See id.*; *Buzzanca*, 72 Cal. Rptr. 2d at 284.

225. *See Buzzanca*, 72 Cal. Rptr. 2d at 285.

226. *See id.* at 282; *R.R.*, 689 N.E.2d at 791.

In fact, there are three, not two models on which society and the law ground parentage. One model permits the transfer of parentage from one parent or set of parents to another. This sort of parentage does not follow automatically from a child's birth. The second assumes parentage follows automatically from the nature of the biological case. Finally, the third model presumes parentage at the moment of a child's birth, but as the result of legal (cultural) presumptions and not as the result of assumptions about nature itself. Artificial insemination statutes that presume that a consenting mother's husband is the father of his wife's child fall within this third category. Similarly, statutes presuming a mother's husband to be the father of that woman's children even if the children were conceived sexually outside the marriage, fall in the same category.

Thus, there are two paradigms for determining a child's parentage *ab initio*.[227] One predicates parentage on reproductive facts. The other predicates parentage on presumptions about some social aspect of familial relationships. The sort of parentage *ab initio* constructed in *Johnson* and expanded in *Buzzanca* is presumptive, not biological parentage.

Recognition of the difference between presumptive and biological parentage—each referred to in *Johnson* and *Buzzanca* as "natural" parentage[228]—does not necessarily determine legal responses to cases occasioned by reproductive technology. It does, however, obviate the apparent need for courts (or legislatures) predicating parentage *ab initio* on social facts (*e.g.*, intentions) to re-define those social facts *as if* they were facts of nature. Expressly recognizing presumptive parenthood *ab initio* as a distinct category of legal parentage clarifies the frame within which courts and legislatures can consider and resolve a series of basic questions about intentional parentage that have been raised, but not yet explicitly addressed. Central among these are questions about identifying intentions or selecting among conflicting or shifting intentions. Once it is clear that parentage predicated on intentions differs (if only on the ground in which it is predicated) from parentage grounded on assumptions about biological aspects of the reproductive process, it becomes easier to consider whether intentional parentage must not ultimately be understood as a form of contractual parentage.[229] If, as seems likely, that is the case, lawmakers must decide

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227. The phrase "*ab initio*" was used in a brief presented by the Association of Certified Family Law Specialists to the California appellate court in *Buzzanca*. *See* Opening Brief in Support of Jaycee B., *supra* note 175, at 32.

228. *See Johnson*, 851 P.2d at 782.

229. *See* Coleman, *supra* note 80, at 529 (decrying judicial resolution of parentage disputes in cases occasioned by reproductive technology on basis of "superficial inquiry into 'intent'"); Dolgin, *supra* note 80, at 1294-95 (describing implications of reluctance of California supreme court in *Johnson* to recognize intentional parentage as form of contractual parentage).

whether or not parentage contracts will be subject to the same rules applied to contracts more generally.

Judicial reluctance to ground parentage on contractual relations and further blur the line between the world of family and the world of work may account for the law's failure to explain more precisely how parental intentions are determined. Yet, if an intent-standard survives as a device for determining parentage in cases involving reproductive technology, it will inevitably be necessary to acknowledge that the concept of intention involves both contract and choice. Indeed, in other responses to the dilemmas spawned by reproductive technology, the law appears increasingly willing to define familial relations contractually.

IV. "[T]O HONOR THE PARTIES' EXPRESSIONS OF CHOICE": *KASS V. KASS*[230]

The commitment to contract is clearest in cases occasioned by disputes about cryopreserved embryos or gametes. *Kass*, decided in 1998 by the Court of Appeals of New York, is one such case. In *Kass*, the court relied on contractual agreements to resolve a dispute that arose in the context of divorce proceedings between Steven and Maureen Kass. The dispute involved five embryos, produced from Maureen Kass's ova and Steven Kass's sperm, and cryopreserved at an infertility clinic on Long Island.[231] Rights to these embryos remained the only unresolved issue in the couple's divorce proceedings.

The *Kass* decision, much like that of the Tennessee Supreme Court in a similar case six years earlier,[232] suggests the readiness of the law to view at least some cases involving reproductive technology outside a familial context, and to apply contract principles in resolving such cases.

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230. Kass v. Kass, 696 N.E.2d 174, 180 (N.Y. 1998), *aff'g* 663 N.Y.S.2d 581 (App. Div. 1997), *rev'g* 1995 WL 110368 (N.Y. Sup. Ct. 1995).

231. The reproductive technology involved in cases such as *Kass* is so new that terminology remains unsettled. The trial court referred variously to the Kass's cryopreserved "embryos" as "zygotes" and as "pre-embryos;" the appellate division and Court of Appeals of New York used the term "pre-zygote," reflecting the term used in the consent agreements on the basis of which the case was ultimately decided. The appellate division also used the term "fertilized human ova," and the court of appeals also used the term "pre-embryos" as an alternative term. *See Kass*, 696 N.E.2d at 175; 663 N.Y.S.2d at 583; 1995 WL 110368, at *1. In Davis v. Davis, 842 S.W.2d 588, 593 (Tenn. 1992), the Tennessee Supreme Court used the term "preembryos." That court commented that a French geneticist, Dr. Jerome Lejeune referred to the "four- to eight-cell entities at issue . . . as 'early human beings,' as 'tiny persons,' and as his 'kin,'" but that Dr. Ray King, who performed the Davis IVF procedures, testified that the "currently accepted term for the zygote immediately after division is 'preembryo' and that this term applies up until fourteen days after fertilization." *Id.*

232. *See Davis*, 842 S.W.2d 588 (Tenn. 1992), *cert. denied sub nom.* Stowe v. Davis, 507 U.S. 911; *see also infra* notes 279-312 and accompanying text.

A. The Kass Decision

Maureen and Steven Kass married in 1988.[233] In 1989, concerned about Maureen's exposure in utero to diethylstilbestrol (DES), the couple sought medical assistance to help them conceive a child.[234] Between 1990 and 1993, the Kasses attempted *in vitro* fertilization (IVF) ten times at the infertility clinic of the John T. Mather Hospital on Long Island.[235] The cost was more than $75,000.[236] All ten attempts were unsuccessful.[237] The clinic successfully fertilized nine ova during the last IVF procedure in May 1993.[238] Doctors implanted four of the fertilized ova in the uterus of Maureen's sister, Eileen, who had agreed to serve as a gestational surrogate.[239] Doctors cryopreserved the remaining five embryos. Maureen's sister did not become pregnant.[240] In July, just two months after the IVF procedure and cryopreservation, Maureen Kass instituted a divorce action[241] and asked for "sole custody" of the frozen embryos.[242] Steven Kass, in contrast, wanted to donate the embryos to the infertility clinic storing them.[243] Steven argued that informed consent agreements between himself and Maureen created before the May IVF controlled.[244] Thus, those agreements protected Steven's right to avoid procreation through use of the frozen embryos, should he so desire.[245]

The agreements in question, executed on May 12, 1993, consisted of four consent forms provided by the infertility clinic and signed by the Kasses.[246]

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233. *See Kass*, 696 N.E.2d at 175.

234. *See id.*

235. *See Kass*, 663 N.Y.S.2d at 583

236. *See id.*

237. *See id.* Maureen became pregnant twice. One pregnancy in 1991 ended in a miscarriage. A few months later, Maureen became pregnant again, but the pregnancy was ectopic and had to be terminated. *See Kass*, 696 N.E.2d at 176.

238. *See Kass*, 663 N.Y.S.2d at 584.

239. *See id.*

240. After this first attempt, Maureen Kass's sister informed the couple that she no longer wanted to serve as a gestational surrogate. *See Kass*, 696 N.E.2d at 177.

241. *See Kass*, 1995 WL 110368, at *1.

242. Brief *Amicus Curiae* of the New York Civil Liberties Union, at 2, Kass v. Kass, 696 N.E.2d 174 (N.Y. 1998) (No. 95-02615). Actually, Maureen did not at first seek "custody" of the embryos. In June 1993, she and Steven prepared and signed "uncontested divorce" papers providing that the five cryopreserved embryos should be "disposed of [in] the manner outlined in our consent form and that neither Maureen Kass[,] Steven Kass or anyone else will lay claim to custody of these pre-zygotes." *Kass*, 696 N.E.2d at 177 (quotations omitted). In July, Maureen commenced the matrimonial action. At that time she asked for "sole custody" of the five cryopreserved embryos. *See id.*

243. *See Kass*, 696 N.E.2d at 177.

244. Brief for Defendant-Respondent at 7-9, *Kass* (No. 95-02615); *see generally* Reply Brief for Defendant-Appellant at 2, *Kass* (No. 95-02615) (arguing consent agreements controlled and that agreements protected Steven Kass' right to avoid procreation).

245. *See id.*

246. *See Kass*, 696 N.E.2d at 176.

The first two forms—"General Informed Consent Form No. 1: In Vitro Fertilization and Embryo Transfer," and "Addendum No. 1-1"—were connected as part of one document.[247] This document explained the procedure and its risks, and indicated that the parties would be required to make decisions regarding the disposition of their embryos.[248] The second two forms, also connected as part of one document, consisted of "Informed Consent Form No. 2: Cryopreservation of Human Prezygotes" and "Addendum No. 2-1: Cryopreservation—Statement of Disposition."[249] Language in Informed Consent Form No. 2 and its Addendum were critical to the New York courts that rendered decisions in the case. Informed Consent Form No. 2 provided:

> In the event of divorce, we understand that legal ownership of any stored pre-zygotes must be determined in a property settlement and will be released as directed by order of a court of competent jurisdiction. Should we for any reason no longer wish to attempt to initiate a pregnancy, we understand that we may determine the disposition of our frozen pre-zygotes remaining in storage.[250]

The form further provided:

> The possibility of our death *or any other unforeseen circumstances* that may result in neither of us being able to determine the disposition of any stored frozen pre-zygotes requires that we now indicate our wishes.[251]

Through this form, the couple further agreed that decisions regarding the disposition of their cryopreserved embryos would be indicated on an addendum. Addendum No. 2-1 states:

> In the event that we no longer wish to initiate a pregnancy or are unable to make a decision regarding the disposition of our stored, frozen pre-zygotes, we now indicate our desire for the disposition of our pre-zygotes and direct the IVF program to (choose one): . . . .

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247. *See id.*

248. *See id.*

249. *See id.*

250. *Id.* at 176.

251. *Id.* (emphasis added). The appellate division and the state's highest court relied on the emphasized language to interpret the consent agreements as determinative in the *Kass* case. *See infra* notes 262-71 and accompanying text.

> (b) Our frozen pre-zygotes may be examined by the IVF Program for biological studies and be disposed of by the IVF Program for approved research investigation as determined by the IVF Program . . . .[252]

The Kasses were divorced in May 1994. Both parties agreed to a resolution on the record of the dispute about their cryopreserved embryos.[253] Thus, no trial occurred.

The court held for Maureen, giving her the right "to take possession to the five zygotes presently in the possession of the John T. Mather Hospital In Vitro Fertilization Program for purposes of attempting conception."[254] Justice Roncallo's decision for the trial court depended on his equating *in vitro* with *in vivo* fertilization and then invoking a woman's constitutional right to abort,[255] or not to abort, a pregnancy.[256]

The trial court's conclusions were also premised on a particular understanding of the ontological status of the embryos. The court explained: "The rights of the parties are dependent upon the nature of the zygote not the stage of its development or its location."[257] The court explained further, "[i]f the wife is awarded possession the preembryos will be afforded an opportunity

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252. *Kass*, 696 N.E.2d at 176-77 (quotations omitted). In addition to option "b" (to donate the embryos to the infertility clinic for "approved research") selected by the Kasses, the form provided two other options. The first provided for donation "to another infertile couple as determined by the IVF Program." The second alternative provided for the embryos to be "thawed, fixed and disposed of by the IVF Program." Record on Appeal, Exhibit 2 to Kass Affidavit and Stempel Affirmation—Informed Consent Form No. 2, at 523-24, *Kass* (No. 95-02615).

253. Record on Appeal, at 473, *Kass* (No. 95-02615) (letter from Vincent Stempel (attorney for Steven Kass) to Honorable Angelo Roncallo, Supreme Court of the State of New York, Jan. 9, 1995 agreeing to determination by trial court upon submissions and noting agreement of Linda Armatti, Esq. (attorney for Maureen Kass)).

254. *Kass*, 1995 WL 110368, at *5.

255. *See* Roe v. Wade, 410 U.S. 113 (1973) (granting women limited right to abortion).

256. The court asserted: "Just as an *in vivo* husband's 'right to avoid procreation' is waived and ceases to exist after intercourse in a coital reproduction, such right should be deemed waived and non-existent after his participation in an *in vitro* program." *Kass*, 1995 WL 110368, at *2. Justice Roncallo supported this assertion through reference to the procreative rights guaranteed to pregnant women under *Roe v. Wade*, 410 U.S. 113 (1973) (granting limited constitutional right to abortion), and *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 71 (1976) (granting woman constitutional right to abort despite husband's opposition "[i]nasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy . . . ."). Both of those cases, however, concerned the rights of *pregnant* women. All of the higher court judges who reviewed the case agreed that the dispute between the two could not be resolved by treating Maureen *as if* she were pregnant. Justice Miller asserted, "[i]t is noteworthy that my colleagues and I are in unanimous agreement . . . that the Supreme Court erred in equating a woman's procreational right to attain pregnancy via *in vitro* fertilization with her right to bodily autonomy attendant to an *in vivo* pregnancy." *Kass*, 663 N.Y.S.2d at 594 (Miller, J., dissenting). *See also Kass*, 696 N.E.2d at 177.

257. *Kass*, 1995 WL 110368, at *3.

to realize their potential; if the husband is successful such potential will be extinguished as part of a scientific inquiry."[258]

Despite the court's concern with the embryos' status and essence—representing "the ultimate in nascency and potentiality"[259]—Justice Roncallo declared that he would have honored an unambiguous contractual agreement indicating the parties' wishes regarding disposition of the embryos in the event of divorce.[260] Justice Roncallo concluded that the existing agreements did not do that.[261]

On appeal, a plurality of the appellate division disagreed, and found the consent agreements determinative.[262] Finally, the state's highest court, affirmed the appellate division's decision and resolved the dispute between the Kasses by reference to their consent agreements.[263] The court declared,

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258. *Id.* at *2.

259. *Id.*

260. *See id.* at *4.

261. In addition, Justice Roncallo determined that the "uncontested divorce" agreement into which the parties entered in June 1993, but which never became operative, did not constitute a waiver of Maureen Kass's "right to determine the future of the subject zygotes." *Id.* at *5.

In fact, the two higher courts that rendered decisions in *Kass* each recognized a potential ambiguity in the consent forms. Informed Consent Form No. 2 provided that in the event of divorce "legal ownership of any pre-stored pre-zygotes must be determined in a property settlement and will be released as directed by an order of a Court of competent jurisdiction." *Id.* at *4. The trial court interpreted that language to grant the divorce court the right to decide as between the wishes of the divorcing parties concerning the frozen embryos. The higher courts disagreed and found that the consent forms disposed of the issue presented in the case. *See infra* note 262 and accompanying text.

262. *See Kass*, 663 N.Y.S.2d at 583. Justice Sullivan, writing for the court's plurality, interpreted the phrase "unforeseen circumstances" for which the parties provided in the Addendum No. 2-1 ("Cryopreservation—Statement of Disposition") to Informed Consent Form No. 2, to include the divorce proceedings in which they were in fact involved. *Id.* at 588. Justice Sullivan further concluded that the provision in the consent agreements that did expressly mention divorce was not dispositional, but was instead intended to confer jurisdiction on the court, and, thereby, to protect the infertility clinic from liability, should a dispute between the parties arise in the context of divorce. *See id.* at 589. Justice Friedmann, who concurred, did not find the contractual language adequately decisive to justify relying on it. Justice Friedmann's concurrence followed from his conclusion, that in the absence of unambiguous contractual agreements, in cases such as *Kass*, "the objecting party, except in the most exceptional circumstance, should be able to veto a former spouse's proposed implantation." *Id.* at 592. Justice Friedmann's position was in harmony with that suggested by the New York State Task Force on Life and Law. That body concluded in a 1998 report that "when two people have joint decision-making authority over a frozen embryo, one person's objection to transferring the embryo for implantation, destroying it, or using it for research should take precedence over the other person's consent." THE NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, ASSISTED REPRODUCTIVE TECHNOLOGIES: ANALYSIS AND RECOMMENDATIONS FOR PUBLIC POLICY 317 (1998).

Justice Miller, who dissented in the appellate division, agreed with Justice Friedmann that the consent agreements were not clear enough to direct resolution of the parties' dispute. She did not, however, agree that a party objecting to use of the embryos for reproduction should be favored. Rather, she would have remitted the case for a full hearing. Specifically, she would have asked the trial court to consider "the competing fundamental, personal rights of both parties" and to balance those rights "utilizing a fact-sensitive analysis." *Kass*, 663 N.Y.S.2d at 599 (Miller, J. dissenting).

263. *See Kass*, 696 N.E.2d at 182.

"[a]greements between progenitors . . . should generally be presumed valid and binding, and enforced in any dispute between them."[264] Specifically, the court concluded, in line with the decision of the appellate division, that the consent agreements were not in fact marred by ambiguity.[265]

The court considered the problematic sentence in Informed Consent Form No. 2, which provided that "[i]n the event of divorce, we understand that legal ownership of any stored pre-zygotes must be determined in a property settlement and will be released as directed by order of a court of competent jurisdiction."[266] Judge Kaye declared that the court could not interpret that sentence as providing that a court should determine legal ownership of the embryos.[267] The court concluded that the construction, which Maureen Kass had suggested, "ignores the direction that ownership of the pre-zygotes 'must be determined in a property settlement'—words that also must be given meaning, words that connote the parties' anticipated agreement as to disposition."[268] Furthermore, Judge Kaye explained that Addendum No. 2-1, which the Kasses had signed, "was not strictly limited to instances of 'death or other unforseen circumstances.'"[269] In short, the court concluded:

> As they embarked on the IVF program, appellant and respondent—'husband' and 'wife,' signing as such—clearly contemplated the fulfillment of a life dream of having a child during their marriage. The consents they signed provided for other contingencies, most especially that in the present circumstances the pre-zygotes would be donated to the IVF program for approved research purposes.[270]

As a result of its straightforward reliance on the consent agreements into which the Kasses had entered, the court almost completely avoided addressing the issues of greatest moment to the trial court—the significance of a constitutional right to determine procreative behavior as well as questions relating to the ontological status of the embryos.[271]

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264. *Id.* at 180.
265. *See id.* at 182.
266. *Id.* at 176.
267. *See id.* at 182.
268. *Id.* at 181
269. *Id.* at 182 (quoting parties' consent agreement, Addendum No. 2-1).
270. *Id.*
271. *Kass*, 1995 WL 110368, at *2-3.

B. The Implications of Kass

Unquestionably, one of the most important aspects of *Kass* was the willingness of all thirteen New York judges who participated in the case[272] to recognize and enforce contractual agreements delineating the parties' wishes for cryopreserved embryos. Justice Miller, who dissented from the plurality decision of the appellate division, suggested that the case be remitted for analysis of the parties' procreational rights.[273] He proposed implementation of a legislative *mandate* requiring parties undergoing IVF and contemplating the cryopreservation of embryos to enter into contractual agreements delineating their intentions.[274] Even Justice Roncallo—whose opinion for the trial court relied on the constitutionally protected procreational rights of a pregnant woman, and the particular status attributed to the embryos[275]—would permit progenitors to waive their constitutional rights, apparently as well as any rights (moral or legal) implied by the "nascency and potentiality" of the embryos, by indicating their own intentions in contractual form.[276]

In short, even those judges most anxious to stress the familial setting of the dispute between the Kasses were ready to acknowledge and enforce the provisions of an unambiguous contract.[277] This consensus is especially remarkable given the wide differences in the courts' (and individual judges')[278] conclusions about how best to resolve disputes over cryopreserved embryos in the absence of contractual agreements.

In this regard, the attention that each court gave to the 1992 decision of the Tennessee Supreme Court in *Davis v. Davis* is significant. Indeed, many of the implications of *Kass* emerge clearly through consideration of *Davis*.[279]

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272. Justice Roncallo wrote a decision for the trial court. *Kass*, 1995 WL 110368. Justice Sullivan wrote the plurality opinion of the appellate division in which Justice Copertino concurred. *See Kass*, 663 N.Y.S.2d 581. Justice Friedmann wrote a separate concurrence. *See id.* at 591. Justice Miller, joined by Justice Altman, dissented. *See id.* at 594, 602. Judge Kaye wrote the opinion of the Court of Appeals of New York and Judges Bellacosa, Ciparick, Levine, Smith, Titone, and Wesley concurred. *Kass*, 696 N.E.2d at 175, 182.

273. *See Kass*, 663 N.Y.S.2d at 594. (Miller, J., dissenting).

274. *See id.*

275. *See supra* notes 254-61 and accompanying text.

276. *Kass*, 1995 WL 110368, at *4. In this regard, Justice Roncallo's decision differed significantly from the Tennessee trial court in *Davis v. Davis*. There, the court viewed the embryos as "human beings." Davis v. Davis, No. E-14496, 1989 Tenn. App. LEXIS 641, at *2 (Blount County Cir. Ct. Sept. 21, 1989). Accordingly, the court based its decision on a determination of the embryos' "best interests." *Id.*

277. Justice Roncallo for the trial court as well as Justice Friedmann, concurring, and Justices Miller and Altman, dissenting from the appellate division's plurality decision, all found the contract too uncertain to be relied upon in resolving the dispute. *See supra* notes 261-62 and accompanying text.

278. *See supra* note 262.

279. *See Davis*, 842 S.W.2d 588. At present, only two state high courts—Tennessee and New York—have rendered decisions in cases involving disputes about cryopreserved embryos between progenitors. *See id.*; *see also Kass*, 696 N.E.2d 174. A few such cases have been considered by lower state

Davis arose as part of divorce proceedings between Junior and Mary Sue Davis.[280] The Davises, much like the Kasses after them, agreed on all aspects of their divorce except for the fate of seven cryopreserved embryos.[281] The embryos, produced from Mary Sue's eggs and Junior's sperm, were cryopreserved in 1988 in a Knoxville infertility clinic where the Davises had been treated.[282]

The Tennessee Supreme Court expressly considered the status of the Davises' embryos.[283] Rejecting both the trial court's conclusion that the embryos were "persons," and the suggestion of the intermediate appellate court that they were "property," the supreme court defined them as worthy of "special respect" due to their "potential for human life."[284] But then, having established the need for deference to the embryos' potentiality, the court ordered them discarded.[285] The court never referred to or commented on the transparent inconsistency between its definition of the embryos and its holding in the case.[286]

After defining the embryos' status, the court turned to the immediate dispute.[287] The Davis agreement, unlike the Kass agreement, did not direct the disposition of the embryos should the couple choose not to use them in the

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progenitors. *See id.*; *see also Kass*, 696 N.E.2d 174. A few such cases have been considered by lower state courts. In June, 1998, a Michigan trial court decided that five frozen embryos, claimed by each of their divorcing progenitors, were not children and that the father had the right not to have the embryos gestated. *See* Karl Leif Bates, *Dad Wins Embryo Court Fight*, DETROIT NEWS, June 25, 1998, at C1. Judge Kaye's decision in *Kass* notes an ongoing New Jersey case involving a dispute between the divorcing progenitors of cyropreserved embryos. The husband desired to have the embryos available "for implantation in a future spouse." The divorcing wife objected. *Kass*, 696 N.E.2d at 179 n.3 (citing Michael Booth, *Fate of Frozen Embryos Brings N.J. Again to Bioethics Fore: With No Precedent, Court to Decide on Request to Destroy Fertilized Ova*, N.J.L.J., Mar. 9, 1998, at 1). *See also* Evelyn Apgar, *Frozen Embryos: New Custody Battlefield*, N.J. LAW., Apr. 27, 1998, at 5 (describing cases pending before New Jersey Court regarding parental rights and embryos).

280. *See Davis*, 842 S.W.2d at 589.

281. *See id.*

282. *See id.* at 592.

283. *See id.* at 594.

284. *Id.* at 597.

285. *See* notes 294-97 *infra* (noting Junior Davis's disposal of embryos).

286. The court did note that under *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989) and even under *Roe v. Wade*, 410 U.S. 113 (1973), a "state's interest in potential human life may justify statutes or regulations that have an impact upon a person's exercise of procreational autonomy." But the court concluded that there was no such relevant state's interest because state law provided no ground for "infringing on gamete-providers' decisional authority over the preembryos to which they have contributed." *Davis*, 842 S.W.2d at 602.

The *Davis* court's delineation of the status of the embryos seems to have had no practical consequence. Perhaps the court would not have considered the status issue at all had the case not inevitably implicated the abortion debate. That debate has involved extensive, and generally inconclusive commentary on the biology of embryonic development. *See* DOLGIN, *supra* note 20, at 163-73 (considering definition of embryos' status in *Davis* in light of holding in case).

287. *See Davis*, 842 S.W.2d at 603.

effort to produce a pregnancy.[288] Yet the *Davis* court concluded that, had such an agreement existed, it would have been dispositive.[289] The court asserted:

> We believe, as a starting point, that an agreement regarding disposition of any untransferred preembryos in the event of contingencies (such as the death of one or more of the parties, divorce, financial reversals, or abandonment of the program) should be presumed valid and should be enforced as between the progenitors. This conclusion is in keeping with the proposition that the progenitors, having provided the gametic material giving rise to the preembryos, retain decision-making authority as to their disposition.[290]

In a subtle twist, the "special respect" owed the embryos has been transferred to the gamete progenitors.[291]

The court immediately proceeded to examine the "right to privacy" enjoyed by the progenitors under the federal and state constitutions.[292] No state interest existed that would justify infringing on the "freedom of these individuals to make their own decisions" about the cryopreserved embryos at issue in the case.[293] The court therefore examined the parties' respective interests,[294] balancing Junior Davis's interest in avoiding procreation against Mary Sue's interest in donating the embryos to an infertile couple.[295] As a result, the court held in Junior's favor.[296] In June 1993, the embryos were

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288. *See id.* at 590.
289. *See id.* at 597.
290. *Id.*
291. *Id.*
292. *Id.* at 598-99.
293. *Id.* at 602.
294. *Id.* at 603.
295. When the litigation began, Mary Sue wanted to have the embryos implanted in her own uterus. During the course of the litigation, she remarried, moved out-of-state, and decided that she no longer desired to become pregnant with the embryos produced from her own and her former husband's gametes. *See* Brief for Appellee at 13, Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992); Initial Brief for Appellant at 8, *Davis*, 842 S.W.2d 588 [hereinafter Davis Appellant Brief]. At first, Junior requested that the embryos be stored indefinitely. *See Davis*, 842 S.W.2d at 589. At the time, indefinite storage was understood as "tantamount to the destruction of the embryos." *Davis*, 1989 Tenn. App. LEXIS 641, at *36. Dr. Charles A. Shivers, an embryologist who testified at the *Davis* trial, stated that despite success freezing mice embryos over longer periods, human embryos had not been frozen for more than two years and then successfully thawed. *See id.* at *70 (summarizing testimony of witnesses). Later, Junior Davis asked that the embryos be discarded. Davis Appellant Brief, *supra*, at 8.
296. The *Davis* court explained:

> Ordinarily, the party wishing to avoid procreation should prevail, assuming that the other party has a reasonable possibility of achieving parenthood by means other than the use of the preembryos in question. If no other reasonable alternatives exist, then . . . argument[s] in favor of using the preembryos to achieve pregnancy should

transmitted from the infertility clinic in Knoxville to Junior Davis who announced that he had had the embryos destroyed.[297]

Finally, the *Davis* court, having balanced the parties' interests only because the parties had not reached agreement about disposition of the embryos, delineated a general framework within which to resolve cases involving disputes between the progenitors of cryopreserved embryos:

> In summary, we hold that disputes involving the disposition of preembryos produced by *in vitro* fertilization should be resolved, first, by looking to the preferences of the progenitors. If their wishes cannot be ascertained, or if there is dispute, then their prior agreement concerning disposition should be carried out. If no prior agreement exists, then the relative interests of the parties in using or not using the preembryos must be weighed.[298]

This framework, the first constructed by a state's highest court concerning a dispute related to the disposition of cryopreserved embryos, has been widely and approvingly cited by commentators and courts addressing disputes involving reproductive technology and other reproductive matters.[299] Moreover, *Davis* provided the framework within which New York's appellate courts approached *Kass*, and it was cited approvingly by the trial court in *Kass*, despite that court's different approach to the *Kass* dispute.[300]

Among judges, there is broad, though not unanimous, acceptance of a contractual approach in cases involving disputes about cryopreserved

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> be considered. However, if the party seeking control of the preembryos intends merely to donate them to another couple, the objecting party obviously has the greater interest and should prevail.

Davis, 842 S.W.2d at 604.

297. *See* Mark Curriden, *Embryo Fight Yields Few Answers: Disposal Disclosed: Embryos Are Discarded in a Tennessee Case, but Legal and Ethical Questions Remain*, ATLANTA J. & CONST., June 14, 1993, at A1.

298. *Davis*, 842 S.W.2d at 604.

299. *See, e.g.*, Valley Hosp. Ass'n, Inc. v. Mat-Su Coalition, 948 P.2d 963, 967 (Alaska 1997) (holding Article 1, Section 22 of Alaska Constitution to include reproductive rights); Belsito v. Clark, 644 N.E.2d 760, 760 (Ohio C.P. 1994) (noting importance of choice in use of reproductive technology); Hecht v. Superior Court, 20 Cal. Rptr. 2d 275, 281 (Ct. App. 1993) (upholding rights of progenitors to cryopreserved gametes and embryos); MMMA v. Jonely, 677 So. 2d 343, 345 (Fla. Dist. Ct. App. 1996) (defining parental rights as part of right to privacy in dispute between mother and couple wishing to adopt child).

Law review articles citing *Davis* include: Judith Daar, *Regulating Reproductive Technologies: Panacea or Paper Tiger?*, 34 HOUS. L. REV. 609, 622 (1997); Meena Lal, Comment, *The Role of the Federal Government in Assisted Reproductive Technologies*, Comment, 13 SANTA CLARA COMPUTER & HIGH TECH. L.J. 517, 526-27 (1997); A. Gunsburg, Note, *Frozen Life's Dominion: Extending Reproductive Autonomy Rights to In Vitro Fertilization*, 65 FORDHAM. L. REV. 2205, 2207 (1997); John A. Robertson, *Assisted Reproductive Technology and the Family*, 47 HASTINGS L.J. 911, 917 (1996).

300. *See supra* note 279 and accompanying text.

gametic[301] and embryonic material.[302] Almost all the judges who wrote decisions for the six state courts that considered *Davis* or *Kass* actually relied on, or would have preferred relying on, a contractual approach.[303] Thus, these courts were willing, even if only implicitly, to amalgamate the laws regulating embryo cryopreservation with the laws of the marketplace. Family law, with its traditional concern for protecting holistic social units, is simply absent from the courts' decisions. In its place is an approach that assumes the right of autonomous individuals to negotiate their own realities.

Moreover, in the absence of a contractual agreement, the Tennessee Supreme court in *Davis* relied on an approach—generally categorized as an aspect of family law or family constitutional law—which assumed the disputing progenitors to have been autonomous individuals. Thus, the court took the independent person, rather than the family, as a social whole as the unit of legal analysis. The court delineated the progenitors' reproductive rights (understood as part of the "right to privacy") and balanced the rights of each progenitor against those of the other.[304] For the most part, these rights, as defined in a broad set of United States Supreme Court decisions between the early 1970s and the present, are applicable to autonomous individuals, not to family members taken as a group.[305] So, for instance, in *Eisenstadt v. Baird*, the Supreme Court premised an extension of the right to contraception by unmarried persons on the understanding that the right to privacy "is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the

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301. *See, e.g.*, *Hecht*, 59 Cal. Rptr. 2d at 226.

302. An exception is Judge Young, the trial court judge in *Davis*. Judge Young implicitly rejected a contractual approach by defining the embryos at issue as children and by proceeding to consider those embryos' "best interests." *Davis*, 1989 Tenn. App. LEXIS 641, at *2. However, the assumptions on which that decision was grounded contrast dramatically with the assumptions behind most decisions about related issues. Judge Young relied heavily on the testimony of one expert witness, Dr. Jerome Lejeune, a French geneticist, who testified for Mary Sue Davis at trial. Dr. Lejeune discovered the chromosome responsible for Down's syndrome. *See Professor Jerome Lejeune* (obituary), THE TIMES (London), Apr. 7, 1994, at 21. In 1974 he was appointed by the Pope as a member of the Pontifical Academy of Sciences. *See id.* Before testifying in *Davis*, he had worked to make abortions illegal. *See id.*

Dr. Lejeune testified that cryopreserved embryos are human beings and then concluded: "[L]ove is the contrary [sic] of chilly. Love is warmth . . . . [T]he best we can do for early human beings is to have them in their normal shelter, not in the fridge." Transcript of Proceedings, Davis v. Davis, No. E-14496 (Tenn. Circ. Ct. Aug. 10, 1989), Vol. III, at 51.

Justice Roncallo, who shared Judge Young's broad approach, expressly premised his decision on Maureen Kass's procreational autonomy and did not find that the preembryos were human. Accordingly, he declared that he would have decided the case differently had he been convinced that Maureen Kass had waived her rights through a pre-IVF consent form or in another legal document. *Kass*, 1995 WL 110368, at *2, *5 (reviewing consent forms and "uncontested divorce" agreement). *See supra* note 261.

303. *See supra* note 302 (noting position of Judge Young for the trial court in *Davis*).

304. *See supra* notes 292-95

305. See DOLGIN, *supra* note 20, at 57-59.

decision whether to bear or beget a child."[306] This understanding, though familiar in a world of contract and commerce, was revolutionary when applied to the family in the early 1970s. Despite broad acceptance for the new understanding of family outlined in *Eisenstadt* in the intervening decades, society and the law remain ambivalent about expressly abandoning traditional understandings of family.[307] That ambivalence has emerged, among other places, in a continuing tendency to disguise the individualism that undergirds the law of reproductive rights.

A subtle instance of that tendency appears in Judge Kaye's consideration in *Kass* of the approach to reproductive rights outlined in *Davis*.[308] The instance is especially noteworthy in that Judge Kaye, herself, defined the rights involved in *Kass* in straightforward contractual terms.[309] Judge Kaye described the *Davis* approach:

> Having declared that embryos are entitled to 'special respect because of their potential for human life[,]' *Davis* recognized the procreative autonomy of both gamete providers, which includes an interest in avoiding genetic parenthood as well as an interest in becoming a genetic parent.[310]

The implied connection between the *Davis* court's characterization of the embryos' status and that court's focus on the progenitors' procreative rights suggests lingering hesitation about abandoning a family law approach in such cases. Family law, not contract law, is motivated by a concern for status and relationship. In fact, as the specific holding in *Davis* shows, the implication of a causal connection between the embryos' status and the progenitors' reproductive rights is illusory. The court in *Kass* was content to rely on the consent agreements into which the Kasses had entered, and expressly dismissed any need to consider the status of the embryos.[311] Thus, both broad approaches suggested by *Davis* (depending on contract law) and approved in

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306. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972).

307. *See* DOLGIN, *supra* note 20, at 39-57 (analyzing ideological differences between the Supreme Court's decision in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and in *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

308. *See Kass*, 696 N.E.2d at 178.

309. *See id.*

310. *Id.* (citing *Davis*, 842 S.W.2d at 597) (internal citations omitted).

311. *See id.* at 179. The Court of Appeals of New York proclaimed:

> The relevant inquiry thus becomes who has dispositional authority over [the pre-zygotes]. Because that question is answered in this case by the parties' agreement, for purposes of resolving the present appeal we have no cause to decide whether the pre-zygotes are entitled to "special respect."

Id.

Kass (depending on privacy law) assume that the rights belong to autonomous individuals, not to family members as participants in larger kin groupings.

In sum, the emphasis in *Davis* on the litigants as autonomous individuals is even more apparent and certain in *Kass*. *Davis*, by invoking the embryos' ontological status and in relying on the parties' procreative rights, at least suggests a familial context. *Kass* relies more transparently on a contract approach. The court recognized, interpreted, and then simply enforced the contractual agreements into which the parties had entered. These cases suggest a judiciary ready, even anxious, to rely on principles of contract law, rather than of family law, in resolving disputes about the disposition of cryopreserved embryos and gametes.[312]

V. FROM "MOTHER" TO PARENTAL INTENTIONS TO CONTRACT

Within two decades, courts have reached a flexible consensus about resolving disputes occasioned by reproductive technology. The consensus reflects a culture struggling to both preserve traditional understandings of family and to respect the right of autonomous individuals to make their own choices and to design their own lives. *In re Marriage of Buzzanca*,[313] *R.R. v. M.H.*[314] and *Kass v. Kass*,[315] as well as earlier cases on which these decisions relied either explicitly or implicitly[316] indicate the scope and character of this evolving consensus.

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312. This tendency is not limited to cases involving divorcing progenitors, where, it might be argued, the only family involved is disintegrating and thus need not be considered. For example, in *York v. Jones*, 717 F. Supp. 421, 425-26 (E.D. Va. 1989), a federal district court in Virginia defined the relationship between a married couple, progenitors of cryopreserved embryos, and the medical facility where their embryos were stored as that of bailor-bailee. In ordering the Virginia medical facility to comply with the progenitors' wishes and transfer the embryos to another fertility clinic, the court relied on terms of the Cryopreservation Agreement between the couple and the facility. *See also* Del Zio v. Columbia Presbyterian Hosp., No. 74 Civ. 3588, 1978 U.S. Dist. LEXIS 14450 (S.D.N.Y. Nov. 14, 1978) (awarding female IVF patient damages for destruction of her eggs).

313. *See In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (Ct. App. 1998).

314. R.R. v. M.H., 689 N.E.2d 790 (Mass. 1998).

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

316. Other decisions involving gestational surrogacy include *Belsito v. Clark*, 644 N.E.2d. 760 (Ohio C.P. 1994) (declaring genetic parents the legal and natural parents of child born to gestational surrogate; surrogate was sister of genetic mother; no dispute existed among parties); *Soos v. Superior Court*, 897 P.2d 1356 (Ariz. Ct. App. 1994) (holding unconstitutional Arizona surrogacy statute that conclusively presumed gestational surrogate legal mother of child); *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993) (denominating genetic, intentional parents as legal, natural parents).

Cases involving "traditional" surrogacy include *In re Baby M*, 537 A.2d 1227 (N.J. 1988) (invalidating surrogacy contract; giving custody to biological father and visitation to surrogate, biological mother); *Surrogate Parenting Assocs., Inc. v. Kentucky ex rel. Armstrong*, 704 S.W.2d 209 (Ky. 1986) (holding surrogate parenting contract voidable but not void; distinguishing between surrogacy and buying and selling children); *In re Adoption of Baby Girl L.J.*, 505 N.Y.S.2d 813 (N.Y. Surr. Ct. 1986) (holding surrogacy contracts voidable if terms violated state adoption laws); *Doe v. Kelley*, 307 N.W.2d 438 (Mich. Ct. App. 1981) (holding constitutional right to bear child included right to enter surrogacy agreement for

A. A Legal Framework

R.R., *Buzzanca*, and *Kass* represent a continuum of responses. In *R.R.*, the Massachusetts court refused to enforce a contract to determine a child's custody or parentage entered into by the biological, surrogate mother and the biological (intending) father.[317] Moreover, the court expressly rejected reliance on statutes promulgated to regulate artificial insemination (called "surrogate fatherhood" by the court).[318] The court justified that decision on the basis of perceived differences between "surrogate fatherhood" and "surrogate motherhood."[319] Therein the court concluded that although fatherhood can be automatically transferred from one man to another through the medium of consent, motherhood belongs to a child's biological mother—her agreements and apparent intentions notwithstanding.[320]

The law already provides for the transfer of parenthood for both mothers and fathers to other men or women through adoption statutes.[321] But under adoption statutes the transfer of parentage is a function of state action, and cannot be effected through parental intention and agreement alone.[322] The Massachusetts court in *R.R.* refrained from prohibiting surrogacy altogether, but instead premised the transfer of parentage from the surrogate mother to the intending parent or parents on compliance with state adoption law.[323] So, for instance, consent given before the fourth day after the birth carries no legal consequence.[324] Further, payment to a surrogate is illegal, beyond that given to cover pregnancy-related expenses.[325] In short, so-called "traditional" surrogacy will be tolerated, but only insofar as it complies with the rules delineated in state adoption law. Surrogacy arrangements become, in effect, adoptions arranged before conception, but without any guarantees until the parties have complied with the provisions of relevant adoption laws.

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money in state with adoption laws forbidding payment of money for child). Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992), is the only other decision about cryopreserved embryos by a state's highest court.

317. *See R.R.*, 689 N.E.2d at 797. The decision was moot since the biological parents had settled the dispute between them and that settlement received judicial approval. *See supra* notes 202-08 and accompanying text.

318. *R.R.*, 689 N.E.2d at 795; *see also supra* notes 209-12 and accompanying text.

319. *R.R.*, 689 N.E.2d at 795.

320. *See id.*

321. Every state has a statute providing for adoption. These statutes require termination (either voluntary or involuntary) of the rights of the original parent or parents before an adoption can occur. In most states, the establishment of the new parent-child relationship requires a judicial proceeding. LESLIE J. HARRIS ET AL., FAMILY LAW 1165 (1996).

322. *See id.*

323. *See R.R.*, 689 N.E.2d at 796.

324. *See id.*

325. *See id.*

In contrast, the California court in *Buzzanca* provided for creation of parentage, without reference to state adoption laws, in a mother and a father, neither of whom was linked biologically to the child involved.[326] The Buzzancas' parentage was premised on their intent to conceive, carry, and bear the child in question.[327] Especially in comparison with *R.R.*, the decision is useful in delineating and considering the truths on which society grounds parentage, in that the intending mother in *Buzzanca* expressly refused to initiate adoption proceedings.[328] Had she done so, she would almost certainly have become baby Jaycee's legal mother, since neither the gestational, nor the genetic mother was available for and interested in that role. Luanne, the intending mother, rejected adoption and hoped instead to be named the child's "natural" mother under California law.[329] In holding for Luanne, the California court significantly expanded the applicability of intentional parentage as delineated in *Johnson*.[330]

Arguably, the court's reliance on parental intention in *Johnson* depended on each potential mother's cognizable claim to biological maternity. In *Buzzanca*, in contrast, Luanne made no claim to biological motherhood. Thus, several essential differences separate the facts of *Buzzanca* from those of *R.R.* First, the surrogate in *Buzzanca* was connected to the child only through the gestational relationship, and not genetically. Second, *Buzzanca* was a dispute between an intending mother and an intending father, whereas in *R.R.* the surrogate was opposed by the intending parents. Finally, *R.R.* involved too many parents, whereas *Buzzanca* involved too few. Each of these facts appeared to influence the *Buzzanca* court. Whatever its motivations, however, the court clearly extended intentional parentage to include a couple unconnected biologically to the child involved. Thus, the court established a new ground on which to predicate maternity—one that depended neither on biological connections nor on compliance with state adoption laws.[331]

Finally, in *Kass*, New York's highest court depended directly on contractual agreements to resolve the dispute between Steven and Maureen Kass over the disposition of their cryopreserved embryos. After reviewing the

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326. *See generally Buzzanca*, 72 Cal. Rptr. 2d 280.

327. *See id.* at 291.

328. *See id.* at 283.

329. *See id.* The decision was motivated, at least in part, by her desire to have John Buzzanca named the child's father. Only in that way would John become liable for child support payments. Luanne explained: "If [John] doesn't want to be an active father in her life, that's his business and that's, I guess, his privilege . . . . But on the other hand, my daughter was brought into this world by two people who committed to each other and to her that they would take care of her until she was 18." *48 Hours*, *supra* note 135.

330. *See Johnson*, 851 P.2d at 782.

331. State statutes regulating artificial insemination already allowed the creation of paternity in a non-biological father without requiring compliance with laws regulating adoption. *See supra* notes 157-59.

facts, the decisions of the courts below, and approaches to the disposition of cryopreserved embryos proposed by other courts and commentators, the court of appeals turned to the informed consent documents. Finding that those documents "clearly expressed [the Kasses'] intent,"[332] and concluding that such agreements "should generally be presumed valid and binding,"[333] the court affirmed the decision of the appellate division, and ordered that the cryopreserved embryos be made available to the IVF clinic "for approved research investigation."[334]

In sum, courts are interpreting cases involving reproductive technology within a broad, flexible framework. That framework encompasses three discrete approaches. The first, represented by *R.R.*, most fully resembles the approach within which the law responded to and regulated the traditional family. The second, represented by *Buzzanca*, presumes an affinity with the first, but in fact premises parentage on choice. Finally, the third, represented by *Kass*, openly treats disputes concerning reproductive technology as the law generally treats disputes in the marketplace—by interpreting contractual arrangements into which the parties entered.

B. Implications of the Legal Framework: Understandings of Family

The three different approaches used in *R.R.*, *Buzzanca*, and *Kass* to develop the legal framework broadly follow the legal approaches applied to family matters in general. A traditional understanding of family survives, but has been replaced in significant part by a view that treats family members as autonomous individuals, free to design their own relationships, as well as the termination of those relationships. Increasingly, courts recognize and enforce contractual agreements into which family members have entered much as they recognize and enforce agreements among business associates.[335] This is especially true in disputes primarily involving relationships between adult family members.[336] In cases more directly implicating the status and welfare

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332. *Kass*, 696 N.E.2d at 178.

333. *Id.* at 180.

334. *Id.* at 177 (quoting "Informed Consent Form No. 2—Addendum No. 2-1: Cryopreservation—Statement of Disposition," Section 2 (b)).

335. For instance, in the second half of the twentieth century, courts widely began to recognize and enforce ante-nuptial agreements. *See, e.g.*, Wilcox v. Trautz, 693 N.E.2d 141 (Mass. 1998); Osborne v. Osborne, 428 N.E.2d 810 (Mass. 1981); Posner v. Posner, 233 So. 2d 381 (Fla. 1970), as well as cohabitation agreements, *see, e.g.*, Marvin v. Marvin, 557 P.2d 106 (Cal. 1976); Morone v. Morone, 413 N.E.2d 1154 (N.Y. 1980). Similarly, the so-called "divorce revolution," involved the replacement of "fault" as the only ground for divorce with a broader scheme that allows for divorce if the parties so desire. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 204-07 (2d ed. 1985). *See generally* LENORE WEITZMAN, THE DIVORCE REVOLUTION (1985).

336. See DOLGIN, *supra* note 20, at 34-35.

of children, the law has been far slower to surrender traditional understandings of family embedded in truths that transcend, and thus cannot be disrupted by, individual family members' shifting needs and desires.[337] So, for instance, divorce courts refrain from automatic acceptance of parents' agreements about the continued custody of their children after parental separation. In this context, the "best interests of the child" have been and largely remain the "judicial yardstick used to measure all claims for children."[338] Between these two approaches is a third. This third approach, much like that in *Johnson* and *Buzzanca*, expressly defines familial relationships as distinct from relationships in the marketplace, but ultimately upholds the choices of family members as autonomous individuals. Much of the law that defines and protects family members' privacy rights reflects this approach.[339]

Analysis of the similarities and differences among *R.R.*, *Buzzanca*, and *Kass* suggests some of the express, as well as some of the more tacit, assumptions underlying the law's willingness to differentiate among various familial relationships. The approach of the California court in *Buzzanca* proves pivotal to this analysis.

On the one hand, *Buzzanca* resembles *Kass* in that the court relied on parental intentions and privileged choice over biology. Inevitably intentions are the affiliates of contract, any notion that the approach in *Buzzanca* (and *Johnson* before it) differs significantly from the approach in *Kass* (with its express reliance on contractual agreements) will likely prove illusory. Reliance on intent *is*, in effect, reliance on contract. *Buzzanca* and *Johnson* struggle to sustain and to reflect traditional familial sentiments, but each case sides ultimately with choice—and thus with a world defined through contract. Indeed, the *Buzzanca* court explicitly invoked the couple's *consent* to the conception of Jaycee as evidence of some parental connection—as the prerequisite needed under *Johnson* to justify application of the intent standard.

On the other hand, *Buzzanca* resembles *R.R.* in that the *Buzzanca* court refrained from expressly enforcing the contract.[340] The court, following the model established in *Johnson*, relied on the contract to determine the parties' intentions, but did not enforce the contract.[341] "There is," the *Buzzanca* court proclaimed, "a difference between a court's enforcing a surrogacy agreement and making a legal determination based on the intent expressed in a surrogacy

337. *See id.*

338. GROSSBERG, *supra* note 16, at 239 (describing construction of that "yardstick" during early decades of the nineteenth century).

339. *See* Eisenstadt v. Baird, 405 U.S. 438 (1972); Carey v. Population Servs. Int'l, 431 U.S. 678 (1977).

340. *See Buzzanca*, 72 Cal. Rptr. 2d at 289.

341. *See id.*

agreement."[342] Like the *Johnson* court, whose model it followed, the *Buzzanca* court was reluctant to rely directly on a contract to determine parentage. Thus, the court looked to the contract, but refrained from actually enforcing it.

In short, the court avoided transparently invoking the world of contract as the basis for determining familial relationships. Instead, it constructed a more opaque response that achieved the same end, while refraining from an explicit amalgamation of the world of contract and the world of family. More specifically, by differentiating "intentional" parentage from parentage based on a contractual agreement, the courts in *Johnson* and *Buzzanca* were able to presume, and thus to proclaim, that a child's best interests are served at least as adequately by "intending" as by "biological" parents.[343] Indeed, the court in *Johnson*, borrowing language from several commentators, portrayed intending parents as especially suited to the parental role:

> The mental concept of the child is a controlling factor of its creation, and the originators of that concept merit full credit as conceivers. The mental concept must be recognized as independently valuable; it creates expectations in the initiating parents of a child, and it creates expectations in society for adequate performance on the part of the initiators as parents of the child.[344]

By equating intentional parentage with protection of a child's best interests, the court presumed to protect familial relationships from unmediated incursions by the law of the marketplace. Yet, as a practical matter, reliance on intentional parentage served to affect the ends of the contract into which the parties had entered. However, protections against unfairness, normally provided in the process of judicial review of a contract were absent, since the contract itself was not examined for flaws that might have led to invalidation.[345]

The intent-approach applied in *Buzzanca* resembles the *Kass* approach in certain regards, and the *R.R.* approach in other regards. Those similarities and differences reflect, and in large part follow from, the facts of the three cases. Thus, the cases form a harmonious set, indicating that different aspects of reproductive technology require different legal responses.

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342. *Id.* (emphasis omitted).

343. *See id.* at 293; *Johnson*, 851 P.2d at 783.

344. *Johnson*, 851 P.2d at 783 (quoting Andrea E. Stumpf, Note, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 YALE L.J. 187, 196 (1986)).

345. *See* Coleman, *supra* note 80, at 511 (noting inconsistency between approach based on notion of intentional parentage and contract approach, insofar as second approach, but not first, allows "an inquiry into gross unfairness in determining whether promises must be kept").

Of the three cases, the facts of *Kass* can most easily be disentangled from a familial perspective. Not only were the Kasses dissolving their marriage, but *Kass*, unlike *Buzzanca* and *R.R.*, did not involve children. Had the embryos in *Kass* been categorized as "humans" or "children"—as were the embryos in *Davis* by the trial court in that case—it would have been difficult, if not impossible, on social, moral, and legal grounds, to enforce the contractual agreements into which the Kasses had entered.[346] Thus, *Kass* only involved the interests of adult family members. The court of appeal's decision followed from the law's increasing willingness to define *adult* family members as autonomous individuals and, accordingly, to permit them to negotiate the terms of their relationships, and to cement those negotiations in legal accords.

In contrast, both *Buzzanca* and *R.R.* involved children, whose fates were to be determined by judicial decisions regarding their potential parents' rights and duties. Accordingly, both decisions reflect the *language*—if not the ideological assumptions—of family relationships and family law. In *Buzzanca*, as in *R.R.*, the court was reluctant to abandon the legal approaches found in the market place when dealing with family matters. However, *R.R.* conclusively preserves the essential approach—as well as the rhetoric and sentiment—associated with family matters and family law. *Buzzanca* does not. *Buzzanca* preserves only the rhetoric and, to a lesser degree, the sentiment of family law rooted in status.

What, then, explains this difference? Both cases involved children conceived, gestated, and born, as a consequence of surrogacy contracts. Only *R.R.*, however, involved a "mother" as the term was traditionally understood before the advent of reproductive technology. According to traditional understandings of family, Michele Hoagland, the surrogate in *R.R.*, was indisputably the mother. Thus, whatever the intentions of the father and his wife, the surrogate could not be deprived of her essential maternity.[347] The *Buzzanca* court expanded the implications of *Johnson* by extending intentional parentage to a woman biologically unconnected to the child involved. However, it did not deprive a "mother," in the traditional sense, of her maternity.

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346. *See* Davis v. Davis, No. E-14496, 1989 Tenn. App. LEXIS 641 at *2 (Blount County Cir. Ct. Sept. 21, 1989) (after defining embryos as children, trial court defined its task as protecting "best interests" of embryos).

347. In fact, the relationships among the parties in *R.R.* were determined before the Supreme Judicial Court of Massachusetts heard the case. *See supra* notes 200-01 and accompanying text. However, in considering the enforceability of surrogacy contracts in Massachusetts, the court determined that a traditional surrogate—consents and intents notwithstanding—has all the rights of maternity until at least four days after the birth of her child. *See R.R.*, 689 N.E. 2d at 796.

The law is most comfortable discarding, or significantly reconstructing, traditional understandings of family in cases involving adult family members and not children. Such re-definitions are evident in the so-called divorce revolution, in the enforcement of cohabitation agreements and prenuptial agreements, and in cases involving cryopreserved embryos. In cases that involve children, the law—as reflected in both *Johnson* and *Buzzanca*—is reluctant to abandon the rhetoric of family even when it looks to the world of intention (and contract) to determine the parentage of actual children. In general, some such decisions may serve the best interests of the children involved; others may not. In either case, invoking children's interests in order to serve the interests of various adults has long been common in family law.[348] Finally, the law adheres most assiduously to traditional understandings about family and to traditional rules that reflect those understandings in cases involving children in relation to their biological mothers.[349] In such cases, there is least room for analyses that borrow, explicitly or implicitly, from the metaphors of the marketplace.

In sum, in cases occasioned by reproductive technology, courts have been more or less ready to relinquish or to reconstruct traditional assumptions about family and parentage depending first, on the extent to which the technology involved has challenged traditional assumptions about biological maternity, and second on the presence or absence of actual children. Thus, in cases such as *R.R.*, involving a child and a surrogate defined unambiguously as that child's biological mother, courts have widely assumed the biological mother to be the mother *ab initio*. Thus, *R.R.* differs from *Buzzanca* and *Kass* in most clearly mirroring traditional understandings of parentage and family. However, *R.R.* and *Buzzanca* together, differ from *Kass* in that *Kass* alone involved no actual children. Thus, the *Kass* court, unlike the courts that decided *R.R.* and *Buzzanca*, was willing to rely directly on contractual agreements to resolve a dispute concerning reproductive technology.

CONCLUSION

In 1978, the world reacted with wonder and with fear to the birth of the first child conceived in a culture dish.[350] In the succeeding two decades, the rapid development of reproductive technology challenged—and

348. *See*, Janet L. Dolgin, *Suffer the Children: Nostalgia, Contradiction and the New Reproductive Technologies*, 28 ARIZ. ST. L.J. 473, 474 (1996) (noting limitations of "best interest" standard in actually serving children's interests).

349. The term "biological mother," here, refers to a woman who gestates a baby conceived from her ovum.

350. *See, e.g.*, Peter Gwynne, *All About that Baby*, NEWSWEEK, Aug. 7, 1978, at 66.

threatened—bed-rock assumptions about the nature of human reproduction and consequently, assumptions about the scope and character of familial relationships. Within a very short period of time, it became possible to separate reproduction from sexuality, to distribute the tasks of biological maternity among several women, and to reorder the spatial and temporal parameters of human reproduction. In addition, a large industry has developed around human reproduction. Third parties, including doctors, lawyers, mediators, brokers, ova and sperm donors, and gestational surrogates, have become an essential part of human reproduction for many people. Inevitably, disputes have developed among potential parents and others participating in the reproductive process. Legislatures have responded slowly to the dilemmas created by reproductive technology. As a result, the American legal response to these dilemmas has come primarily from courts that are compelled to respond to the claims of particular disputants.

Within a remarkably short time—at least from the perspective of cultural history—American courts, though often hesitant and confused, have sketched the outlines of a broad, though still evolving, response to the conundrums presented by surrogacy and by reproductive technology. That response reflects a culture committed to safeguarding traditional understandings of family and, at the same time, anxious to redefine familial relationships through the metaphors of the marketplace.

Thus, despite the persistent cry of the American judiciary for a legislative response to the dilemmas produced by reproductive technology,[351] society seems increasingly well-served by decisions reached by courts that operate with little or no legislative direction. Indeed, the contours of the judicial response, indicated by *Buzzanca*, *R. R.*, and *Kass*, read as a group, provide a model around which statutes can be successfully created. At least in the main, society is likely to be more comfortable with such statutes than with laws promulgated by legislators, influenced by lobbyists, or overly concerned with responses from vociferous, rather than from representative, voters.

The emerging judicial consensus is incomplete and continues to evolve. Significant questions await responses. For instance, practical questions about intentional parentage remain unanswered. Despite the sentimental attraction of distinguishing intentional from contractual parentage, the result is unsettling. If intentions are to be identified through reference to contractual agreements, how long can society refrain from applying contract law more directly to cases involving children and their welfare? Will the law rely on two essential models for determining parentage—an adoption model, and a "natural" parentage model? Or will additional models be recognized so that,

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351. *See supra* notes 39-42.

for instance, parentage grounded on intent or consent is categorized separately from other sorts of parentage?

These questions notwithstanding, a framework within which American law can respond to disputes occasioned by reproductive technology has clearly emerged. This framework promises, at least for the moment, to satisfy the demands of modernity and of tradition. So, although in cases involving reproductive technology, familial relationships are no longer widely and conclusively grounded in natural truth, a few "natural truths" survive. Thus, for instance, courts assume the maternity of so-called "traditional" surrogates, even as they describe intentional parents as "natural" parents in other contexts. In consequence, choice—the correlate of modernity—is welcomed and, at the same time, through other choices, images of enduring, affective, "traditional" families are preserved.