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Baseline, Bright-line, Best Interests: A Pragmatic Approach for California to Provide Certainty in Determining Parentage

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"Again we must call on the Legislature to sort out the parental rights and responsibilities of those involved in artificial reproduction. No matter what one thinks of artificial insemination, traditional and gestational surrogacy (in all its permutations), and—as now appears in the no–too-distant future, cloning and even gene splicing—courts are still going to be faced with the problem of determining lawful parentage. A child cannot be ignored. Even if all means of artificial reproduction were outlawed with draconian criminal penalties visited on the doctors and parties involved, courts would still be called upon to decide who the lawful parents are and who—other than the taxpayers—is obligated to provide maintenance and support for the child. These cases will not go away."[1]

I. INTRODUCTION

California's present approach to determining the identity of a child's parents in the eyes of the law has its roots in an age when it was scientifically impossible to determine identity of the genetic parent, when the only way to create a child was by sexual intercourse between a man and a woman with the woman giving birth, and when society had a much narrower view of who should be allowed to have a parental relationship with a child. Even when scientifically reliable evidence of genetic[2] paternity and maternity became readily available, pre-scientific notions still controlled the system of determining parentage.[3] An outmoded and confusing

1. *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 293 (Ct. App. 1998).

2. Because this article is about parentage and sorting out the various criteria or standards to be used to determine a child's parent, I have found it necessary to almost always use an adjective before the words "father," "mother," or "parent." The great variety of these terms confirms the complexity of this subject; however, most of the terms are used in their everyday meanings. "Fathers," "mothers," and "parents" can all be "genetic," "genetic-biological," or "adoptive." In addition, they can also be "psychological" (meaning an adult parental figure who has a psychological or emotional relationship with the child to such a degree that we refer to it as parental), "intended" (meaning a person defined as the "intended parent" in the case of *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993)), or "contractual" (referring to a parent designated as such in a contract of assisted conception). Fathers can also be "presumed" fathers of which there are two varieties, "conclusively presumed" and "rebuttably presumed." These terms have their origin in the two types of statutory presumptions of paternity, the conclusive presumption of California Family Code section 7540, and the rebuttable presumptions of California Family Code section 7611. CAL. FAM. CODE § 7540 (West 1994 & Supp. 2003); *id.* § 7611. Mothers are most often "birth mothers," "surrogate mothers," or "gestational mothers." The term "birth mother" is used to identify the woman who is designated the child's mother by virtue of the fact that she gave birth to the child. "Surrogate mother" and "gestational mother" also give birth to a child but these terms designate a woman who has contracted to gestate and deliver a child to other parents. "Gestational mother" is the term used by the Uniform Parentage Act (2000) (UPA (2000)) to replace "surrogate mother," so the terms are really synonymous. UNIF. PARENTAGE ACT § 102(11) (enacted 2002), 9B U.L.A. 303 (2001). One adjective that I have rarely used is the term "natural" to modify either "father," "mother," or "parent." "Natural parent" is used numerous times in the California Family Code to designate the person who will have the parent and child relationship with the child. *See, e.g.*, CAL. FAM. CODE § 7611 (West 1994 & Supp. 2003). In a sense, this article is about determining who is the child's natural parent.

3. Perhaps the best example of this phenomenon is Justice Scalia's plurality opinion in *Michael H. v. Gerald D.*, in which Justice Scalia found substantive due process protection for the family but not for the genetic

system of presumptions plays a central role in the California statutory scheme.[4] In such determinations, California still has a conclusive presumption of paternity,[5] although it has been modified in a manner which makes it rebuttable to some extent.[6] In addition to the conclusive presumption, there is a series of rebuttable presumptions, adopted from the Uniform Parentage Act (UPA) which also deals with paternity.[7] In adopting these rebuttable presumptions from the UPA, the California Legislature ignored the fact that the conclusive presumption of paternity was conspicuously absent from the UPA. Although both the conclusive and the rebuttable presumptions were originally established as methods of determining legitimacy and paternity, these presumptions have been imbued with the patina of protecting the intact family.[8] But in the end, this system of presumptions does not protect the intact family,[9] it does not protect the child's relationship with a psychological parent,[10] and it does not protect the best interest of the child.[11]

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parent. 491 U.S. 110, 124 (1989). Applying the traditional test to determine fundamental rights, Justice Scalia could not conclude that a genetic father had a fundamental right to a relationship with his child simply because traditionally it was impossible to determine a child's genetic father. *Id.* Similarly, in *Johnson v. Calvert*, the California Supreme Court resolved a parentage issue between a gestational surrogate mother and the genetic mother by resorting to an intent test, under which the mother was determined to be the woman who had intended to create life, rather than simply saying the mother was the genetic mother, because the statutory scheme in existence at that time gave no special weight to the genetic parent. 851 P.2d at 782 & n.10.

4. In California these presumptions are found at California Family Code sections 7540 and 7600-7730, (West 1994 & Supp. 2003), which California adopted from the Uniform Parentage Act. *See* UNIF. PARENTAGE ACT (1973), 9B U.L.A. 377 (2001).

5. CAL. FAM. CODE § 7540 (West 199 & Supp. 2003). For the sake of easy reference, throughout this article I have referred to the presumption in this code section as the conclusive presumption. At one time this presumption was not rebuttable in the sense that, once the foundational requirements of the presumption had been established, evidence could not be admitted to rebut the presumption. I have used the term "conclusive" to easily distinguish this presumption from those "rebuttable" presumptions of Family Code section 7611. *Id.* § 7611. The fact that the presumptions in both sections 7540 and 7611 are rebuttable, supports the argument that section 7540 should be abolished.

6. The presumption is rebuttable by the presumed father himself, by the child's birth mother, and by another man who is a presumed father under section 7611. *Id.* § 7541(b)-(c). The presumption, even with the present modification, cannot be rebutted by a mere genetic father unless that genetic father is also a presumed father. *See id.* (omitting genetic father from the list).

7. *Id.* § 7611 (adopted, with changes, from UNIF. PARENTAGE ACT (1973), 9B U.L.A. 377 (2001)). There is also a statutory test for determining maternity which is not stated as a presumption. ("Between a child and the natural mother, [the parent-child relationship] may be established by proof of her having given birth to the child. . . ." CAL. FAM. CODE § 7610(a) (West 1994)) but which has been treated very much like a presumption by the California Supreme Court. *See Johnson*, 851 P.2d 776.

8. *See Michael H.*, 491 U.S. at 124; Dawn D. v. Superior Court, 952 P.2d 1139, 1144-45 (Cal. 1998) (referring to the concept that the interests of the family are stronger than those of the biological parent).

9. *See* discussion *infra* Part III.A.2.

10. Of all the presumptions, only one even hints at the possibility of a psychological relationship: California Family Code section 7611(d) states that a man will be presumed to be a child's father if he "receives the child into his home and openly holds out the child as his natural child." CAL. FAM. CODE § 7611(d) (West 1994 & Supp. 2003). Still, it is obvious that a man could fulfill this requirement without having a psychological relationship with the child. The other presumptions merely refer to the presumed father's relationship to the mother. The Uniform Parentage Act allows a man to be a presumed father if "he acknowledges his paternity of the child in a writing filed with the [appropriate court or Vital Statistics Bureau] . . . ," a provision which at least shows a desire of the putative father to have some relationship, including a psychological one, with the child. UNIF. PARENTAGE ACT § 4(a)(5) (1973), 9B U.L.A. 394 (2001).

The California Legislature has done very little to modernize the statutory scheme governing parentage; regarding assisted conception, it has buried its head in the sand. While the California statutory scheme has gradually expanded the role of genetic testing, the legislative process has stopped short of making the genetic-biological relationship the baseline test for parentage. As a result, the California statutory scheme still greatly favors certain putative parents over others.[12] As to new developments of assisted reproduction, the California parenthood scheme has also failed to change in another way: the scheme is almost entirely silent on determining parentage when assisted reproduction is involved. In terms of parentage, there is only one reference to assisted reproduction in the California statutes. Family Code section 7613 establishes that a husband who consents to his wife's artificial insemination is the father of the child[13] and that the donor, if he provided the sperm to a licensed physician, is not the father.[14] There is no equivalent provision governing ovum extraction, ovum donation, or in vitro fertilization. Most importantly, the statute is silent about surrogacy.

The California Legislature[15] has simply failed to recognize that there are new factors, both scientific and sociological, which the California statutory scheme

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11. Indeed, presumptions fail to safeguard the best interests of the child. In a contested parentage case, a hearing would be required to resolve the fact-intensive question of what is in the best interest of the child. Presumptions prevent hearings, or at least hearings in which all of the interested parties are present. The interested party most likely to be absent is the unwed father. Keeping the unwed father out of the picture may have been one of the rationales for presumptions: this person was presumed to be unfit. *See* Stanley v. Illinois, 405 U.S. 645 (1972) (considering whether a legal presumption that an unwed father is an unfit parent and removing his children from his custody based only on that presumption and with no hearing violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment).

12. The man who is married to the mother is the most favored. He is favored over both the biological father and even the birth mother. He can disavow his paternity easily through genetic evidence, CAL. FAM. CODE § 7541(b) (West 1994 & Supp. 2003), and, when either the conclusive presumption or a rebuttable presumption is involved, he can prevent the genetic father from asserting his paternity. *Id.* §§ 7540, 7611. When the conclusive presumption is involved, the mother can challenge her husband's paternity only if she has an affidavit from the biological father that he will support the child. *Id.* § 7541(c). There is also a bias favoring birth mothers over genetic fathers who are not married to the mother. The birth mother can simply cut off any rights of a genetic father by engaging in conduct which establishes another man as the presumed father, *id.* § 7611, or she can limit the ability of the genetic father to establish his paternity by relinquishing the child for adoption. *Id.* § 7662. However, unless there is a conclusively presumed father, she can establish the paternity of the genetic father merely through genetic testing. *Id.* § 7541(c). The fathers who are not presumed fathers have the least rights of any party to establish their paternity. If there is a presumed father who has not disavowed paternity, the non-presumed father has no right whatsoever to assert his paternity. *Id.* § 7541. If the mother has chosen to relinquish the child for adoption, the genetic father, if he is not a presumed father must, in order to establish his paternity, prove not only his genetic relationship with the child but also that it is in the best interest of the child that his parental rights not be terminated. *Id.* § 7664.

13. *Id.* § 7613(a) (West 1994).

14. *Id.* § 7613(b).

15. While both the United States Supreme Court and the California Supreme Court, out of respect for tradition, have upheld portions of the California scheme, they have done little to make this scheme more consistent with modern views regarding the nature of determining parenthood. The United States Supreme Court has never had great respect for the purely genetic parent, requiring the genetic parent to have participated in the child's upbringing in order for a fundamental right to attach. *See* Lehr v. Robertson, 463 U.S. 248 (1983); Caban v. Mohammed, 441 U.S. 380 (1979); Quilloin v. Walcott, 434 U.S. 246 (1978); Stanley v. Illinois, 405 U.S. 645 (1972). In *Michael H.*, Justice Scalia, having perhaps the narrowest view of tradition among the

has not taken into account. It is now possible to establish without doubt the genetic parents of a child.[16] Sperm donation and artificial insemination can be done by amateurs.[17] Ovum donation is a routine procedure, but not a simple one. In vitro fertilization is a daily occurrence. Cloning of humans is such a scientific likelihood that it has been banned.[18] Tentative steps are already being taken in the creation of an artificial womb, and there is no reason to believe that it will not be perfected someday.[19] New technology means that new avenues exist for childless couples to have children, and that children whose parentage cannot be determined under the present system will be brought into this world.

Supreme Court Justices, in a plurality decision rejected the view that *Lehr*, *Caban*, *Quilloin*, and *Stanley* established "that a liberty interest is created by biological fatherhood plus an established parental relationship—factors that exist in the present case as well" and stated that "[w]e think that distorts the rationale of those cases. As we view them, they rest not upon such isolated factors but upon the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family." Michael H. v. Gerald D., 491 U.S. 110, 123 (1989). Although the California Supreme Court has slavishly adopted the techno-phobic views of Justice Scalia and followed *Michael H.* in holding that there is no constitutional protection for the parental relationship outside of the family, Dawn D. v. Superior Court, 952 P.2d 1139, 1140 (Cal. 1998), the only real gap that the court has filled in the incomplete California scheme was in *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993). In *Johnson*, the court adopted a somewhat novel approach to determining parenthood in a surrogacy case between the gestational mother and the genetic mother. *Id.* The court applied the intent of the parties to determine parentage, but has failed to deal with the inadequacies of this test as pointed out in a devastating dissent by Justice Kennard. *Id.* at 781-82, 791-93.

16. *See* discussion *infra* Part III.A.4.

17. *See generally* Jhordan C. v. Mary K., 224 Cal. Rptr. 530 (Ct. App. 1986); *In re* Marriage of Moschetta, 30 Cal. Rptr. 2d 893 (Ct. App. 1994).

18. California Health and Safety Code section 24185 states as follows:

> (a) No person shall clone a human being or engage in human reproductive cloning.
>
> (b) No person shall purchase or sell an ovum, zygote, embryo, or fetus for the purpose of cloning a human being.
>
> (c) For purposes of this chapter, the following definitions apply:
>
> (1) "Clone" means the practice of creating or attempting to create a human being by transferring the nucleus from a human cell from whatever source into a human or non human egg cell from which the nucleus has been removed for the purpose of, or to implant, the resulting product to initiate a pregnancy that could result in the birth of a human being.
>
> (2) "Department" means the State Department of Health Services.
>
> (3) "Human reproductive cloning" means the creation of a human fetus that is substantially genetically identical to a previously born human being. The department may adopt, interpret, and update regulations, as necessary, for purposes of more precisely defining the procedures that constitute human reproductive cloning.

California Health and Safety Code § 24185 (West Supp. 2003). *See generally* Janet L. Dolgin, *Foreword: Cloning Debate*, 27 HOFSTRA L. REV. 473 (1999) (discussing the moral, ethical, and legal implications of cloning); Nanette Elster, *Who Is the Parent in Cloning?*, 27 HOFSTRA L. REV. 533 (1999) (exploring how existing laws relating to parentage, surrogacy, egg donation, and artificial insemination may apply in the cloning context to clarify the parent-child relationship established through cloning); Clarke D. Forsythe, *Human Cloning and the Constitution*, 32 VAL. U. L. REV. 469 (1998) (discussing whether cloning is a constitutional liberty encompassed within the liberty created by *Roe v. Wade* and whether legislation regulating cloning may pass constitutional muster).

19. Robin McKie, *Men Redundant? Now We Don't Need Women Either: Scientists Have Developed an Artificial Womb that Allows Embryos to Grow Outside the Body*, THE OBSERVER, Feb. 10, 2002, at 7. In a world which utilizes the artificial womb, the relationship of every human being, male or female, to his or her offspring is that of a father.

The nature of the family and marriage is also changing. Indeed, most articles written today regarding the determination of parentage deal with what might be called new family relationships.[20] It is clear that many children are being raised in families that are different from what might be called the "traditional family." A large percentage of children are raised in single-parent homes.[21] A remarkable number of couples who have children choose not to get married, at least at the outset of their child-rearing years.[22] We know that fathers can adequately rear children, even babies, alone, and that far more of them are doing so than in the past.[23] Many states allow single people, and same-sex couples barred from marriage, to adopt. Nevertheless, the law now governing who is a parent was framed long before any of these changes took place.

The purpose of this article is to propose a system of determining parentage that takes advantage of modern genetic testing but is not a slave to it, that takes into account new technology and indeed could be expanded to meet the technology of the future, and that also allows for changes in society's collective opinion about who should raise children and which adults should have a right to have a relationship with a child. It is possible, in a very simple manner, for legislation to modify the California scheme governing parenthood in a way that will create a degree of certainty which has not been present in California parentage law, remove the need for judicial gap-filling, and adequately meet the demands of new reproductive technology and the needs of contemporary families which appear in many and varied manifestations. This proposed model uses the genetic relationship as the starting point,[24] relegates the traditional presumptions to the minor role of determining parentage in situations where parentage itself is not being litigated, and creates pragmatic, easily implemented criteria to determine when someone other than the genetic parent is to be designated as a child's parent.

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20. *See infra* Part II.

21. U.S. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, CURRENT POPULATION REPORTS, SERIES P23-194, POPULATION PROFILE OF THE UNITED STATES: 1997, 27 (1998).

22. *Id.* at 26-27.

23. *Id.* at 27.

24. Indeed, the impetus for me in investigating the subject of parentage and pursuing this article was the injustice that I felt in the treatment of genetic fathers, especially those who had not had the opportunity to develop a participatory relationship with their children. The case of *Lehr v. Robertson* represented not only a cramped and grudging view of due process but a rank injustice as well. 463 U.S. 248, 262 (1983). On an intuitive and emotional level, the other United States Supreme Court cases dealing with parental rights, *Caban v. Mohammed*, 441 U.S. 380 (1979), *Quilloin v. Walcott*, 434 U.S. 246 (1978), and *Stanley v. Illinois*, 405 U.S. 645 (1972), all seemed wrong to me, not because of the results but because of the rationales. To me it seemed that fatherhood, even on the constitutional level, did not commence once the father had participated in a child's life, but, rather, fatherhood existed as a result of the genetic relationship, and could be lost through neglect. In other words, the genetic relationship stood for something both in the real world and in the realm of human rights. The proper model for me was *Adoption of Kelsey S.*, which recognized the right of the genetic father who attempted to form a relationship with his child. 823 P.2d 1216 (Cal. 1992). In this light and on the intuitive level, the plurality opinion of the United States Supreme Court in *Michael H. v. Gerald D.* seemed to lead to the absurd conclusion that the genetic relationship counted for nothing and that the family included just about every relationship but that of the genetic father and his child. 491 U.S. 110, 123 n.3, 124 (1989).

The model presented in this article for a legislative parentage scheme in California has three parts. The first, which I refer to as the baseline, makes the genetic parent the parent for all purposes unless another person has been designated as the child's parent by operation of law. Present California law can be easily modified to achieve this result simply by abolishing the conclusive presumption and by making the rebuttable presumptions truly rebuttable: that is, all genetic fathers, not just genetic fathers who are also presumed fathers, could rebut the presumptions. The second part, the bright-line, requires that, except for cases of artificial insemination,[25] in all instances of assisted conception in which someone other than the genetic parent is the intended parent of the child, there be a judicially pre-validated contract.[26] Implementation of this part would require legislation that not only states that assisted conception requires a pre-validated contract, but also sets forth specific requirements for that judicial validation. Finally, the third part, which would also necessitate legislation, requires that, in all instances of assisted conception where there is either no contract or an unenforceable contract due to lack of judicial pre-validation, the best interest of the child standard be used to determine parentage.

II. THE CALIFORNIA STATUTORY SCHEME

A. *Paternity*

1. *The Conclusive Presumption*

California Family Code section 7540,[27] commonly called "the conclusive presumption," is not a conclusive presumption at all—at least for two years from the birth of the child whose paternity is in question;[28] in a sense, it is actually a rebuttable presumption that at one time was absolutely conclusive. The language of the presumption is straightforward: "the child of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage."[29] However, at the present time, section 7541(a) of the Family

25. CAL. FAM. CODE § 7613 (West 1994); UNIF. PARENTAGE ACT § 5 (1973), 9B U.L.A. 407 (2001).

26. Pre-validation simply means that the assisted conception contract must be judicially approved before the conception is allowed to take place. While this concept has been borrowed from the UPA (2000), the UPA (2000) does not actually use the terms "pre-validation" or "pre-validated"; however, the first line of the comment to the pertinent section makes it clear that validation must take place before conception: "This pre-conception authorization process for a gestational agreement is roughly analogous to adoption procedures in place in most jurisdictions as of December 2000." UNIF. PARENTAGE ACT § 803 cmt (2000), 9B U.L.A. 362 (2001).

27. CAL. FAM. CODE § 7540 (West 1994 & Supp. 2003).

28. *Id.* § 7541.

29. *Id.* § 7540 (West 1994). There is an ambiguity in this language which is only partially apparent on the face of the statute: at what point does the wife have to be cohabiting with the husband? Cases have made it clear that the presumption will arise when the wife and the husband are cohabiting at the time of conception. *See, e.g., In re* Marriage of Freeman, 53 Cal. Rptr. 2d 439 (Ct. App. 1996). *Accord* Dawn D. v. Superior Court,

Code[30] states that the presumption of paternity can be rebutted by blood tests under sections 7550 through 7557[31] which show that the husband is not the father of the child if the action is brought within two years of the child's birth.[32] The presumption can be rebutted by the husband[33] of the woman who gave birth, by a man who is a presumed father under the rebuttable presumptions of paternity,[34] by the birth mother herself if she has an affidavit acknowledging paternity from the biological father,[35] or by the guardian ad litem of the child.[36] Conspicuously absent from the group of people who can rebut the presumption is the child's genetic father who has no status as a presumed father; for example, an unwed father who has never had the opportunity to receive the child into his home and hold the child out as his own would not have the right to rebut the presumption.[37]

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952 P.2d 1139, 1140 (Cal. 1998); *In re* Estate of McNamara, 183 P. 552, 555-56 (Cal. 1919); Brian C. v. Ginger K., 92 Cal. Rptr. 2d 294, 298 (Ct. App. 2000); San Francisco v. Strahlendorf, 9 Cal. Rptr. 2d 817, 818 (Ct. App. 1992); Fuss v. Superior Court, 279 Cal. Rptr. 46, 49 n.3 (Ct. App. 1991). The fact that conception serves as the key time is additional evidence that the statute was actually designed for the purpose of determining who the father was, not protecting the unitary family. *Cf.* Susan H. v. Jack S., 37 Cal. Rptr. 2d 120, 123 (Ct. App. 1994) (stating that even though the conclusive presumption does "not comport with biological reality, [the presumption] does not purport to determine factually the biological paternity of [the] child.").

30. CAL. FAM. CODE § 7541(a) (West 1994 & Supp. 2003).

31. *Id.* §§ 7550-7557. *See* Rodney F. v. Karen M., 71 Cal. Rptr. 2d 399, 403 (Ct. App. 1998) (stating that only blood tests authorized by the paternity statute, section 7541, "can overcome the conclusive presumption of paternity").

32. CAL. FAM. CODE § 7541(b) (West 1994 & Supp. 2003). The legislative intent behind the two-year statute of limitations on paternity actions was that "biology will control determination of paternal responsibility for a limited period early in a child's life and thereafter the predominant consideration must be the nature of the presumed father's social relationship with the child." *In re* Marriage of Freeman, 53 Cal. Rptr. 2d at 445-46 (citing William P. Hoffman, Jr., *California's Tangled Web: Blood Tests and the Conclusive Presumption of Legitimacy*, 20 STAN. L. REV. 754, 761-62 (1968)).

33. CAL. FAM. CODE § 7541(b) (West 1994 & Supp. 2003).

34. *Id.* By "rebuttable presumptions of paternity," I am referring to the presumptions under the Uniform Parentage Act, *id.* § 7611.

35. *Id.* § 7541(c). There are three situations in which the presumed father may not challenge the presumption of his paternity: (1) where there is a judgment of paternity signed before Sept. 30, 1980, *id.*; (2) where the child is conceived by artificial insemination; and (3) where the child is conceived by a surgical procedure. *Id.* § 7541(e)(1)-(3).

36. *Id.* § 7541(b).

37. The exclusion of the non-presumed genetic father from the list of those who may rebut the conclusive presumption has been upheld by the United States Supreme Court in *Michael H. v. Gerald D.* 491 U.S. 110 (1989). Justice Scalia announced the judgment of the Court and wrote an opinion which is most notable for its substantive due process analysis and comments regarding the constitutional rights of unwed parents who seek to establish parental relationships with their children. The legal effect of the case is debatable because it is a very fragmented plurality decision and because subsequent legislation has modified the California statute to remove the specific limitation that was upheld. (The genetic father who challenged the conclusive presumption was also a presumed father under the "receiving and holding out" provision of section 7611(d), but at the time of his action there was no statutory provision for presumed fathers to rebut the conclusive presumption. After *Michael H.*, the California Legislature modified section 7541(b) to allow presumed fathers to rebut the presumption.). CAL. FAM. CODE § 7541(b) (West 1994 & Supp. 2003). Despite this legislative repudiation of *Michael H.*, the California Supreme Court in *Dawn D. v. Superior Court*, did adopt the reasoning of the plurality opinion of Justice Scalia. 952 P.2d 1139, 1140 (Cal. 1998). In his analysis of the constitutional right of the genetic father to rebut the conclusive presumption, Justice Scalia acknowledged that the term liberty in the Due Process Clause protects more than freedom from physical restraint, that there are fundamental rights, that in determining these rights the Court "comes nearest to illegitimacy," *Michael H.*, 491 U.S. at 122 (quoting the dissenting opinion of Justice White in *Moore v. East Cleveland*, 431 U.S. 494, 544

It is evident from both the language and history of the conclusive presumption that its primary purpose was to serve as a substitute for real evidence of who fathered the child. In a sense, the presumption has always been a rule of expediency.[38] As the court stated in *In re Marriage of B.*,

> [e]arly California cases were able to justify the conclusive presumption in question on the ground that no competent evidence could be adduced to indicate who among those who had had intercourse with the wife during the period of possible conception was the biological father of the child born to her.[39]

While it might be argued that the presumption mainly operated relating to matters concerning the legal concept of legitimacy and the integrity of the family, regardless of paternity,[40] this view is belied by the fact that, before modern blood testing, presumptions of paternity had never been applied where there was physical evidence available to prove the father of the child was not the mother's husband—where he was impotent or unavailable, for example.

When California legislatively adopted the conclusive presumption, it adopted the common impotency exception and the requirement of cohabitation as well.[41] The common law allegiance to physical evidence of paternity has been continued by subsequent acts of both the courts and the legislature evidenced by the following: the willingness of the courts to allow racial characteristics to rebut the

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(1977)), and that these rights must be "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Michael H.*, 491 U.S. at 122 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)). However, Justice Scalia rejected the assertion of the genetic father (based upon *Lehr v. Robertson*, 463 U.S. 248 (1983), *Caban v. Mohammed*, 441 U.S. 380 (1979), *Quilloin v. Woolcott*, 434 U.S. 246 (1978), and *Stanley v. Illinois*, 405 U.S. 645 (1972)) that "biological fatherhood plus an established parental relationship—factors that exist in the present case" create such a liberty interest. *Michael H.*, 491 U.S. at 123. Justice Scalia instead presented an alternate reading of these cases: "As we view them, they rest not upon such isolated factors but upon the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family." *Id.* The end result was that the genetic father's challenge failed because the conclusive presumption did not violate his substantive due process rights: "It is a question of legislative policy and not constitutional law whether California will allow the presumed parenthood of a couple desiring to retain a child conceived within and born into their marriage to be rebutted." *Id.* at 129-30. *See generally* Gregory C. Cook, *Footnote 6: Justice Scalia's Attempt to Impose a Rule of Law on Substantive Due Process*, 14 HARV. J.L. & PUB. POL'Y 853 (1991) (arguing that the footnote 6 methodology proposed by Justice Scalia is legally sound).

38. *In re* Lisa R., 532 P.2d 123, 132 (Cal. 1975) (stating that "a possible legitimate interest which the state might assert in support of the conclusiveness of the presumption is speed and efficiency of judicial inquiry in circumstances where such inquiry might seldom be productive."). *See also* Mindy S. Halpern, Comment, *Father Knows Best—But Which Father? California's Presumption of Legitimacy Loses Its Conclusiveness:* Michael H. v. Gerald D. *and Its Aftermath*, 24 LOY. L.A. L. REV. 275, 277 (1991).

39. 177 Cal. Rptr. 429, 431 (Ct. App. 1981).

40. *Michael H.*, 491 U.S. at 124 (citing H. NICHOLAS, ADULTURINE BASTARDY 9-10 (1836), citing BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE, bk. i, ch. 9, p. 6; bk. ii, ch. 29, p. 63; ch. 32, p. 70 (1569)). *See also* Banbury Peerage Case, 57 Eng. Rep 62 (H.L. 1811), cited in D. Le Marchant's Barony of Gardner, app. note. E, 389 (1828). The case itself is much earlier than this report. Lord Banbury died in 1632.

41. CAL. CIV. PROC. CODE § 1962(5) (1963) (repealed 1965). "[T]he issue of a wife cohabiting with her husband, *who is not impotent*, is indisputably presumed to be legitimate." *Id.* (emphasis added).

presumptions;[42] the judicial and legislative addition of the sterility exception;[43] and the legislative creation of the right of the mother,[44] mother's husband,[45] a presumed father under Family Code section 7611, and the child to challenge the presumption based upon blood tests.[46]

This allegiance to physical evidence of paternity is important because it shows an unspoken preference in the California paternity scheme for the genetic father as the person who should raise and support the child. The presumption as it stands now allows a man who has not fathered a child to avoid serving as the psychological and financial father of the child. This legislative policy probably corresponds to the sensibilities of most people—it is unfair to require a man who is not the father of a child to raise and support the child against his will. This view is based upon the belief that the man who is not the biological father is not sufficiently connected to the child to have such a responsibility. The requirement that the mother have an affidavit from the biological father also indicates the importance of the biological connection.[47] The mother is not simply entitled to find any man who will support the child (such as her new husband). She must establish the biological connection to the father before she can challenge the paternity of the conclusively presumed father.[48]

This preference for establishing the paternity of the biological father does not, of course, preclude other rationales for the conclusive presumption. There can be no doubt that there has always been a state interest in the financial protection of children, in addition to merely protecting lineage and inheritance rights. Moreover, the state has a general "desire to have an individual rather than the state assume the financial burden of supporting the child."[49] Although this interest is still apparent in the requirement that the birth mother have an affidavit from the biological father in order to rebut the presumption,[50] in recent times—with the expansion of the right to rebut the conclusive presumption—the protection of this interest has become subordinate to the interest in protecting the presumed father who is not the biological father from having to pay support for a child who is not his. The easiest way to implement this general interest in having *some* man available to support the child would be simply to make the presumption truly conclusive.

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42. *In re* McNamara's Estate, 183 P. 552, 557-58 (Cal. 1919) (stating that the conclusive presumption does not apply when indeterminability is absent because, for example, a "husband and wife are of the same race . . . and it appears that the wife has had intercourse with a man of another race . . . and the child is of mixed blood.").

43. Hughes v. Hughes, 271 P.2d 172, 175 (Ct. App. 1954); 1975 Cal. Stat. 1244 § 13.

44. 1980 Cal. Stat. 1310 § 1.

45. 1981 Cal. Stat. 1180 § 1.

46. 1990 Cal. Stat. 543 § 2.

47. CAL. FAM. CODE § 7541(c) (West 1994 & Supp. 2003).

48. *Id.*

49. *In re* Marriage of B., 177 Cal. Rptr. 429, 432 (Ct. App. 1981).

50. CAL. FAM. CODE § 7541(c) (West 1994 & Supp. 2003).

Another rationale for the conclusive presumption is that it protects the family. This is the rationale that captured the imagination of Justice Scalia in *Michael H. v. Gerald D.* and served as the basis of his opinion upholding the constitutionality of the presumption.[51] There are a variety of ways to express this rationale: protection of family integrity, protection of family privacy, or protection of the unitary family.[52] However, no matter how one phrases it, there is really very little left in the modern presumptions that protects the family, at least within the first two years after the child's birth. Within the family, the husband, the wife, and the child (through a guardian) can all rebut the presumption and destroy whatever integrity or unity still exists.[53] From outside the family, the presumption and the family unit can be attacked by a man who is a presumptive father under the UPA. During the two year period, the only protection for the family, although some may consider this significant, is that the mother and her husband may join forces—in that they do not attack the presumption themselves—to fend off an attempt to rebut the presumptions by the biological father who has not reached the status of presumed parent. Although, where a non-presumptive genetic father is involved, there has already been a breach of family unity.

If the rationale of protecting the family is examined historically, two important points must be made. First, the family integrity rationale as we know it today was first applied to the rebuttable presumption of paternity, not to the conclusive presumption. In *In re McNamara's Estate*, the California Supreme Court confronted the dilemma of whether to apply the conclusive presumption or the rebuttable presumption of Civil Code section 194 to a child born 304 days after the mother left the husband.[54] The court concluded that the rebuttable presumption should apply.[55] For the conclusive presumption to apply, the mother had to be cohabiting with her husband at the time of conception, and 304 days, though shown scientifically to be a *possible* period of time for human gestation, would be quite exceptional and unlikely, and the court refused to consider this possibility to trigger the conclusive presumption.[56] Since the conclusive

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51. 491 U.S. 110, 120 (1989).

52. Justice Scalia used all three terms. At one point he said, "Of course the conclusive presumption not only expresses the State's substantive policy but also furthers it, excluding inquiries into the child's paternity that would be destructive of family integrity and privacy." *Id.* Later in the opinion he referred to unitary family: "As we view them, they rest not upon such isolated factors but upon the historic respect—indeed, sanctity would not be too strong a term—traditionally accorded to the relationships that develop within the unitary family." *Id.* at 123. *See also* Rodney F. v. Karen M., 71 Cal. Rptr. 2d 399, 403 (Ct. App. 1998) (recognizing that the policy of the conclusive presumption is to "reflect[] the sanctity traditionally accorded to . . . relationships that develop within the unitary family").

53. CAL. FAM. CODE § 7541(b) (West Supp. 2003).

54. 183 P. 552 (Cal. 1919). This rebuttable presumption was a precursor to the present-day rebuttable presumptions of the California Family Code section 7611, both of which were derived from the Uniform Parentage Act. CAL. FAM. CODE § 7611 (West 1994 & Supp. 2003).

55. *In re McNamara Estate*, 183 P. at 558.

56. *Id.* at 555.

presumption did not apply, external evidence of paternity was admissible.[57] In reaching this conclusion, the court made the following statement regarding the policy differences between the conclusive presumption and the rebuttable presumption:

> Nor is there any reason of public policy which requires such extending of the conclusive presumption. The *prima facie* presumption of legitimacy, which requires clear and satisfactory proof for its overcoming, is founded on the policy of protecting the integrity of the family, of preventing the bastardizing of issue born in wedlock except upon clear and certain evidence. The reason for going beyond this *prima facie* presumption, and applying a conclusive presumption wherever the husband has had intercourse with the wife during the time when the child must normally have been conceived, although others as well may have had intercourse with her during the same period, is the impossibility of determining under such circumstances who is the father. As was said in *Commonwealth v. McCarty*, 2 Clark (Pa.), 356, the process of conception is a hidden one, and the organs perform their appropriate functions without the volition of the female and without her being conscious that the process is going on. Where she has had intercourse with more than one man at about the same time, and a child has resulted, neither she nor anyone else can say with reasonable certainty which is the father. Any weighing of probabilities under such circumstances is but guessing, and, where the husband is one of the possible fathers, he must bear the burden of his relation to the woman and be taken to be the father of her child.[58]

Ironically, under the present presumption, the husband has an absolute right to prove that he is not the father of the child.

Secondly, the protection of the family rationale began to be applied to the conclusive presumption only when scientific evidence from blood tests became viable evidence regarding paternity. Although the conclusive presumption originally existed as a substitute for evidence regarding paternity, the courts began to justify the presumption as a means of protecting the integrity of the unitary family. As one appellate court stated,

> Early California cases were able to justify the conclusive presumption in question on the ground that no competent evidence could be adduced to indicate who among those who had had intercourse with the wife during the period of possible conception was the biological father of the child born to her. However, as blood tests became scientifically reliable so that they could exclude a husband as the biological father, the courts sustained

57. *Id.*

58. *Id.* at 557.

the legislative mandate by unabashedly calling it a substantive rule of law.[59]

While the protection of the family rationale is accepted today, getting a strong boost from Justice Scalia, it must be admitted that all family members do not benefit equally from this protection. In fact, the present structure of the conclusive presumption creates a hierarchy of benefits. The patriarch gets the greatest benefit of the statute in several ways. First, within the two year period after the child's birth, he is free to disavow his paternity or maintain it.[60] Second, there are limitations placed upon all those who would challenge his paternity.[61] His wife can challenge his paternity only if there is another man, the genetic father, who is willing to accept responsibility for the child.[62] Next, the child can challenge his paternity only if it is for the purpose of proving another man's paternity; furthermore, a child would face significant practical difficulties in obtaining a guardian ad litem. Finally, the child's genetic father can challenge the patriarch's paternity only when he is a presumed father under the UPA,[63] a status which is almost completely controlled by the child's mother.[64]

2. *The Rebuttable Presumptions*

What I have referred to as the rebuttable presumptions are, of course, the presumptions established in California's version of the UPA, Family Code sections 7600-7730.[65] The California statutes define the "parent and child

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59. *In re* Marriage of B., 177 Cal. Rptr. 429, 431 (Ct. App. 1981) (footnote omitted), *accord* Michelle W. v. Ronald W., 703 P.2d 88, 92-93 (Cal. 1985); Estate of Cornelious, 674 P.2d 245, 247 (Cal. 1984); *In re* Lisa R., 532 P.2d 123, 132 (Cal. 1975); Kusior v. Silver, 354 P.2d 657, 667-68 (Cal. 1960); *In re* Estate of Lund, 159 P.2d 643, 648 (Cal. 1945).

60. CAL. FAM. CODE § 7541(b) (West 1994 & Supp. 2003).

61. *Id.* § 7611(d) (West Supp. 2003).

62. *Id.*

63. *Id.* § 7541(b) (West 199 & Supp. 2003).

64. The birth mother controls the genetic father because she has absolute control over whether she marries or attempts to marry the genetic father, and she has practical control over whether the genetic father "receives the child into his home and openly holds out the child as his natural child." *Id.* § 7611(d). She also controls the ability of the genetic father to file for a voluntary declaration because she must sign the declaration as well. *Id.* § 7574(b)(1).

65. *Id.* §§ 7600-7730. The California Family Code refers to these statutory provisions as the Uniform Parentage Act although California did not adopt all of the provisions of the actual Uniform Parentage Act. *See* UNIF. PARENTAGE ACT (1973), 9B U.L.A. 377 (2001). There were forms of a rebuttable presumption enacted in 1872 along with the conclusive presumption. Code of Civil Procedure section 1963 created a disputable presumption "[t]hat a child born in lawful wedlock, there being no divorce from bed and board, is legitimate." CAL. CIV. PROC. CODE § 1963 (1963) (repealed 1965). Civil Code section 193 created a corresponding presumption: "All children born in wedlock are presumed to be legitimate," CAL. CIV. CODE § 193 (1937) (repealed 1965), and Civil Code section 194 added an additional factor, foreshadowing the Uniform Parentage Act: "[a]ll children of a woman who has been married, born within ten months after the dissolution of marriage, are presumed to be legitimate children of that marriage." *Id.* § 194. All three provisions were repealed, without replacement, in 1965. 1965 Cal. Stat. 299 §§ 8, 10.

relationship" and then establish a series of presumptions that are used to determine when the parent and child relationship applies, at least as it applies to fathers. "Parent and child relationship" means a relationship between the child and the child's natural or adoptive parents upon which law "imposes rights, privileges, duties, and obligations."[66] Section 7610(a) provides two methods of establishing the maternal parent and child relationship: (1) proof of giving birth; and (2) "under this part,"[67] which was interpreted in *Johnson v. Calvert*[68] to mean genetic testing under Family Code sections 7550 through 7558.[69] As to fathers, the statutes provide that the parent and child relationship can be established "between a child and the natural father . . . under this part."[70] The phrase "under this part" refers to the conclusive presumption of section 7540,[71] to voluntary declarations authorized under section 7571,[72] and most importantly, refers to the rebuttable presumptions in section 7611.[73]

The rebuttable presumptions of paternity are at the heart of the California version of the UPA. The statute states that a man is presumed to be the natural father[74] if any of the following four conditions are found:[75] (1) under section 7611(a), the man and the natural mother are or were married and the child was born during marriage or within 300 days after marriage terminated;[76] (2) under section 7611(b), the man has attempted an invalid marriage with the mother before the birth of the child;[77] (3) under section 7611(c), the man has married or

66. CAL. FAM. CODE § 7601 (West 1994). Family Code section 7602 also establishes that a parent and child relationship applies equally to every child and every parent regardless of marital status of the parents. *Id.* § 7602. *Cf.* Nancy S. v. Michele G., 279 Cal. Rptr. 212, 215 (Ct. App. 1991) (holding that a lesbian partner was not a parent within the meaning of the UPA where the lesbian partner was not the natural mother, had not adopted the children, and she and the natural mother did not have a "legally recognized marriage when the children were born").

67. CAL. FAM. CODE § 7610 (a) (West 1994).

68. CAL. FAM. CODE §§ 7550-7558 (West 1994 & Supp. 2003).

69. 851 P.2d 776 (Cal. 1993).

70. *Id.* § 7610(b) (West 1994). The statute also provides for the establishment of the parent and child relationship between child and adoptive parents "by proof of adoption." *Id.* § 7610(c).

71. *Id.* § 7540.

72. *Id.* § 7571 (West 1994 & Supp. 2003).

73. *Id.* § 7611.

74. Also, the presumptions do not apply where the child was conceived by an act of rape (a violation of California Penal Code section 261) or statutory rape (a violation of California Penal Code section 261.5) where the father is convicted and the mother was under the age of 15 and the father was 21 years of age or older. *Id.* § 7611.5(a)-(b) (West 1994).

75. *Id.* § 7611. It is the father's burden to prove he is a presumed father by a preponderance of the evidence. Glen C. v. Superior Court, 93 Cal. Rptr. 2d 103, 115 (Ct. App. 2000).

76. CAL. FAM. CODE § 7611(a) (West 1994 & Supp. 2003). The provision for the child to be born within 300 days of the end of the marriage indicates that marriage at the time of conception is the threshold requirement of this presumption.

77. *Id.* § 7611(b) (stating that a man is the presumed father if "[b]efore the child's birth, he and the child's natural mother have attempted to marry each other by a marriage solemnized in apparent compliance with law, although the attempted marriage is or could be declared invalid . . ."). This provision applies to invalid marriages which are voidable or void. If the marriage is merely voidable, meaning it "could be declared invalid only by a court," the child must be born during the marriage "or within 300 days after its termination by death,

attempted to marry the child's mother after the child's birth,[78] and any of the following is true: "[w]ith his consent, he is named as the child's father on the child's birth certificate";[79] he is obligated by "written voluntary promise or by court order" to pay child support for the child;[80] or (4) the man "receives the child into his home and openly holds out the child as his natural child."[81]

The primary method of rebutting the presumptions is the genetic test,[82] but if pre-UPA cases are applied to the present law, it seems clear that the presumptions could be rebutted by evidence that the man was absent or did not have intercourse with the mother.[83] The statute also has provisions for rebuttal by a judgment establishing paternity of another man[84] or where the man has consented in writing to the artificial insemination of his wife.[85] There is also a cryptic statement in section 7612 which declares that if two or more conflicting presumptions arise, the one that is "founded on the weightier considerations of policy and logic controls."[86] The standard of proof is clear and convincing evidence.[87]

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annulment, declaration of invalidity, or divorce." *Id.* If the attempted marriage is void, the child must be born "within 300 days after the termination of cohabitation." *Id.* Family Code section 2210 describes the grounds, such as unsound mind, fraud, coercion, or physical incapacity, for a marriage to be voidable, *id.* § 2210 (West 1994), and sections 2200 and 2201 designate incestuous, bigamous and polygamous marriages as void ab initio. *Id.* §§ 2200-01.

78. *Id.* § 7611(c).

79. *Id.* § 7611(c)(1).

80. *Id.* § 7611(c)(2).

81. *Id.* § 7611(d). This last presumption was removed from the Uniform Parentage Act (2000) on the grounds that this relic of the past has become outmoded due to the precision of modern genetic testing. UNIF. PARENTAGE ACT § 204 cmt (2000), 9B U.L.A. 348 (2001). *See* Adoption of Michael H., 898 P.2d 891, 895 (Cal. 1995); Glen C. v. Superior Court, 93 Cal. Rptr. 2d 103, 114 (Ct. App. 2000) (stating that there must be actual receipt into the home; constructive receipt is insufficient). *Cf.* Adoption of Kelsey S., 823 P.2d 1216, 1220-23 (Cal. 1992) (finding no actual receipt even though the father's attempts to bring the child into his home were thwarted by legal action of the mother); *In re* Estate of Baird, 188 P. 43, 47-48 (Cal. 1920) (finding no actual receipt where, under an assumed name, the father maintained illegitimate child clandestinely in another home with its mother, with whom he lives in illicit relations part of his time and also maintains relations with his legitimate family); *In re* Tanis H., 69 Cal. Rptr. 2d 380, 387-88 (Ct. App. 1997) (holding that living with the mother while she was pregnant did not amount to actual receipt). The burden is on the proponent of the rebuttable presumption to show actual receipt and public acknowledgment by a preponderance of the evidence. *In re* Spencer W., 56 Cal. Rptr. 2d 524, 527 (Ct. App. 1996).

There was a fifth provision which was in effect only until January 1, 1997 which stated "[a] man [was] presumed to be the natural father of a child . . . [i]f the child was born and reside[d] in a nation with which the United States engage[d] in an Orderly Departure Program, and [the man] acknowledge[d] that he [was] the child's father in a declaration under penalty of perjury." CAL. FAM. CODE § 7611(e) (West 1994 & Supp. 2003).

82. *See In re* Olivia H., 241 Cal. Rptr. 792, 795 (Ct. App. 1987) (stating that paternity may be conclusively refuted with blood tests).

83. *See* Cinders v. Lewis, 208 P.2d 687, 688 (Cal. Ct. App. 1949); *In re* Walker's Estate, 168 P. 689, 691 (Cal. 1917). Both of these cases would seem to be valid under to the modern provisions under the UPA.

84. CAL. FAM. CODE § 7612(c) (West 1994 & Supp. 2003); *see also* Barkaloff v. Woodward, 55 Cal. Rptr. 2d 167, 170-71 (Ct. App. 1996), *review denied.*

85. CAL. FAM. CODE § 7613 (West 1994). This provision also states that the husband and wife will be treated as the parents of the child conceived by artificial insemination. *Id.*

86. *Id.* § 7612(b) (West 1994 & Supp. 2003). *See* Brian C. v. Ginger K., 92 Cal. Rptr. 2d 294, 313 (Ct.

While it is clear that the presumptions are rebuttable, the question of who can rebut them is more complicated.[88] There are four categories of possible petitioners under the statutes who can attempt to rebut the rebuttable presumptions of paternity. Three of the categories appear in Family Code section 7630.[89] The first is described explicitly in section 7630(a): an action to determine the parent and child relationship may be brought by the "child, the child's natural mother, or a man presumed to be the child's father under section 7611."[90] However, one type of presumed father, the man who "receives the child into his home and openly holds out the child as his natural child,"[91] is excluded from the list of presumed fathers who can bring such an action.[92] All other presumed fathers—men who have been married to the mother before the birth of the child,[93] men who attempted marriage to the mother before the birth of the child,[94] and men who married or attempted to marry the mother after the birth of the child[95]—have the same rights to bring an action as the child and the natural mother. Together with the child and natural mother, these presumed fathers constitute the first category of people who can bring an action to establish paternity.[96]

The second category of persons who can assert paternity is by far the broadest. Section 7630(b) states that "[a]ny interested party may bring an action at any time for the purpose of determining the existence or nonexistence of the father and child relationship presumed under subdivision (d) of Section 7611," which involves a man who has taken the child into his home and held the child out to be his own.[97] In a sense, this broad group of those who can rebut the "taking in and holding out" presumption makes this the weakest of the presumptions; even non-presumed genetic fathers can bring an action to rebut it.[98]

App. 2000) (describing section 7612 as a weighing process to determine which man meeting the requirements will be the presumed father).

87. CAL. FAM. CODE § 7612(a) (West 1994 & Supp. 2003).

88. There is precedent from another state that the presumption of paternity in California law can be rebutted in any forum by any person who has an interest in doing so. *See* Taylor v. Richardson, 354 F. Supp. 13, 16 (D. La. 1973).

89. CAL. FAM. CODE § 7630 (West 1994 & Supp. 2003).

90. *Id.* § 7630(a) (West 1994).

91. *Id.* § 7611(d). *See also* sources cited *supra* note 81.

92. CAL. FAM. CODE §§ 7611(d), 7630(a) (West 1994).

93. *Id.* § 7611(a).

94. *Id.* § 7611(b).

95. *Id.* § 7611(c).

96. *Id.* § 7630(a). As to this first category of possible petitioners, the statute draws a distinction between actions brought for the purpose of declaring the existence of the paternal relationship and those declaring the nonexistence of the paternal relationship. Actions to declare the existence of the relationship may be brought at any time. *Id.* § 7630(a)(1). Those that are brought to declare the nonexistence of the relationship must be brought "within a reasonable time after obtaining knowledge of relevant facts." *Id.* § 7630(a)(2).

97. *Id.* § 7630(b).

98. Brian C. v. Ginger K., 92 Cal. Rptr. 2d 294, 313 (Ct. App. 2000).

The third category, established by section 7630(c), includes a long list of parties who can bring an action for paternity when there is no presumed father or when the presumed father is dead. The action may be brought by

> the child or personal representative of the child, the Department of Child Support, the mother or the personal representative or a parent of the mother if the mother has died or is a minor, a man alleged or alleging himself to be the father, or the personal representative, or a parent of the alleged father if the alleged father has died or is a minor.[99]

The fourth category, which falls under Family Code section 7631, includes putative fathers who are not presumed fathers. Simply paraphrased, section 7631 states that, except for cases under the conclusive presumption, a man who is not the presumed father may bring an action to have himself declared the natural father of a child who has a presumed father if the birth mother consents to adoption of the child.[100] Except for section 7630(b), the second category mentioned above, this is the only provision that expressly allows a non-presumed genetic-biological father to rebut a presumption of paternity in order to establish a parent-child relationship.[101] However, severe limitations are placed upon the biological father's right to do so. This action must be brought quickly, within thirty days after the man is served with notice of his potential paternity,[102] or after

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99. CAL. FAM. CODE § 7630(c) (West 1994 & Supp. 2003). This action may also be joined with an action under section 7662 to terminate the parent's rights. *Id.*

100. *Id.* § 7631 (West 1994).

101. In Dawn D. v. Superior Court, the California Supreme Court was asked to decide the constitutionality of California's rebuttable presumption of paternity and the corresponding limitations on standing to rebut the presumption. 952 P.2d 1139 (Cal. 1998). At issue before the California Supreme Court was whether sections 7611 and 7630 unconstitutionally deprived the genetic father of the chance to prove his paternity. Id. at 1139-40. The genetic father argued that he had "a liberty interest, protected as a matter of substantive due process, in being permitted to develop a parental relationship with his offspring." Id. at 1142. The court, however, relying on Michael H., rejected the notion that the genetic father had a protected liberty interest in establishing his paternity and upheld that statutory scheme preventing him from doing so. Id. at 1146. The majority viewed Michael H. as controlling and quickly concluded that Jerry, the genetic father, had no protected liberty interest in establishing a relationship with his son. Id. The court apparently found Michael H. persuasive because seven Justices in Michael H. agreed that a biological link alone does not create a protected interest. Id. at 1144-45. Ignoring the fact that Jerry made great efforts to establish a relationship with his son and was only prevented from doing so by Dawn, the mother, the court concluded that, because Jerry had no existing relationship with the child, he also had no protected liberty interest in establishing one. Id.

Justice Chin, in dissent, began her analysis with the proposition that Jerry's interest in establishing a relationship with his child was a constitutionally protected liberty interest. *Id.* at 1150. She first pointed out that *Michael H.* is not authoritative because only four Justices agreed that there was no liberty interest for a biological father in Michael H. or Jerry's position. *Id.* at 1150-51. In *Michael H.*, Justice Stevens, who provided the fifth vote for the plurality, found that the California scheme provided sufficient due process protection but rejected the plurality's reasoning that a biological father of a child born to a woman married to another man could never have a protected interest in establishing a relationship with his child. *See id.* (discussing Michael H. v. Gerald D., 491 U.S. 110, 132-36 (1989) (Stevens, J., concurring)).

102. CAL. FAM. CODE §§ 7660-7670 (West 1994 & Supp. 2003). The notice provision referred to in the statute is required as part of the process of terminating a parent's rights prior to adoption under sections 7660 through 7670. The notice provision in section 7666 specifically requires that "notice be given to every person

the child's birth, "whichever is later."[103] It is worthwhile to note that these provisions allow for the automatic termination of parental rights of a non-presumed father who does not respond to the notice.[104] If the non-presumed genetic father does respond to the notice and claims parental rights, then the best interest test applies. The court will make a preliminary decision on whether it is in the best interest of the child for the adoption to proceed considering all "relevant evidence, including efforts made by the father to obtain custody, the age and prior placement of the child, and the effects of the change of placement on the child."[105] If it is in the best interest of the child, the father will be allowed to retain parental rights and the adoption will be barred unless the father consents to it.[106] If it is in the best interest of the child for the adoption to proceed, or if the man is found not to be the genetic father, the court may order that the man's consent is not required. Such an order terminates all possible parental rights.[107] This application of the best interest standard does not apply to the presumed father if the mother attempts to place the child up for adoption. The presumed father's rights must be terminated.[108]

3. *Voluntary Declaration*

The California Family Code also provides for the establishment of paternity by voluntary declaration in sections 7570-7577.[109] These provisions provide an administrative framework to obtain voluntary declarations and to encourage the establishment of paternity through the utilization of voluntary declarations.[110] The voluntary declaration must be signed by both the putative father[111] and the

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identified as the natural father or a possible natural father." *Id.* § 7666. This provision indicates that the California Rules of Civil Procedure will be followed although publication or posting of notice is not required, presumably because of concerns for privacy. *Id.* Additionally, where the whereabouts of the father are unknown, the court may dispense with the notice requirement. *Id.*; *see also id.* § 7663 (identifying special provisions included to identify and locate possible fathers).

103. *Id.* § 7662.

104. *Id.* § 7664(a) (West 1994). Section 7665 terminates parental rights when the court cannot find the natural father. *Id.* § 7665. *See generally* Louise A. Leduc, *No-Fault Termination of Parental Rights in Connecticut: A Substantive Due Process Analysis*, 28 CONN. L. REV. 1195 (1996) (providing general background on termination of parental rights and the application of Connecticut law to the proceedings).

105. CAL. FAM. CODE § 7664(b) (West 1994).

106. *Id.*

107. *Id.*

108. *Id.* § 7664(c).

109. *Id.* §§ 7570-7577 (West 1994 & Supp. 2003).

110. *See id.* §§ 7571-7572, 7574. These provisions include: requirements to notify unmarried mothers and putative fathers of the procedures for a voluntary declaration, *id.* § 7571(a); the development and publication of written informational materials, *id.* § 7572(a); warnings regarding the effect of a voluntary declaration to be attached to materials, *id.* § 7572(b); authorization for the State Department of Social Services to promulgate regulations, *id.* § 7572(e); and requirements for the creation of a form for the declaration. *Id.* § 7574.

111. *Id.* § 7574(b)(2).

mother,[112] and must be filed with the Department of Child Support Services.[113] At one time the effect of a voluntary declaration was expressed in terms of a presumption and, indeed, this presumption still applies to voluntary declarations signed prior to December 31, 1996.[114] The present statute simply states that the voluntary declaration signed after December 31, 1996 "shall establish the paternity of a child and shall have the same force and effect as a judgment for paternity issued by a court of competent jurisdiction."[115] Nevertheless, one California court of appeal case[116] has determined that the voluntary declaration still creates a presumption because of the language of Family Code section 7611.[117]

Regardless of whether the declaration creates a presumption, the declaration can be rescinded by either parent within sixty days.[118] The court may also set aside the declaration if all experts conclude based upon genetic tests that the man who signed the declaration was not the child's father.[119] A notice of motion for such a declaration may be filed by "a local child support agency, the mother, [or] the man who signed the voluntary declaration" within two years of the child's birth.[120] The notice of motion can also be filed in an action brought under section 7630 "to determine the existence or nonexistence of the father and child relationship."[121]

4. Genetic Tests

While the California statutory scheme relies heavily on presumptions, it does provide for the use of genetic tests to determine paternity and, indeed, creates a presumption in favor of the result of paternity tests. The term "genetic test" is defined by the statute as "any genetic test that is generally acknowledged as reliable by accreditation bodies,"[122] and the statute adds that the test must be performed by an accredited laboratory.[123] In any proceeding the court may order

112. *Id.* § 7574(b)(1).

113. *Id.* § 7571(a).

114. *Id.* § 7576.

115. *Id.* § 7573.

116. *In re* Liam L., 101 Cal. Rptr. 2d 13 (Ct. App. 2000).

117. CAL. FAM. CODE § 7611 (West Supp. 2003). "A man is presumed to be the natural father of a child if he meets the conditions provided in Chapter 1 (commencing with Section 7540) or Chapter 3 (commencing with Section 7570) of Part 2 . . . ."

118. *Id.* § 7575(a).

119. *Id.* § 7575(b)(1). A stipulation to paternity is also voidable when a parent was not represented by counsel, was not advised of his right to trial, and would not have executed the agreement had he been properly advised. County of Los Angeles v. Soto, 674 P.2d 750, 752 (Cal. 1984).

120. CAL. FAM. CODE § 7575(b)(2)(a) (West Supp. 2003).

121. *Id.* Also, the notice of motion may be filed "in any action . . . for child custody, visitation, or child support based upon the voluntary declaration of paternity." *Id.*

122. *Id.* § 7551 (West 1994 & Supp. 2003).

123. *Id.* § 7552. The accreditation body must be approved by the United States Secretary of Health and Human Services. *Id.*

the "mother, child, and alleged father" to have a genetic test[124] and it has the power to resolve an issue against a party who refuses to submit to the test.[125] If the testing process meets specific procedural requirements,[126] it will be admitted without foundation for authenticity unless there is a written objection.[127] However, if there is a written objection, which may be filed as late as five days before the hearing,[128] experts appointed by the court must be called to establish authenticity and veracity.[129]

As to the evidentiary effect of the genetic test, the California Family Code has two provisions. The first provision under section 7554 instructs courts to resolve the question of paternity according to the testimony of the experts.[130] If the experts agree "that the alleged father is not the father," the court must conclude that he is not the father.[131] If the experts disagree about the results of the test or conclude that there is only a probability of paternity, then the court may take the question under submission subject to California Evidence Code section 352, which allows a court to exclude evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."[132] The second provision regarding the evidentiary effect of genetic tests under section 7555 creates a rebuttable presumption of paternity "if the court finds that the paternity index, as calculated by experts qualified as examiners of genetic markers, is 100 or greater."[133]

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124. *Id.* § 7551. The only limitation would appear to be the relevancy of the information that the test will reveal. *Id.*

125. *Id.*

126. *Id.* Among these requirements are: the requirements for service of copies, *id.* § 7552.5(a) (West Supp. 2003); a declaration of custodian of records, *id.* § 7552.5(a)(1); a statement establishing chain of custody, *id.* § 7552.5(a)(2); a statement establishing that procedures are "in the laboratory's ordinary course of business to ensure accuracy. . . ," *id.* § 7552.5(a)(3); and a statement that test results were prepared by qualified person. *Id.* § 7552.5(a)(4).

127. *Id.* § 7552.5(b).

128. *Id.*

129. *Id.* § 7552.5(c).

130. *Id.* § 7554 (West 1994).

131. *Id.* § 7554(a). This same instruction to the court exists in section 7541(a). *Id.* § 7541(a) (West 1994 & Supp. 2003).

132. *Id.* § 7554(b) (West 1994); CAL. EVID. CODE § 352 (West 1995).

133. CAL. FAM. CODE § 7555(a) (West 1994 & Supp. 2003). Subsection (b) defines the relevant terms as follows: "'[g]enetic markers' mean separate genes or complexes of genes identified as a result of genetic tests," *id.* § 7555(b)(1), and "'[p]aternity index' means the commonly accepted indicator used for denoting the existence of paternity," *id.* § 7555(b)(2). The authors of the section add this information regarding the "paternity index":

> It expresses the relative strength of the test results for and against paternity. The paternity index, computed using results of various paternity tests following accepted statistical principles, shall be in accordance with the method of expression accepted at the International Conference on Parentage Testing at Airlie House, Virginia, May 1982, sponsored by the American Association of Blood Banks.

Id. § 7555(b)(2); *see also* County of El Dorado v. Misura, 38 Cal. Rptr. 2d 908, 916-17 (Ct. App. 1995)

The impact of the genetic testing provisions on paternity is really determined by those code sections which govern the use of genetic testing. The workhorse provision is Family Code section 7630(c) which allows a wide variety of people to bring an action to determine the father and child relationship through the use of genetic testing where there is no presumed father.[134] The child, the Department of Child Support Services, or the mother can bring an action to establish through genetic testing that a particular man is the child's natural father,[135] and an alleged father can also bring an action to establish his own relationship with the child.[136]

If there is a presumed father, then the ability to use genetic testing to determine the existence of a father and child relationship becomes restricted, especially for a non-presumed genetic father. If there is a conclusive presumption of paternity, then genetic testing can only be used to rebut the presumption by the conclusively presumed father himself, by a man who is a presumed father under the rebuttable presumptions,[137] by the child, or by the mother of the child if she has an affidavit from the genetic father acknowledging his paternity.[138] The genetic father, if he does not have the status of a presumed father, may not challenge the conclusive presumption.[139] The approach is similar under the rebuttable presumptions: they can be challenged under section 7630(a) by the child, the mother,[140] or "a man presumed to be the child's father."[141] With two exceptions, the genetic father who does not have presumed status may not challenge the rebuttable presumptions. The first exception applies when the action is for the purpose of rebutting the presumption created by section 7611(d), where a man "receives the child into his home and openly holds the child out as his natural child,"[142] which under section 7630(b) can be rebutted by "[a]ny interested party . . . at any time."[143] The second exception, under section 7631, allows a genetic father to bring an action to establish his paternity where there is a presumed father under the rebuttable presumptions "if the mother relinquishes

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(holding that evidence that the father had intercourse with the mother during the period of conception and had a paternity index of 970 based on genetic testing was sufficient to trigger the statutory presumption of paternity).

134. CAL. FAM. CODE § 7630(c) (West 1994 & Supp. 2003).

135. *Id.*

136. *Id.*

137. *Id.* § 7611. Only presumed fathers under California Family Code section 7611 qualify as presumed fathers to rebut the conclusive presumption. *Id.* The presumption of paternity created by a genetic test with a paternity index of 100 or greater under California Family Code section 7555(a) does create presumed-father status for purposes of rebutting the conclusive presumption or the rebuttable presumptions. *Id.* § 7555(a).

138. *Id.* § 7641 (West 1994).

139. *See supra* note 15 (discussing *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (upholding the limitation placed upon the right of the genetic father to challenge the conclusive presumption)).

140. CAL. FAM. CODE § 7630(a) (West 1994 & Supp. 2003). The mother does not have to have an affidavit from the natural father to rebut these presumptions.

141. *Id.* (excluding presumed fathers under section 7611(d) from using genetic tests to rebut a presumption of paternity).

142. *Id.* § 7611(d).

143. *Id.* § 7630(b) (West 1994).

for, consents to, or proposes to relinquish for or consent to, the adoption of the child."[144] There are significant limitations on this right to bring an action. The genetic father must bring the action within thirty days of being notified that he might be the father or the date of the child's birth, whichever is later.[145] More significantly, if the genetic father seeks to assert his rights, the court must determine not only that he is the genetic father but also that it is in the best interest of the child for the genetic father to retain his parental rights.[146] The existence of these restrictions on the application of genetic testing to paternity determinations establishes a very important point. Presently in California, genetic testing does not serve as the baseline in establishing paternity.

B. *Maternity*

Issues regarding the establishment of maternity have been rare simply because the primary criterion for determining maternity, the "giving birth test," has always served so well. Moreover, the birth mother was always the genetic mother. Traditionally, problems only arose when there was a mix-up regarding the birth mother.[147] Solomon would not have had to resort to his "sword test" if he had solid evidence regarding the birth mother.[148] If two babies were switched in the hospital, they were returned to their "real" mothers, the mothers who had given birth to them.[149] If many years had passed and the children had formed strong psychological bonds with their custodial parents,[150] the result might have been different; but until those bonds were fully formed, the consensus was that the children should be returned to their birth mothers.[151] However, in recent times, with the advent of modern reproductive technology, things have become much more complicated. The "giving birth test" is no longer adequate because it is now possible for different women to be a child's genetic mother, birth mother,

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144. *Id.* § 7631.

145. *Id.*

146. *Id.* § 7664(b).

147. The result can be humorous or tragic. *See, e.g.*, HENRY FIELDING, TOM JONES (Wordsworth Classics 1999) (1749) and SOPHOCLES, OEDIPUS REX (R.D. Droger David Dawe ed., Cambridge Univ. Press 1983) (n.d.).

148. *See* 1 *Kings* 3:16-27. It is interesting that Solomon assumed that the psychological mother was the same as the genetic and birth mother; otherwise, the story means that Solomon was actually determining who had bonded with the child.

149. *See, e.g.*, Jennifer L. Foote, Comment, *What's Best for Babies Switched at Birth? The Role of the Court, Rights of Non-Biological Parents, and Mandatory Mediation of the Custodial Agreements*, 21 WHITTIER L. REV. 315, 332-33 (1999) (acknowledging that many courts have some preference for natural parents); Janet Leach Richards, *Redefining Parenthood: Parental Rights Versus Child Rights*, 40 WAYNE L. REV. 1227, 1254-55 (1994) (stating that most jurisdictions have a natural parent preference); *see also* Perry-Rogers v. Fasano, 715 N.Y.S.2d 19, 25 n.2 (2000) (noting that hospital mix-ups discovered immediately should be corrected at once).

150. *Cf.* Twigg v. Mays, 1993 WL 330624 at *6 (Fla. Cir. Ct. 1993) (rejecting the claim of the natural parents because the switch was not discovered for ten years and because of the detrimental effect to the child that would otherwise result).

151. *See* 1 *Kings* 3:16-27.

intended mother, and even psychological mother.[152] If an artificial womb were ever developed, the "giving birth test" would be in danger of becoming meaningless, and some women would stand in the same relationship to their children as fathers do now.

The California version of the UPA[153] contains the "giving birth test." Family Code section 7610(a) provides that "[b]etween a child and the natural mother, [the parent-child relationship] may be established by proof of her having given birth to the child . . . ."[154] In addition, the California Supreme Court in *Johnson v. Calvert*,[155] has construed the genetic testing provisions of Family Code sections 7550 through 7558 to apply also to the mother and child relationship.[156] This construction was based upon two other Family Code provisions: section 7650 which states, "[i]nsofar as practicable, the provisions of this part [which include the genetic testing provisions] applicable to the father and child relationship apply" also to the establishment of the mother and child relationship;[157] and section 7551 which authorizes blood testing of "mother, child, and alleged father" in any "proceeding in which paternity is a relevant fact."[158] Therefore, the *Johnson* court concluded that, "[w]hen maternity is disputed, genetic evidence derived from blood testing is likewise admissible. . . . By parity of reasoning, blood testing may also be dispositive of the question of maternity."[159]

Johnson v. Calvert was the first California Supreme Court case truly to struggle with the issue of establishing maternity. The court ultimately concluded that where the two tests to determine maternity under California law—the genetic test and the "giving birth test"[160]—conflict and yield disparate results, the courts must use a wholly new approach to maternity, the intent test:

> [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.[161]

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152. In addition, a child may have a genetic father, a presumed father, an intended father, a contractual father, and a psychological father. *See, e.g.*, *In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280, 285 (Ct. App. 1998) (discussing different ways in which paternity may be established under California law).

153. CAL. FAM. CODE §§ 7600-7700 (West 1994 & Supp. 2003).

154. *Id.* § 7610(a).

155. 851 P.2d 776, 779 (Cal. 1993).

156. CAL. FAM. CODE §§ 7550-7558 (West 1994 & Supp. 2003).

157. *Id.* § 7650 (West 1994).

158. *Id.* § 7551.

159. *Johnson*, 851 P.2d at 781 (citations omitted).

160. *Id.* at 782.

161. *Id.*

The issue of maternity came to the fore in *Johnson* only because the child who was the subject of the maternity dispute was created through the use of new technology. The new technology in *Johnson* was gestational surrogacy, which is delicately described by the California Supreme Court as the process whereby "pursuant to a surrogacy agreement, a zygote formed of the gametes of a husband and wife is implanted in the uterus of another woman, who carries the resulting fetus to term and gives birth to a child not genetically related to her . . . ."[162] The genetic donors in *Johnson* were Mark and Crispina Calvert, a married couple who, under the provision of the surrogacy contract, were to receive the child. The surrogate mother was Anna Johnson who, in violation of the agreement, sought to keep the child.[163] The supreme court broke the tie[164] between Crispina, the genetic mother, and Anna, the birth mother, by resorting to the intent test[165] and concluded that Crispina was the child's natural mother.[166]

In reaching this conclusion, however, the court offered no direct statement of why it chose the intent test; rather, its position was expressed through a series of references to legal commentators.[167] From the court's use of these references, it is possible to understand the court's reasons for choosing the intent test. First, the intended parents have a special status and claim because they are the prime movers of the child's birth; the child would not have been born without their efforts.[168] Second, the court was also influenced by the intended parents'

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162. *Id.* at 777-78 (footnotes omitted); *see also* Anne Goodwin, *Determination of Legal Parentage in Egg Donation, Embryo Transplantation and Gestational Surrogacy Arrangements*, 26 FAM. L.Q. 275, 276 (1992) (providing a detailed description of gestational surrogacy).

163. *Johnson*, 851 P.2d at 778. The only explanation as to why the court did not simply pick the genetic mother must be inferred from footnote 10, which shows that the court wanted an approach which would also cover the situation in which the genetic mother was a true donor and the birth mother was the intended mother. *Id.* at 782 n.10.

164. California Family Code section 7612 contemplates situations where presumptions conflict and states that if two or more conflicting presumptions arise, the one which is founded "on the weightier considerations of policy and logic controls." CAL. FAM. CODE § 7612(b) (West 1994 & Supp. 2003). While technically the "giving birth test" in the code is not stated as a presumption and the court is not necessarily bound to follow this section, this section does show the legislature's preference to stay within the bounds of the statute and not create a new test as a tie-breaker.

165. This approach had been suggested by several law review commentators, including: John Lawrence 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 (1991); Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297; Andrea E. Stumpf, Note, *Redefining Mother: A Legal Matrix for New Reproductive Technologies*, 96 YALE L.J. 187 (1986).

166. *Johnson*, 851 P.2d at 778.

167. *Id.*; *see also* Hill, *supra* note 165, at 415; Shultz, *supra* note 165, at 323; Stumpf, *supra* note 165, at 197-202.

168. The court stated:

> Professor Hill, arguing that the genetic relationship per se should not be accorded priority in the determination of the parent-child relationship in the surrogacy context, notes that "while all of the players in the procreative arrangement are necessary in bringing a child into the world, *the child would not have been born but for the efforts of the intended parents*. . . . [T]he intended parents are the first cause, or the prime movers, of the procreative relationship."

Johnson, 851 P.2d at 782 (quoting Hill, *supra* note 165, at 415); *see also* Hill, *supra* note 165, at 415 (citation

intentions because they were "voluntarily chosen, deliberate, express and bargained-for . . . ."[169] Third, the court followed what might be called the "mental concept doctrine"—that is, the parent is that person who was the originator of the concept of the child.[170] Fourth, the court seemed to be influenced by the desire to meet the needs of other situations which may arise using new technology.[171] Finally, the court viewed the intended parents as those who will act in the best interests of the child,[172] a view which is especially interesting because the court, while applying this "imputed best interest test," rejected the use of the "actual" best interest standard suggested by Justice Kennard in her dissent.[173] The court

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omitted). The court does not go beyond this quote to explain why the prime mover mother should have preference over the birth mother. This is an important point because, in regard to intent, Crispina and Anna are on equal footing. Both intended to create and raise a child. The only difference between the two is that Crispina developed her full intent first. The court defines the term "intended mother" as "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" and concludes that she "is the natural mother under California law." *Johnson*, 851 P.2d at 782. Using the definition of "intent" in the Restatement of Torts, that "the actor desires to cause consequences of his act," it can be said validly that both Anna and Crispina acted with intent, with a desire to create a child and that they both believed that the birth of a child would result. RESTATEMENT (SECOND) OF TORTS § 8A (1965). The claims of Crispina and Anna to the status of intended mother diverge only when emphasis is placed on the second half of the definition that the woman intends not only to procreate but also "to raise [the child] as her own." *Johnson*, 851 P.2d at 782. Crispina developed her desire to raise the child earlier than Anna. As to the use of intent to determine maternity, timing appears to be of the essence; the "prime" in "prime mover" is key.

The next question is, why should the prime mover be favored over a birth mother who develops her desire to raise the child during the period of gestation? The court does not fully explain its answer to this question, but, if the court had looked to statutory authority regarding birth mothers who change their minds and want to raise their children, the result might have been different. California law allows birth mothers to revoke their consent to adoption. While there is a thirty day limit on the right to revoke, that limit does not begin to run until after the placement agreement or consent has been signed, which cannot take place until the child is born. CAL. FAM. CODE § 8814.5 (West Supp. 2003). Basically, adoption law allows a birth mother to have a change of heart. A woman who during gestation consents to the adoption of her child, like Anna, has no intent to raise the child, but this woman, unlike Anna, has the right to change her mind after the birth of the child. If she develops an intent to raise the child during gestation or after the child's birth, that intention will be honored, and she will be considered the natural mother. Why is Anna not afforded a similar right to revoke her agreement? One possible answer is that she is not the child's genetic mother.

169. *Johnson*, 851 P.2d at 783 (citing Shultz, *supra* note 165, at 323). The full statement by the court is as follows: "'Within the context of artificial reproductive techniques,' Professor Shultz argues, 'intentions that are voluntarily chosen, deliberate, express and bargained-for ought presumptively to determine legal parenthood.'" *Johnson*, 851 P.2d at 783 (quoting Shultz, *supra* note 165, at 323)..

170. *Id.* (citing Stumpf, *supra* note 165, at 196). This doctrine comes from a student note in the Yale Law Journal. The court stated:

> Another commentator has cogently suggested, in connection with reproductive technology, that "[t]he 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."

Id. (quoting Stumpf, *supra* note 165, at 196).

171. *Id.* at 782 & n.10, 783.

172. *Id.* at 783 (quoting Shultz, *supra* note 165, at 397).

173. Except for these comments about the best interest test, the majority in *Johnson* did not address any of the analytical problems raised by Justice Kennard in her dissent. In dealing with the majority's arguments, Justice Kennard raised four issues. First, she argued that the intent test as it is being used by the majority in

concluded the best interest test was inappropriate because (1) it is repugnant to the right of privacy;[174] (2) its use confused issues of parentage and issues of custody;[175] and (3) because the best interest standard is a fact-intensive determination which promotes litigation and instability.[176]

The court did not offer a satisfactory explanation as to why it did not simply enforce the surrogacy contract. If a tie-breaker was needed in this situation, why not make it the contract rather than the somewhat novel intent test? The law of contracts is well-established; the law regarding the use of the intent test to determine maternity, however, is non-existent.[177] The usual reason for not enforcing surrogacy contracts is that they violate public policy; however, the court expressly stated that it did not find that the contract violated public policy:

Johnson is really the "but-for" test, a tort doctrine which has been rejected in California, and replaced by the substantial factor test. *Johnson*, 851 P.2d at 795-96 (Kennard, J., dissenting) (citing Mitchell v. Gonzales, 819 P.2d 872, 876, 879-81, (Cal. 1991) (disallowing the "but-for" test in jury instructions for tort cases)). More importantly, she pointed out, under either the "but-for" test or the substantial factor test, the positions of Anna and Crispina are equal. But for the conduct of both Anna and Crispina, the child would not have been born; both Anna and Crispina are a substantial factor in the birth of the child. *See id.* at 796. (Kennard, J., dissenting) (stating: "Neither the 'but for' nor the 'substantial factor' test of causation provides any basis for preferring the genetic mother's intent as the determinative factor in gestational surrogacy cases: Both the genetic and the gestational mothers are indispensable to the birth of a child in a gestational surrogacy arrangement.").

Second, Justice Kennard pointed out that the "originator of the concept" idea is one that is borrowed from intellectual property law, an area that is completely unrelated to parentage and that is indeed repugnant to the parent-child relationship, since, above all, we must not treat children as property. *See id.* (Kennard, J., dissenting).

Third, Justice Kennard dealt with the "voluntarily chosen, deliberate, express and bargained-for" argument of the majority, by pointing out that this is really a contract enforcement argument and that law does not recognize specific enforcement of personal service contracts. *Id.* at 796-97. (Kennard, J., dissenting).

Finally, Justice Kennard pointed out that the majority adopted an imputed best interest standard, that the interest of the child and those of the person who intended to bring him/her into the world correspond, and rejected the actual "best interest test," where the best interest of the particular child in question would be determined and followed. *Id.* at 798-99. (Kennard, J., dissenting). Kennard stated:

> I agree with the majority that the best interests of the child is an important goal; indeed, as I shall explain, the best interests of the child, rather than the intent of the genetic mother, is the proper standard to apply in the absence of legislation. The problem with the majority's rule of intent is that application of this inflexible rule will not serve the child's best interests in every case.

Id. at 798. (Kennard, J., dissenting).

174. There is no explanation as to why privacy concerns are especially great and outweigh the best interest of the child when matters of assisted conception are involved. It is not difficult to imagine scenarios that would endanger a child that could easily outweigh whatever privacy right the putative parent might have. The child suffers no additional loss of privacy by virtue of a best interest analysis.

175. While the best interest standard is commonly associated with custody disputes, there is no reason why it cannot be used to determine parentage; in fact, such a use is authorized by statute in California Family Code sections 7631 and 7664 for the determination of parentage when a mother relinquishes a child for adoption. CAL. FAM. CODE §§ 7631, 7664(b) (West 1994).

176. *Johnson*, 851 P.2d at 782 n.10. In a sense, the best interest standard might promote judicial economy. If there is truly something egregious in the background of the intended parent, the protection afforded by a best interest hearing is a small price to pay, one that is not uncommon or abnormal, one that has established rules and procedures in place. Refusal to inquire into the best interest of the child at this point of judicial contact is a false and dangerous economy.

177. Perhaps the court did not want to enforce the contract because specific performance of a personal service contract is not an available remedy under contract theory. But, as Justice Kennard pointed out, if the law forbids the enforcement of a personal service contract, should it not prohibit the specific performance of the intent of the parties as it is presented in that contract?

"[i]n deciding the issue of maternity under the Act we have felt free to take into account the parties' intentions, as expressed in the surrogacy contract, because in our view the agreement is not, on its face, inconsistent with public policy."[178] Also, the court in *Johnson* used a contract-like rationale to justify the intent test: "'Within the context of artificial reproductive techniques,' Professor Shultz argues, 'intentions that are voluntarily chosen, deliberate, express and bargained-for ought presumptively to determine legal parenthood.'"[179] Moreover, the court appears to have relied heavily on the contract in this case. The intent of the parties is revealed in the contract. No inquiry need be made as to who is the intended mother because the intended mother is also the contractual mother. Application of the intent test has the same result as enforcement of the contract unless the court envisions assisted reproduction scenarios in which there is an intended mother but no contract.[180] While this situation might arise where there is no written contract, it is difficult to imagine the absence of at least an oral contract. Or, does the court envision situations in which there is a contractual mother and an intended mother, for example, where the contractual mother is a mere front for the intended mother, the prime-mover, or the originator of the concept? Would the court award the child to the intended mother over the contract mother? Unless there really are scenarios in which the intent test yields a different approach than enforcement of the contract, the better approach is simply to enforce the contract and develop parameters for enforcing contracts.

The California Supreme Court's dismissal of the best interest standard as a tie-breaker seems premature and ill-considered as a rule of law. It is difficult to imagine the court would have awarded the baby to Crispina and Mark if the court actually had thought that it was not in the best interest of the baby to be placed with them. Would the court have followed the intent test if there had been something truly egregious in Crispina and Mark's background? No doubt the court was greatly comforted by its own conclusion as to the best interest: "[t]he Calverts are the genetic and intending parents of their son and have provided him, by all accounts, with a stable, intact, and nurturing home."[181] The court had the luxury of ignoring the child's best interest standard because it was convinced that, in this particular case, it would be in the child's best interest to be placed with Crispina and Mark.

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178. *Johnson*, 851 P.2d at 783. The view that surrogacy contracts violate public policy has been widely expressed. The most commonly mentioned policies are: the best interest of the child should determine custody arrangements; children should remain with their natural parents; the rights of natural parents are equal; the policy against the sale of children; a mother's consent for adoption is revocable; the policy against the commodification and degradation of women who serve as surrogates; and the policy that asserts that the legislature, as the voice of the people, ought to be the branch of government to decide such important issues. *See, e.g.*, *In re* Baby M., 537 A.2d 1227, 1246-50 (N.J. 1988).

179. *Johnson*, 851 P.2d at 783 (citing Shultz, *supra* note 165, at 323).

180. The position of this article is that, if there is an invalid contract, or no contract for that matter, then the best interest standard should be used.

181. *Johnson*, 851 P.2d at 781 n.8.

The court's rejection of the best interest test to be applied in assisted conception cases is even more enigmatic because of its reliance upon what might be called the imputed best interest standard. The court quoted from a scholarly source:

> Moreover, as Professor Shultz recognizes, the interests of children, particularly at the outset of their lives, are "[un]likely to run contrary to those of adults who choose to bring them into being." Thus, "[h]onoring the plans and expectations of adults who will be responsible for a child's welfare is likely to correlate significantly with positive outcomes for parents and children alike."[182]

There are, of course, several problems with this imputed best interest standard. First, this view seems to be based upon the naive assumption that those who would use new technology to bring a child into the world are good people and would bring a child into the world only for good reasons. The Court imputed wholly pure motives and purposes to the persons who intend to procreate through new reproductive technology. However, one of the objections to new technology, such as cloning, is that it will be used for bad motives and purposes and will lead to the commodification of children by those who would procreate solely for economic benefit or worse. Second, this form of reasoning is purely intuitive. To many it may seem just as likely that a woman who has given birth to a child would act in the best interest of the child. Third, an imputed best interest standard is always suspect. Such a standard might be justified in an emergency situation where there is a need for an immediate decision regarding parentage. In all other situations, doing that which is in the best interest of the child demands a determination of the best interest. It may be that an intended parent is an alcoholic, drug addict, child abuser, or even a pedophile. Justice Kennard was correct: accuracy in the application of the best interest standard demands a hearing.[183]

Perhaps the question which really remains after *Johnson* is whether the intent test is merely a tie-breaker to be used when there is both a birth mother and a genetic mother vying for the status of natural mother or whether it is a new test designed to meet the needs of all cases of assisted reproduction. There is no doubt that the authors cited by the court in *Johnson* argue that the intent test should play a much greater role than merely that of tie-breaker.[184] Moreover, the court in *Johnson* also may have used the intent test to determine that Mark was the father of the child even though in his case there was no tie to break.[185]

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182. *Id.* at 783 (quoting Shultz, *supra* note 165, at 397).

183. *See id.* at 799-800 (Kennard, J., dissenting).

184. *See* Hill, *supra* note 165, at 413-18; Shultz, *supra* note 165, at 322-27; Stumpf, *supra* note 165, at 194-97.

185. *Johnson*, 851 P.2d at 778. The court in *Johnson* appeared to have used the intent test to determine that Mark was the father of the child. *See id.* at 782. At the very least, this case is somewhat vague as to what test is being used for paternity. There can be no doubt that the court actually resolved the issue of paternity

Additional support for the view that the intent test has the potential for wider applicability can be found in *In re Marriage of Buzzanca*,[186] in which a man attempted to avoid his parental responsibilities to a child born through the process of gestational surrogacy. There was no tie to break because the action was brought by the intended mother against the intended father; the two were married at the time the gestational surrogacy process[187] had been initiated.[188] The gestational mother and the donors of both the sperm and the ovum did not assert parental rights.[189] The California court of appeal concluded that the intended parents were the child's parents and that the intended father had to pay child support. The court declared, "they are still her lawful parents given their initiating role as the intended parents in her conception and birth."[190]

C. Assisted Conception

1. Artificial Insemination

In California, as in most states,[191] the process of semen donation and artificial insemination and the issue of parentage as a result of this process is controlled by statutory provisions. California Family Code section 7613 is straightforward and direct. Subsection (b) severs the potential parent-child relationship between donor and child: "The donor of semen provided to a licensed physician and surgeon for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived."[192] Subsection

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when it stated: "We conclude that the husband and wife are the child's natural parents . . . ." *Id.* at 778. Justice Arabian, in his concurring opinion, referred to Mark, as "the child's natural father." *Id.* at 787 (Arabian, J., concurring). The court did not apply any of the standard presumptions of paternity. The trial court decided the case based on the genetic evidence linking Mark and Crispina to the child. *Id.* at 778. However, the California Supreme Court did not explicitly base the paternity issue on genetics. Moreover, there are several places where the court mentioned the husband Mark's intent: "The Calverts are the genetic and intending parents of their son and have provided him, by all accounts, with a stable, intact, and nurturing home." *Id.* at 781 n.8.

> Mark and Crispina are a couple who desired to have a child of their own genes but are physically unable to do so without the help of reproductive technology. They affirmatively intended the birth of the child, and took the steps necessary to effect in vitro fertilization. But for their acted-on intention, the child would not exist.

Id. at 782. "Mark and Crispina never intended to 'donate' genetic material to anyone. Rather, they intended to procreate a child genetically related to them by the only available means." *Id.* at 787.

186. 72 Cal. Rptr. 2d 280 (Ct. App. 1998).

187. *Id.* at 282.

188. *Id.* at 282-83.

189. *Id.* at 283.

190. *Id.* at 293. One other case, decided just after *Johnson*, declined to use the intent test when there was no tie to be broken. *See In re* Marriage of Moschetta, 30 Cal. Rptr. 2d 893, 896 (Ct. App. 1994).

191. According to Nanette Elster, there are thirty-four states which have statutory provisions dealing with artificial insemination. Nanette Elster, *Who Is the Parent in Cloning?*, 27 HOFSTRA L. REV. 533, 537 n.14 (1999).

192. CAL. FAM. CODE § 7613(b) (West 1994).

(a) establishes the new parental relationship with the husband of the woman inseminated:

> If, under the supervision of a licensed physician and surgeon and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband's consent must be in writing and signed by him and his wife.[193]

The statute is silent about the determination of the mother-child relationship, presumably because in non-surrogacy situations the woman inseminated will be the birth mother under section 7610(a).[194] The involvement of a licensed physician in both severing one paternal relationship and establishing another is significant. In a sense, the physician represents the operation of law at a non-judicial level; in other words, the law is implemented not by judicial action or by the action of a representative of the executive branch such as a state agency, but rather by a private individual who has been licensed by the state. Moreover, this licensed individual has not been licensed by the state for the specific purpose of severing and creating parental relationships, but for the more general purpose of practicing medicine. Although there are requirements[195] and limitations[196] placed upon the physician in this situation, the physician's conduct actually operates in a manner similar to a judicial order severing a natural parent's rights and establishing an adoptive parent-child relationship.

Perhaps the most interesting case, and one of the few dealing with section 7613(b), is *Jhordan C. v. Mary K.*[197] which involved an at-home artificial insemination. The ultimate birth mother Mary K. and her partner Victoria T. sought to raise a child together.[198] They selected Jhordan C. to provide sperm so that Mary could artificially inseminate herself, possibly with the help of Victoria.[199] The implantation took place at home without physician involvement and pregnancy

193. *Id.* § 7613(a).

194. *Id.* § 7610(a).

195. CAL. BUS. & PROF. CODE § 2260(a) (West Supp. 2003). The Code states that, "[a] physician and surgeon who removes sperm or ova from a patient shall, before the sperm or ova are used for a purpose other than reimplantation in the same patient or implantation in the spouse of the patient, obtain the written consent of the patient as provided in subdivision(b)." *Id.* Subsection (b) states specific requirements for the form of consent. *Id.* §2260(b).

196. CAL. PENAL CODE § 367g (West 1999). The California Penal Code makes it a crime for anyone "to knowingly use sperm, ova, or embryos in assisted reproduction technology, for any purpose other than that indicated by the sperm, ova, or embryo provider's signature on a written consent form." *Id.* § 367g(a). It is also a crime "to knowingly implant sperm, ova, or embryos, through the use of assisted reproduction technology, into a recipient who is not the sperm, ova, or embryo provider, without the signed written consent of the sperm, ova, or embryo provider and recipient." *Id.* § 367g(b).

197. 224 Cal. Rptr. 530 (Ct. App. 1986).

198. *Id.* at 532.

199. *Id.*

resulted.[200] During the pregnancy, Jhordan kept in contact with Mary and when the baby, Devin, was born, Jhordan visited and showed interest in the child.[201] When Mary and Victoria sought to cut off his visitation, he brought an action to establish paternity and visitation.[202] Justice Donald King, a well-respected jurist and author of an important treatise on family law,[203] authored the opinion which held that "the trial court properly declared Jhordan to be Devin's legal father."[204] The rationale for this decision was straightforward. California Civil Code section 7005, the identical predecessor of Family Code section 7613, did not apply in this case to cut off the parent-child relationship between Jhordan and Devin.[205] The court reasoned that section 7005 had given women[206] the opportunity to take advantage of artificial insemination "without fear that the donor may claim paternity."[207] The requirement of physician involvement was an essential part of the statute, and it served two important functions: first, "a physician can obtain a complete medical history of the donor (which may be of crucial importance to the child during his or her lifetime) and screen the donor for any hereditary or communicable diseases,"[208] and second,

> the presence of a professional third party such as a physician can serve to create a formal, documented structure for the donor-recipient relationship, without which, as this case illustrates, misunderstandings between the parties regarding the nature of their relationship and the donor's relationship to the child would be more likely to occur.[209]

Additionally, the court held that the failure to apply section 7005 to this case withstood the constitutional challenges brought by Mary and Victoria on both equal protection[210] and privacy grounds.[211]

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200. *Id.*

201. *Id.*

202. *Id.* at 533.

203. William P. Hogoboom & Donald B. King, CALIFORNIA PRACTICE GUIDE: FAMILY LAW (The Rutter Group 2002).

204. *Jhordan C.*, 224 Cal. Rptr. at 537-38 (holding also that Victoria did not have the status of parent).

205. *Id.* at 535.

206. The court pointed out that the original version from the Uniform Parentage Act also limited the application of this provision to married women and California had removed this limitation. *Id.* at 533-34.

207. *Id.* at 534.

208. *Id.*

209. *Id.* at 535.

210. *Id.* at 536. The equal protection argument asserted by Mary and Victoria was simply that the law provides less protection for the unmarried mother than it does for the married mother. If the mother was married, the donor could not assert paternity because he would be blocked by the statutory provisions now found in Family Code section 7541(b) and (c) which only allow a mother and her husband to challenge the presumptions of paternity arising out of the marriage. The court took the position that this disparity is the result of section 7541(b) and (c) and not of the physician requirement of Family Code section 7613 and that it is well settled that the law may discriminate in favor of married parents: "[e]qual protection is not violated by providing that certain benefits or legal rights arise only out of the marital relationship." *Id.*

As to Jhordan's paternity, Justice King and the other members of the court assumed that Jhordan, the genetic father, was the natural father and the father who was protected by law. Although the court held that Family Code section 7613 (formerly Civil Code section 7005) did not sever his parental relationship, it cited no statutory provision that established his parental relationship. While it may not have been necessary to mention any statutory provision because the case, after all, was based upon a trial court judgment declaring Jhordan to be Devin's father, there was no provision which could be cited in Jhordan's favor other than the provision that says that blood tests may be used to establish paternity. Jhordan was not a presumed father under either the conclusive or rebuttable presumption. Although he had acknowledged paternity, he had never taken Devin into his home. The only possible statutory basis was the provision which says that blood tests can be used to prove paternity which assumes as its basis that the genetic parent is the parent.[212]

2. *Ovum Donation and In Vitro Fertilization*

As to ovum donation and in vitro fertilization (IVF), the Family Code is silent; there is no provision[213] equivalent to Family Code section 7613, severing the parental ties of the donor[214] and establishing a new maternal relationship. The main references to these subjects are in Business and Professions Code section 2260, which requires consent to implant an ovum in someone other than the donor and establishes a fine for failure to obtain consent,[215] and Penal Code section 367g, which makes it a crime to use donated sperm, ova, or an embryo in any other manner than that specified by the donor when he or she consented to the donation.[216] While the consent easily might be construed as severing the parent and child relationship, there is no appellate case that has made this construction. The result is that in an IVF situation, there are three possible mothers: the genetic mother who provides the egg, the surrogate mother who gives birth, and the intended mother. According to *Johnson v. Calvert*,[217] the claims of both the genetic mother and the birth mother could be based upon

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211. The court's conclusion regarding privacy was two-pronged: first, "the court's ruling did not infringe upon any right of Mary and Victoria to family autonomy, because, under the peculiar facts of this case, Jhordan was not excluded as a member of Devin's family for purposes of resolving this custody dispute," and second, "the statute imposes no restriction on the right to bear a child," in other words, on procreative choice. *Id.* at 536-37.

212. Interestingly, if the court had applied the intent test, there is a possibility that Victoria would have been found to be the parent of Devin rather than Jhordan. While this test has not been applied in a factual setting such as this, there is no conceptual reason why it could not be so applied.

213. There are only five provisions nationwide that deal with egg donation and in vitro fertilization: "*See, e.g.*, FLA. STAT. ANN. § 742.14; N.D. CENT. CODE § 14-18-04; OKLA. STAT. ANN. tit. 10, § 555; TEX. FAM. CODE ANN. § 151.102; VA. CODE ANN. § 20-158." Elster, *supra* note 181, at 181 n.15.

214. The UPA (2000) has such a provision.

215. CAL. BUS. & PROF. CODE § 2260 (West Supp. 2003).

216. CAL. PENAL CODE § 367g (West 1999).

217. 851 P.2d 776 (Cal. 1993).

California Family Code section 7610(a).[218] The claim of the intended mother could be supported by *Johnson v. Calvert*[219] and, more specifically, by *In re Marriage of Buzzanca* in which the appellate court upheld the claim of the intended mother who was neither the biological donor nor the birth mother.[220] Additionally, because there is no provision limiting the rights of ovum donors even if they donate, as they always do, to a licensed physician, it would appear that ovum donors may assert parental rights in a manner that sperm donors cannot.[221]

The relative status of the three possible mothers in IVF situations is difficult to unravel; in other words, should the courts favor any one of these mothers? *Johnson v. Calvert* favored the woman who was both the genetic mother and the intended mother over the birth mother.[222] By the same reasoning, a court might favor the gestational mother who was also an intended mother,[223] and also favor the donor mother who is also the gestational mother, as in traditional surrogacy.[224] This approach to determining maternity in a surrogacy case might be referred to as a point system. One point is awarded to the woman who satisfies each one of the three criteria for motherhood. If any woman receives two points, she is the mother. However, the point system helps little in a surrogate situation in which the genetic donor, the gestational mother, and the intended mother are all different women.[225]

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218. *Id.* at 779. The genetic mother is included because of the reference to establishing the natural mother "under this part," which Johnson interpreted as referring to the genetic testing of Family Code sections 7550 through 7557. *Id.* at 781.

219. *Id.* at 782.

220. 72 Cal. Rptr. 2d 280, 282 (Ct. App. 1998).

221. *See id.* While it might be argued that *In re Marriage of Buzzanca* stands for the application of the intended parent test in all cases of gestational surrogacy regardless of whether there is a tie to break, where the intended parents are not the donor parents, this conclusion is suspect. In *In re Marriage of Buzzanca* the donor parents and the gestational mother did not seek parental rights and were not before the court. As a result, the court was somewhat anxious, even desperate, to find a solution to the thorny problem presented by the trial court which had declared that the child had no parents:

> Even though neither Luanne nor John are biologically related to Jaycee, they are still her lawful parents given their initiating role as the intended parents in her conception and birth. And, while the absence of a biological connection is what makes this case extraordinary, this court is hardly without statutory basis and legal precedent in so deciding. Indeed, in both the most famous child custody case of all time [the one decided by Solomon], and in our Supreme Court's *Johnson v. Calvert* decision, the court looked to *intent to parent* as the ultimate basis of its decision. . . . *That is far more than can be said for a model of the law that renders a child a legal orphan.*

Id. at 293 (Citation and footnotes omitted; emphasis added).

222. *Johnson*, 851 P.2d at 776.

223. *See id.* This scenario is not uncommon. An example is a woman who is infertile and uses the IVF procedure and bears the child herself. Her husband might be the sperm donor as well.

224. This is actually the scenario of traditional surrogacy which usually involves artificial insemination rather than IVF. *See In re* Marriage of Moschetta, 30 Cal. Rptr. 2d 893, 894 (Ct. App. 1994) (stating that, in a traditional surrogacy arrangement, the mother was the woman who was both the genetic mother and the birth mother).

225. *In re Marriage of Buzzanca* favored the intended parent, but neither the donor mother nor the birth mother sought to assert parental rights. *See In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d at 280.

The real question that needs to be asked in regard to the genetic donor in IVF cases is whether there are scenarios in which the genetic mother would be favored over either the birth mother or the intended mother. There are two conceivable situations in which the answer would be yes: first, where the embryo created through IVF is implanted either negligently or intentionally through fraud or theft in the wrong woman;[226] and second, and this is one of the main points of this article, where it is clearly in the best interest of the child to have a parental relationship with the genetic parents. If the gestational mother and the intended mother were unavailable to raise the child or if there was clearly something in the character of these women which would make them unfit, then the genetic donor should have the opportunity to raise her child.

3. *Surrogacy*

Perhaps because of the complexity of the subject of surrogacy or because of the power of the special interest involved in formulating a statutory scheme to control surrogacy, the California statutory scheme is silent on the subject of surrogate motherhood as an alternate means of reproduction.[227] There is no mention of the words surrogate or surrogacy in the California Family Code.[228] The Legislature has considered numerous proposals[229] and passed one which was vetoed by Governor Pete Wilson.[230] Despite public outcry for legislation to govern

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226. *See* Robert B. v. Susan B., 135 Cal. Rptr. 2d 785 (Ct. App. 2003); Prato-Morrison v. Doe, 126 Cal. Rptr. 2d 509 (Ct. App. 2002). In the Historical and Statutory Notes to Penal Code section 367g, which makes it a crime to improperly use sperm, ova, or embryos, the Legislature included the following findings:

> (a) At least 60 California families allege that, in the last decade, medical personnel at fertility clinics at the University of California at Irvine and the University of California at San Diego transferred their sperm, ova, or embryos to researchers or implanted their sperm, ova, or embryos into other women without their signed written consent.
>
> (b) The fertility industry is a multibillion dollar industry with hundreds of fertility clinics nationwide.
>
> (c) The continued risk of these unethical transfers and implantations without informed consent warrants stronger legislative protections for California families undergoing in vitro and other assisted reproduction procedures.
>
> (d) Physicians and other medical personnel must obtain signed written consent from patients before performing in vitro and other assisted reproduction procedures.

HISTORICAL AND STATUTORY NOTES TO CAL. PENAL CODE § 367g (West 1999).

227. The term "surrogate" appears many times in the code, but it usually refers to a substitute decision-maker. *See* CAL. BUS. & PROF. CODE § 2290.5(g) (West 1990 & Supp. 2003); CAL. EDUC. CODE §§ 51131, 56050 (West 1989 & Supp. 2003); CAL. GOV'T CODE § 7579.5 (West 1995 & Supp. 2003); CAL. PROB. CODE §§ 4643, 4685 (West Supp. 2003). The term "surrogate" does not appear at all in the Family Code. According to Nanette Elster, "[w]hile twenty states and the District of Columbia have laws addressing surrogacy, only eight of those address the issue of parentage." Elster, *supra* note 191, at 537-38.

228. The Westlaw search: pr (family-code) & surrog! yields no results.

229. *See* John D. Miller, *A Political Review of Alternative Surrogacy Proposals*, 28 U.S.F. L. REV. 627, 627 n.1 (1994).

230. *Id.* at 627 n.2 (citing S.B. 937, Reg. Sess. (Cal. 1991-92) (vetoed by Governor Wilson (1992)).

surrogacy contracts,[231] there is still no specific statutory law on this subject. According to one insider, however, "[t]he hearings and debate surrounding these measures produced a remarkably thorough and in-depth review of surrogacy."[232] Nevertheless, because of the Legislature's failure to enact legislation, it has left the courts to struggle with statutes that were not intended to apply to surrogacy. Ultimately, the Legislature has surrendered control of surrogacy to the marketplace without safeguards for the children who are conceived or for the adults who play a role in their conception.

There are, of course, two forms of surrogate motherhood. First, in what might be called traditional surrogacy, the surrogate mother is artificially inseminated with the semen of a man who is not her husband but who has contracted with her to have her surrender custody of the child to him and to relinquish the child for adoption by the man's wife, although adoption by the father's wife is not essential. A single man or a gay couple could also make use of traditional surrogacy. In traditional surrogacy the genetic material is provided by the man who is the contractual, as well as the intended, father and the woman who is also the birth mother but not the contractual or intended mother.[233] The technology used in traditional surrogacy is not sophisticated at all, requiring only artificial insemination, which can be done at home[234] even with household utensils.[235] Indeed, traditional surrogacy can be accomplished without resort to technology at all.[236]

Gestational surrogacy, on the other hand, requires significant use of technology. While the distinctly low-tech process of semen donation is required, the sophisticated processes of ovum extraction, in vitro fertilization, and embryo transplantation are also required.[237] The use of technology widely expands the

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231. *See* Garry Whiter, Note, *Surrogate Contracts: Another Cry from the California Courts for Legislative Action*, 19 J. JUV. L. 437, 438 n.10 (1998).

232. Miller, *supra* note 229, at 627. Mr. Miller, who was the principal consultant to the State Senate Committee on Health and Human Services and Chief of Staff for California State Senator Diane E. Watson, has added the following insight into the legislative process in this area:

> In addition to the reasoned legal arguments presented, the political, and often deeply personal, debates encompassed every aspect of this complex and emotional dispute. The novelty of one woman voluntarily carrying another woman's genetic child forced the legal community to advance original concepts in the proposed legislation. Likewise, the subjective nature of the questions generated by surrogacy stretched accepted political doctrines. So divisive was the debate over surrogacy, that the vast majority of interested organizations could not agree on *any* position regarding the legislation. Even when specific positions could be established, they followed no consistent pattern. For example, the National Organization of Women strongly opposed permitting surrogacy, while the Commission on the Status of Women strongly supported it.

Id. at 627.

233. *See In re* Matter of Baby M., 537 A.2d 1227, 1234 (N.J. 1988).

234. *See* Jhordan C. v. Mary K., 224 Cal. Rptr. 530, 535 (Ct. App. 1986).

235. *See In re* Marriage of Moschetta, 30 Cal. Rptr. 2d 893, 894 & n.3 (Ct. App. 1994).

236. *See Genesis* 16:2.

237. *See* Goodwin, *supra* note 162, at 276.

number of people who may claim to have the rights and responsibilities of parenthood. The possible mothers include the surrogate who is the birth mother, the egg donor who is the genetic mother, and the intended or contractual mother who may also be the egg donor and therefore the genetic mother. The list of potential fathers is just as long. While among the potential fathers there is no equivalent of the birth mother, the birth mother's husband may have a claim. While the rebuttable presumptions may not apply in artificial insemination cases, there is no statutory provision which might prevent the conclusively presumed father from asserting the presumption. There could also be a genetic father, and a contractual or intended father who may or may not also be the genetic father.

Both forms of surrogacy involve complicated contractual arrangements, but the number of combinations of contracts depends, of course, on the type of surrogacy. The basic contractual arrangement is between the surrogate mother and the future parents of the child. The surrogate mother agrees to be either artificially inseminated or to be implanted with a fertilized ovum, and, in return, the future parents agree to pay money. This was the basic arrangement in *Johnson v. Calvert.*[238] In addition, the future parents may also enter into a contract with an intermediary who has provided the service.[239] While the cases do not usually discuss it, there may be other contracts involving doctors, sperm donors, and egg donors. Each of the donors may contract with the doctor, and all three may have contractual relations with an intermediary organization or with the future parents.

Despite the complexity, as noted above, the issue of surrogacy has been left to the courts, and the result has been a general endorsement of gestational surrogacy. *Johnson v. Calvert*[240] is the most important case dealing with surrogacy in California, and has analytically confused the issue by the court's resort to the intent test rather than simply enforcing or refusing to enforce the surrogacy contract. However, it is clear that the court in *Johnson* endorsed surrogacy contracts and that the actual contract in *Johnson* played an important role. The court stated, "[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.*"[241] In addition, the

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238. *See* Johnson v. Calvert, 851 P.2d 776, 778 (Cal. 1993), stating:

> On January 15, 1990, Mark, Crispina, and Anna signed a contract providing that an embryo created by the sperm of Mark and the egg of Crispina would be implanted in Anna and the child born would be taken into Mark and Crispina's home "as their child." Anna agreed she would relinquish "all parental rights" to the child in favor of Mark and Crispina. In return, Mark and Crispina would pay Anna $10,000 in a series of installments, the last to be paid six weeks after the child's birth. Mark and Crispina were also to pay for a $200,000 life insurance policy on Anna's life.

Id. at 778.

239. *See In re* Matter of Baby M., 537 A.2d. 1227, 1246-50 (N.J. 1988).

240. 851 P.2d 776.

241. *Id.* at 782 (emphasis added).

court concluded that the surrogacy contract did not violate public policy: "In deciding the issue of maternity under the Act we have felt free to take into account the parties' intentions, as expressed in the surrogacy contract, because in our view the agreement is not, on its face, inconsistent with public policy."[242] The court rejected three public policy arguments against surrogacy contracts. The first two policy arguments against surrogacy contracts involved the law of adoption, and the court dealt with these two arguments together. The first is "the public policy embodied in Penal Code section 273, prohibiting the payment for consent to adoption of a child,"[243] and the second is the group of "policies underlying the adoption laws of this state [which] are violated by the surrogacy contract because it in effect constitutes a prebirth waiver of [the mother's] parental rights."[244]

The court rejected both of these arguments simply because they are adoption-related, and, since surrogacy is not adoption and since the differences between adoption and surrogacy are crucial, adoption law and the policies behind adoption law do not apply.[245] More specifically, the court stated,

> Gestational surrogacy differs in crucial respects from adoption and so is not subject to the adoption statutes. The parties voluntarily agreed to participate in in vitro fertilization and related medical procedures before the child was conceived; at the time when Anna entered into the contract, therefore, she was not vulnerable to financial inducements to part with her own expected offspring. As discussed above, Anna was not the genetic mother of the child. The payments to Anna under the contract were meant to compensate her for her services in gestating the fetus and undergoing labor, rather than for giving up "parental" rights to the child. Payments were due both during the pregnancy and after the child's birth. We are, accordingly, unpersuaded that the contract used in this case violates the public policies embodied in Penal Code section 273 and the adoption statutes.[246]

What the court was really saying is that Anna is not the genetic mother, and, therefore, she is not being paid money to give up her child.[247] The court appears to ignore the status it had just given to Anna because she is the birth mother. While she did contract to provide services, she also agreed to relinquish a child to whom she gave birth—facts which in any other circumstance would make her the child's mother without question. One wonders why, if the court was going to place such an emphasis on the fact that Anna is not the child's genetic mother,

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242. *Id.* at 783.
243. *Id.* at 783-84.
244. *Id.* at 784.
245. *Id.*
246. *Id.*
247. *See id.*

the court did not simply say that Crispina was the natural mother because she was the child's genetic mother.

The court also dealt with several other social policies in a summary fashion. Surrogacy does not violate prohibitions on involuntary servitude because the court saw "no potential for that evil in the contract at issue here, and extrinsic evidence of coercion or duress is utterly lacking," and because the contract contained a clause that said that any promise which is contrary to a woman's "absolute right to abort or not abort any fetus she is carrying . . . is unenforceable."[248] The court rejected claims that surrogacy will "exploit or dehumanize women, especially women of lower economic status," or that "surrogacy may encourage society to view children as commodities, subject to trade at their parents' will," because there was insufficient evidence that these bad effects would result.[249] Regarding dehumanization, the court stated, "there has been no proof that surrogacy contracts exploit poor women to any greater degree than economic necessity in general exploits them by inducing them to accept lower-paid or otherwise undesirable employment."[250] The court dismissed the commodification of children argument simply by saying, "no evidence is offered to support it."[251] The court's response to both of these issues missed the point and showed that the court either chose to ignore or was unaware of the essential moral nature of these issues and the potential for even greater problems when new technology such as cloning becomes widely available.[252]

Finally, the court dismissed any constitutional issues. There were no procedural due process issues[253] or equal protection issues.[254] According to the

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248. *Id.*

249. *Id.* at 784-85.

250. *Id.* at 785. The court also appended what might be considered a pseudo-feminist argument:

> The argument that a woman cannot knowingly and intelligently agree to gestate and deliver a baby for intending parents carries overtones of the reasoning that for centuries prevented women from attaining equal economic rights and professional status under the law. To resurrect this view is both to foreclose a personal and economic choice on the part of the surrogate mother, and to deny intending parents what may be their only means of procreating a child of their own genes. Certainly in the present case it cannot seriously be argued that Anna, a licensed vocational nurse who had done well in school and who had previously borne a child, lacked the intellectual wherewithal or life experience necessary to make an informed decision to enter into the surrogacy contract.

Id.

251. *Id.*

252. *See* Matthew H. Baughman, *In Search of Common Ground: One Pragmatist Perspective on the Debate over Contract Surrogacy*, 10 COLUM. J. GENDER & L. 263 (2001); April L. Cherry, *Nurturing in the Service of White Culture: Racial Subordination, Gestational Surrogacy, and the Ideology of Motherhood*, 10 TEX. J. WOMEN & L. 83 (2001); Pamela Laufer-Ukeles, *Approaching Surrogate Motherhood: Reconsidering Difference*, 26 VT. L. REV. 407 (2002); Adam Marshall, *Choices for a Child: An Ethical and Legal Analysis of a Failed Surrogate Birth Contract*, 30 U. RICH. L. REV. 275 (1996).

253. *Johnson*, 851 P.2d at 785.

254. *Id.* The court explained:

> Furthermore, neither Anna nor amicus curiae ACLU articulates a claim under the equal protection clause, and we are unable to discern in these facts the necessary predicate to its

court, Anna's constitutional claim must rest "on theories of substantive due process, privacy, and procreative freedom."[255]

However, the court dismissed these claims almost peremptorily:

> Anna's argument depends on a prior determination that she is indeed the child's mother. Since Crispina is the child's mother under California law because she, not Anna, provided the ovum for the in vitro fertilization procedure, intending to raise the child as her own, it follows that any constitutional interests Anna possesses in this situation are something less than those of a mother.[256]

As to the constitutionality of the court's determination that Anna was not the child's natural mother, the court rejected her contention that she had a liberty interest in her relationship to the child.[257] The court based its reasoning upon *Michael H. v. Gerald D.*,[258] which Anna also relied upon, and stated: "Society has not traditionally protected the right of a woman who gestates and delivers a baby pursuant to an agreement with a couple who supply the zygote from which the baby develops and who intend to raise the child as their own."[259] In reaching this

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> operation. This is because a woman who voluntarily agrees to gestate and deliver for a married couple a child who is their genetic offspring is situated differently from the wife who provides the ovum for fertilization, intending to mother the resulting child.

Id.

255. *Id.* The court cited the following cases as the basis of Anna's argument: Santosky v. Kramer, 455 U.S. 745, 768 (1982); Lassiter v. Dep't. of Social Services, 452 U.S. 18, 27 (1981); Smith v. Org. of Foster Families, 431 U.S. 816, 842 (1977); Stanley v. Illinois, 405 U.S. 645, 651 (1972). The court then stated:

> Most of the cases Anna cites deal with the rights of unwed fathers in the face of attempts to terminate their parental relationship to their children. (See, e.g., [*Stanley v. Illinois*, 405 U.S. 645, 658-59 (1972); *Quilloin v. Walcott*, 434 U.S. 246, 247-48 (1978); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Lehr v. Robertson*, 463 U.S. 248 (1983).] These cases do not support recognition of parental rights for a gestational surrogate. Although Anna quotes language stressing the primacy of a developed parent-child relationship in assessing unwed fathers' rights (see *Lehr v. Robertson*, [463 U.S. at 260-62], certain language in the cases reinforces the importance of genetic parents' rights. (*Lehr v. Robertson*, [463 U.S. at 262] ["The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development."]; *see also* Adoption of Kelsey S.,[823 P.2d 1216 (Cal. 1992).] ["The biological connection between father and child is unique and worthy of constitutional protection if the father grasps the opportunity to develop that biological connection into a full and enduring relationship."].)

Johnson, 851 P.2d at 785-86.

256. *Id.* at 786.

257. *Id.*

258. 491 U.S. 110, 124-25 (1989) (plurality opinion).

259. *Johnson*, 851 P.2d at 786.

conclusion, the court ignored the inherent problems in the traditional test[260] and the special problem when it is applied to issues of new technology.[261]

In re Marriage of Moschetta, a traditional surrogacy case, was the first post-*Johnson* surrogacy case.[262] Despite the California Supreme Court's generally favorable attitude toward surrogacy contracts, the court in *In re Marriage of Moschetta* declined to enforce the traditional surrogacy contract.[263] The case resulted from a surrogacy agreement between a married couple, Robert and Cynthia, and a surrogate mother, Elvira Jordan. In a provision typical of traditional surrogacy contracts, Elvira agreed that Robert "could obtain sole custody and control of any child born" and Elvira would "sign all necessary papers to terminate her parental rights and 'aid' Cynthia . . . in adopting the child."[264] Elvira became pregnant after being artificially inseminated with semen from Robert. During the course of the pregnancy, Robert and Cynthia began to have marital difficulties, which Elvira learned of just before delivery. Elvira had second thoughts regarding the surrogacy agreement and refused to let Robert see the child for two days. She retained custody but relented when Robert and Cynthia "told her they would stay together."[265] When Robert and Cynthia separated, Robert and Cynthia asserted their parental rights, and Elvira asserted her parental rights. In holding that Robert and Elvira, the surrogate mother, were the natural parents of the child, Marissa, the court declined "to enforce the agreement, not for the public policy reasons sometimes advanced by those who oppose surrogacy, but because enforcement of a traditional surrogacy contract *by itself* is incompatible with the parentage and adoption statutes already on the books."[266] The court also refused to apply the intent test simply because "[t]here

260. *See id.* First, the concept of tradition is easy to manipulate by simply redefining categories. Tradition has always protected gestational mothers. But the court rejected that category and placed Anna in a category of gestational mothers pursuant to a surrogacy agreement. Then the court created a category which fit the Calverts, stating "[t]o the extent that tradition has a bearing on the present case, we believe it supports the claim of the couple who exercise their right to procreate in order to form a family of their own, albeit through novel medical procedures." *Id.*

261. *See id.* Of course, tradition never protected gestational surrogacy mothers. The social process that created the tradition occurred long before people in society ever conceived of the technology that created gestational surrogacy. While the court does recognize that surrogate contracts are of recent origin, the court did not acknowledge the possibility that the traditional test may be inapplicable in this area where new technology is so important. It simply decided that "such arrangements are of too recent an origin to claim the protection of tradition." *Id.*

262. 30 Cal. Rptr. 2d 893 (Ct. App. 1994). *See id.* at 894 ("By 'traditional' surrogacy we mean an arrangement where a woman is impregnated with the sperm of a married man with the prior understanding that the resulting child is to be legally the child of the married man and his infertile wife."). *Id.* at 894. The trial of this case was actually before *Johnson v. Calvert.*

263. *Id.* at 894-95.

264. *Id.* at 895. In return, Robert and Cynthia agreed to pay Jordan $10,000 in "recognition" of Robert's "obligations to support [the] child and his right to provide [Jordan] with living expenses." *Id.*

265. *Id.*

266. *Id.* at 894-95 (footnote omitted).

[was] no 'tie' to break."[267] Robert was the father because he was the genetic father and Elvira the mother because she was both the genetic and birth mother.[268] Once the contract and intent were ruled out as criteria for parenthood, Cynthia had no valid claim to the child.[269]

Finally, *In re Marriage of Buzzanca* also deal with the subject of surrogacy, but it does not add much to the overall process of surrogacy.[270] In this case, the marriage of the contractual parents, Luanne and John, both of whom had signed the surrogacy agreement, ended. John attempted to disavow the surrogacy agreement and to avoid the parental and financial responsibility for the child. The case received great notoriety because the trial court, applying the statutory scheme, stated (figuratively throwing up its hands) that this child had no parents at all.[271] While the California court of appeal firmly rejected this position, the trial court was technically correct under the California statutory scheme. John did not have a genetic tie to the child and did not fit any of the statutory presumptions. Luanne did not give birth and did not have a genetic connection. There was no statutory recognition of surrogacy contracts.

While the decision of the court of appeal is complicated, the court applied the intent test of *Johnson v. Calvert*. The court stated that John was the father based upon the well-established doctrines of consent and estoppel. Like a husband who has consented to his wife's artificial insemination, he consented to becoming the child's father and, as the consensual father,[272] he should be estopped from

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267. *Id.* at 896.

268. *See id.* at 900 stating:

> Moreover, the 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.*

Id.

269. *See id.* It should be noted that at the appellate level, Robert actually asserted the position that the contract should be enforced and Cynthia should be declared the child's mother.

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

271. *See id.* at 282 (stating:

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

Id.

272. *See id.* at 286 (stating:

> If a husband who consents to artificial insemination under Family Code section 7613 is "treated in law" as the father of the child by virtue of his consent, there is no reason the result should be any different in the case of a married couple who consent to in vitro fertilization by

denying his own paternity and parental duty.[273] The court also specifically referred to the fact that John *caused* the birth of Jaycee, and, of course, when the court in *Johnson* spoke of the intended parent, it was referring to the person who through intent caused the birth of the child.[274] With Luanne, the court was more explicit. She was the mother because she was the intended mother: "Not only was Luanne the clearly intended mother, no bona fide attempt has been made to establish the surrogate as the lawful mother."[275] Regarding both parents, the court concluded, "[e]ven though neither Luanne nor John are biologically related to Jaycee, they are still her lawful parents given their initiating roles as the intended parents in her conception and birth."[276]

In summary, California has no statutory provisions to deal with surrogacy. No California appellate case has enforced a surrogacy contract based upon contract theory, although the California Supreme Court in *Johnson* concluded that such contracts do not violate public policy, the most common legal impediment to the enforcement of surrogacy contracts in other states. All four cases that have dealt with issues of parentage arising out of surrogacy contracts have applied the law dealing with parentage, not the law of contracts. In three of the cases, the genetic parent, both mother and/or father, has prevailed. In *Johnson,* where the genetic test conflicted with the "giving birth test," the California Supreme Court resorted to the intent test to break the tie, although the

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unknown donors and subsequent implantation into a woman who is, as a surrogate, willing to carry the embryo to term for them. The statute is, after all, the clearest expression of past legislative intent when the Legislature did contemplate a situation where a person who caused a child to come into being had no biological relationship to the child.).

Id.

273. *Id.* at 287 (stating:

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

Id.

274. *See id.* at 291 (stating:

In context, then, the high court's considered dicta is directly applicable to the case at hand. The context was not limited to just *Johnson*-style contests between women who gave birth and women who contributed ova, but to any situation where a child would not have been born "'but for the efforts of the intended parents.'" ([*Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993) (quoting Hill, *supra* note 165, at 415)]).

Id.

275. *Id.* at 288. The court treated this statement as two reasons why Luanne was the child's mother. However, the second part of the statement, that neither the genetic mother nor the birth mother had come forward to parent the child, actually supports the view that the court was really relying on the intent test. Without these other potential mothers involved, it is clear that the court was not using the intent test as a tie-breaker.

276. *Id.* at 293.

result was that the genetic parent was the one who was declared to be the child's parent. Only in *In re Marriage of Buzzanca* did the court resort exclusively to another test, the intent test, to establish the parental relationship, and in that case the genetic parent was a mere donor and did not seek a parental relationship. Finally, in none of the cases has a court applied rules which were based upon the preservation of the unitary family.

4. *New Technology*

While discussions of new assisted-reproduction technology sometimes take on a science-fiction quality, there is one form of new technology,[277] cloning,[278] which has reached such a level of sophistication and likelihood that it deserves discussion in the context of parenting. On the other hand, while there is no evidence at this time that the cloning of a human has been achieved, the possibility appears to be so likely that serious thought is being given to the moral, ethical, biological, economic and legal effects,[279] and two Presidential

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277. Another form of new technology which may in the future merit discussion is the artificial womb, which has clearly not been perfected, although some scientists have claimed some breakthroughs in this area. Even with these possible breakthroughs, serious thought is not yet being given to the implications for the law of parentage, although existence of such a womb would at least in some cases undermine the need for the giving birth test and emphasize either the genetic test or the intent test for parentage. *See supra* note 19.

278. Clarke D. Forysythe has described two kinds of cloning. Of these two types, only the latter is the subject of discussion in the text:

> The cloning of entire organisms, especially mammals, may be performed using two different techniques with different implications. One technique is called blastomere separation or "cloning by embryo splitting." This involves splitting the cells of a human embryo at its earliest stages of development, a method of artificially creating a twin. Each cell at this early stage is undifferentiated and totipotent—individually able to grow into a mature embryo, and then a fetus, leading to birth. The cloning of human embryos that was reported in October 1993 was achieved by blastomere separation. This method avoids the specter of replicating a dead or living adult human being.
>
> In contrast, the second cloning technique that reportedly resulted in the Scottish sheep is called "nuclear transfer" (or transplantation), a term which effectively describes the basic procedure. This may be attempted using embryonic or adult cells. This technique has also been called (in the bills introduced in Congress) *somatic cell nuclear transfer*, which refers to the use of genetic material from non-germ (non-sex) cells. The female's genetic material is contained in the nucleus of the ovum (the egg cell). The nucleus from an egg is removed (enucleated egg) and replaced with the nucleus from a cell of the human being to be cloned. The unfertilized egg is artificially fertilized by replacing its nucleus. . . . This technique of human cloning, like IVF, is conducted extracorporeally—outside the human body, in a laboratory. As with IVF, only after the human egg is denucleated, the nucleus replaced, and the resulting embryo is allowed to divide would it be implanted in a woman's uterus. Only then would a normal pregnancy exist. Cloning by somatic cell nuclear transfer (in contrast to other techniques) was the exclusive focus of the 1997 National Bioethics Advisory Commission (NBAC) hearings and report.

Clarke D. Forsythe, *Human Cloning and the Constitution*, 32 VAL. U. L. REV. 469, 481-82 (1998) (footnotes omitted).

279. *See* Elster, *supra* note 191, at 533; Forsythe, *supra* note 278, at 469; Leon R. Kass, *The Wisdom of Repugnance: Why We Should Ban the Cloning of Humans*, 32 VAL. U. L. REV. 679 (1998); Bruce Wilder, *From Bastardy to Cloning: Adaptations of Legal Thought for Unorthodox Reproduction*, 26 HUM. RTS. Q. 23 (1999).

Commissions have recommended that the cloning of a human being, at least for reproductive purposes, be prohibited.[280] California and other states have taken this step and prohibited human cloning.[281] However, this prohibition does not mean that a child will not be produced in this manner. Moreover, in light of the fact that no reproductive technology has been successfully resisted in the long run, there is a distinct possibility that cloning may become a part of our reproductive arsenal in the future, even if it is "off shore" or "underground." The full implications of cloning are far beyond the scope of this article even on the subject of parentage, yet I think they must be addressed because any restructuring of our parentage law should take them into account.

As to cloning, the issue for parentage law is, of course, who will be the parent of the cloned child; more specifically, the issue is which portion of the present law would govern the parentage of a cloned child? If present law proves to be inadequate, how should a new law be drafted? These issues are made especially difficult by the reality that, for every cloned child, there is a relatively large number of potential parents to choose from. One commentator has described this array of potential parents as follows:

> The process of cloning will result in a child having genetic material from as many as four individuals: the person from whom the cell nucleus was derived, that individual's biological parents, and the woman contributing the enucleated egg cell, which contains a small fraction of mitochondrial deoxyribonucleic acid ("DNA"). In addition, if the egg with the transferred nucleic material is implanted in a surrogate gestational mother, the child will have two other potential parents—the gestator, and if she is married, her husband. . . . There may also be intended rearing parents unrelated to the individual who is cloned, such as when the cloned individual is deceased or a celebrity.[282]

Every one of these parental candidates can receive some support in the California statutory scheme for determining parentage.

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280. *See Remarks Announcing the Prohibition on Federal Funding for Cloning on Human Beings and an Exchange with Reporters*, WEEKLY COMP. DOC., Mar. 4, 1997, at 278.

281. California Health and Safety Code section 24185(a) states, "No person shall clone a human being or engage in human reproductive cloning." CAL. HEALTH & SAFETY CODE § 24185(a) (West Supp. 2003). Subsection (c) provides a definition of cloning:

> "Clone" means the practice of creating or attempting to create a human being by transferring the nucleus from a human cell from whatever source into a human or nonhuman egg cell from which the nucleus has been removed for the purpose of, or to implant, the resulting product to initiate a pregnancy that could result in the birth of a human being.

Id. § 24185(c)(1) (West 2002).

282. Elster, *supra* note 191, at 536. Additionally, it is not impossible to consider the physician or scientist who was responsible for the physical cloning of the child. Although this person should not be viewed as a potential parent to rear the child, he or she is a potential candidate to play the parental role of supporting the child.

The use of blood testing or genetic testing to determine parentage is possible, but it presents technological problems which must be addressed. In theory, the DNA test could be used to support the claim of the donor parent; the problem is that, using the most sophisticated forms of DNA testing, the conclusion would be that the donor's DNA was almost 100 percent similar to the cloned child, a situation which normally would indicate twin siblings.[283] Under present day standards, the DNA test would most likely conclude that the donor's parents were the parents of the cloned child. Additionally, as mentioned in the quotation above, the woman who donated the enucleated egg cell also contributes a small amount of DNA to the cloned child which might register on a DNA test.[284]

Both the conclusive presumption[285] and the various rebuttable presumptions[286] would support the candidacy of the husband of the gestational mother. The husband of the gestational mother might also be the genetic donor. If cloning were to be legalized, this scenario might be common: a couple desires to have a child that is not encumbered by the wife's genetic disease and so "[t]o avoid this possibility of passing on the disease, the couple decides to transfer nucleic material from one of the husband's cells to the wife's enucleated egg cell and then transfer the resulting embryo to the wife's uterus."[287] However, there are situations in which the husband of the gestational mother would almost be a stranger to the child. If the husband were married to a true gestational surrogate, he would have no connection to the child other than being married to the birth mother; nevertheless, there would be no way to challenge his paternity unless the genetic father had also attained the status of presumed father. The same would be true under the rebuttable presumptions of Family Code section 7611.[288]

The "giving birth standard" would, of course, support the gestational mother. While the gestational mother might also be the donor mother and the intended mother, the more difficult scenario is that in which the gestational mother is a surrogate whose only connection with the child is giving birth, and her status as parent might be challenged by a donor parent supported by DNA testing, an intended parent, or even by a potential parent who is both a donor and an intended parent. In this situation would the court use the tie-breaking approach of *Johnson v. Calvert*?[289] In *Johnson*, the gestational mother was opposed by the genetic mother who was also the intended mother.[290] One could say that the

283. *See id.* at 548.

284. *Id.* at 536. Nevertheless, these problems are minor and can be resolved by merely tinkering with the legal standards used to establish parenthood. It seems absurd to think that if we select the person who contributed "a small fraction" of a child's DNA as the parent, we would refuse to accept the person who contributed almost 100 percent. *Id.*

285. CAL. FAM. CODE § 7540 (West 1994 & Supp. 2003).

286. *See id.* §§ 7600-7730.

287. Elster, *supra* note 191, at 549.

288. CAL. FAM. CODE § 7611 (West 1994 & Supp. 2003).

289. 851 P.2d 776 (Cal. 1993).

290. *Id.* at 778.

weight of the genetic test and the intent test combined to outweigh the giving birth test. Likewise, it would be possible with a cloned child for the donor and the intended parent to be the same person. However, with a cloned child it is entirely possible for the donor parent to be different from the intended parent. *Johnson v. Calvert* did not resolve this scenario. Although the appellate court case of *In re Marriage of Buzzanca* upheld the parentage of purely intended parents,[291] there was no claim to the status of parent by the donor or gestational parents.

Finally, the standard of the intended parent leads to the greatest level of controversy. The problem arises because in California cloning is illegal. The full scope of Health and Safety Code section 24185(a),[292] which prohibits cloning a human being, is not known at this time. But those who participate knowingly in a wrongful cloning at least have violated the public policy of California. Each of the potential parents of a clone under California law must be examined in light of this policy shift, which most dramatically affects the status of the intended parents who, instead of being sympathetic individuals seeking to bring a child into the world and to rear that child, are now the prime movers of a statutory violation and perhaps of a moral wrong. If "intended parents" were allowed to keep a cloned child, they would benefit from their own wrongdoing and encourage other people to engage in the practice of cloning. Most importantly, the use of the intent test as the tie-breaker may be lost.

III. SUGGESTED MODEL FOR CALIFORNIA

As stated in the introduction, the approach proposed by this article is simply this: first, to make the genetic test the baseline standard for establishing the existence of the parent-child relationship; second, to require a judicially pre-validated contract when modern means of assisted conception are used to conceive and give birth to a child; and third, to use the best interest of the child standard where the parties (donors, surrogate parents, and intended parents) have failed to have a pre-validated contract, where a true tie-breaking test is required, or where the facts of the case are unique, as in *In re marriage of Buzzanca.*[293] This system can be implemented easily in California. The genetic baseline can be established in California by simply abolishing the conclusive presumptions and by making the rebuttable presumptions fully rebuttable. Legislation establishing the bright-line pre-validated contract could be modeled after the approach of the Uniform Status of Children of Assisted Conception Act[294] (USCACA) or the

291. 72 Cal. Rptr. 2d 280, 282 (Ct. App. 1998).

292. CAL. HEALTH & SAFETY CODE § 24185(a) (West Supp. 2003).

293. *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280. The history of the law and reproductive technology is testimony to the fact that novel situations can arise.

294. *See* UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT (USCACA) § 5, 9C U.L.A. 373, 383 (2001). This citation is only of historical interest. The latest addition of volume 9B of the *Uniform Laws*

Uniform Parentage Act (2000)[295] (UPA (2000)). Implementation of the best interest standard would deviate from the model of either the USCACA or the UPA (2000) and would require new legislation.

A. *The Baseline: The Genetic-Biological Relationship*

With minor changes to the Family Code, California can establish the genetic test as the baseline method for determining parentage. The first step would be to abolish the conclusive presumptions of paternity, which could be accomplished by simply repealing Family Code sections 7540 and 7541. The second step would be to make the rebuttable presumptions of Family Code section 7611 completely rebuttable.[296] It is not necessary to repeal these presumptions because they fill an important role in the paternity scheme in that they allow issues of paternity to be resolved without litigation. The presumptions allow courts to determine paternity in cases in which the biological father has not come forward and in which paternity is important but not really the subject of the litigation.

The easiest way to make the presumptions of Family Code section 7611 fully rebuttable is by enlarging the list of those who can rebut those presumptions. At present under Family Code section 7630, only "[a] child, the child's natural mother, or a man presumed to be the child's father"[297] can bring an action to declare the existence or nonexistence of a father and child relationship under the rebuttable presumptions; a genetic-biological father who is not a presumed father cannot bring an action to establish his paternity. The list of those who may rebut the presumptions in section 7630(a) could be expanded to include "any interested party"[298] or "a man alleged or alleging himself to be the father. . . ."[299] Both of

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Annotated no longer contains the Uniform Status of Children of Assisted Conception Act because this act has been superceded by the Uniform Parentage Act (2000). UNIF. PARENTAGE ACT (2000), 9B U.L.A. 295 (2001).

295. *See* UNIF. PARENTAGE ACT (2000) §§ 801-803, 9B U.L.A. 362-364 (2001).

296. *See* CAL. FAM. CODE § 7611 (West 1994 & Supp. 2003).

297. *Id.* § 7630(a). A presumed father who attains that status by receiving the child into his home and holding it out as his natural child is excluded from this group. *See id.*

298. *See id.* § 7630(a)(2)(b). While there are many permutations, the new statutory provision might take, the new version of section 7630 might read like this:

> Any interested party may bring an action as follows:
>
> (1) At any time for the purpose of declaring the existence of the father and child relationship.
>
> (2) For the purpose of declaring the nonexistence of the father and child relationship presumed under Section 7611 only if the action is brought within a reasonable time after obtaining knowledge of relevant facts. After the presumption has been rebutted, paternity of the child by another man may be determined in the same action, if he has been made a party.

299. The addition of this phrase to section 7630 (a) would create a less expansive provision than the one mentioned in footnote 298:

> (a) A child, the child's natural mother, a man presumed to be the child's father under Section 7611, or a man alleged or alleging himself to be the father may bring an action as follows:
>
> (1) At any time for the purpose of declaring the existence of the father and child relationship.

these phrases already appear in section 7630.[300] Another way to accomplish this change would be to allow a father who is a presumed father under Family Code section 7555, which creates a rebuttable presumption of paternity where the genetic test yields a paternity index of at least 100,[301] to rebut the presumptions of Family Code section 7611.[302]

As to the subject of maternity, it is not necessary to alter the statutory scheme to establish the genetic baseline simply because, without the use of assisted conception, the birth mother and the genetic mother are always the same. In effect, the genetic baseline has already been established for mothers. It is the position of this paper that, if assisted conception is used so that the birth mother and the genetic mother are different women, the provisions which are suggested below for dealing with assisted conceptions should apply. Even if in the future an artificial womb is developed and commonly used,[303] it would still not be necessary to change the provisions of the statute simply because *Johnson v. Calvert* has already established that the provisions of Family Code section 7550

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(2) For the purpose of declaring the nonexistence of the father and child relationship presumed under Section 7611 only if the action is brought within a reasonable time after obtaining knowledge of relevant facts. After the presumption has been rebutted, paternity of the child by another man may be determined in the same action, if he has been made a party.

300. *See* CAL. FAM. CODE § 7630 (West 1994 & Supp. 2002). The phrase "any interested party" comes from Family Code section 7630(b) which allows rebuttal of section 7611(d) (the receiving and holding out presumption) and "a man alleged or alleging himself to be the father" is used in section 7630(c) which allows an action where there is no presumed father. *See id.* The language of UPA (2000) might also serve as a model for a new provision of the California Family Code:

§ 602. Standing to Maintain Proceeding.

Subject to [Article] 3 and Sections 607 and 609, a proceeding to adjudicate parentage may be maintained by:

(1) the child;

(2) the mother of the child;

(3) a man whose paternity of the child is to be adjudicated;

(4) the support-enforcement agency [or other governmental agency authorized by other law];

(5) an authorized adoption agency or licensed child-placing agency; [or]

(6) a representative authorized by law to act for an individual who would otherwise be entitled to maintain a proceeding but who is deceased, incapacitated, or a minor [; or

(7) an intended parent under [Article] 8].

UNIF. PARENTAGE ACT (2000) § 602, 9B U.L.A. 338 (2001).

301. CAL. FAM. CODE § 7555(a) (West 1994).

302. Specifically, this could be accomplished by modifying Family Code section 7630(a) to say, "A child, the child's natural mother, or a man presumed to be the child's father under subdivision (a), (b), or (c) of Section 7611 *or under Section 7555* may bring an action" to prove the existence or nonexistence of the father and child relationship. The phrase in italics has been added by the author to the statutory language. *See id.* § 7630.

303. The phrase "commonly used" is important here. An artificial womb would certainly be assisted conception and the provision suggested herein for assisted conception could apply. However, if artificial wombs were routinely used for normal child birth, it would be impossible to use the contract approach of assisted conception. The judicial system would simply fail from overload.

through section 7558, regarding the use of the genetic testing, apply to maternity as well as to paternity.[304]

1. California and the Majority of States

By making the genetic test the baseline for establishing parentage, California would not be doing anything novel or revolutionary. Indeed, California has always been somewhat backwards in this area. California appears to be the only state to maintain the conclusive presumption of paternity,[305] and, according to the UPA (2000), "[t]hirty-three States allow a man alleging himself to be the father of a child with a presumed father to rebut the marital presumption."[306] The UPA (2000) uses the genetic test as the baseline for parentage determinations. Section 631 of the UPA (2000) states that a "presumed, acknowledged, or adjudicated father may be disproved only by admissible results of genetic testing excluding that man as the father of the child or identifying another man as the father of the child."[307] But, even more importantly, this section requires that "a man identified as the father of a child under Section 505 [which states the standard that genetic testing must meet to establish paternity] must be adjudicated the father of the child"[308] and that "a man excluded as the father of a child by genetic testing must be adjudicated not to be the father of the child." [309] Even more to the point, the framers of the UPA (2000) made the following statement in the Comment to section 631:

> This section establishes the controlling supremacy of admissible genetic test results in the adjudication of paternity. Other matters such as statute of limitations, equitable estoppel and res judicata may preclude the matter from reaching trial or the court denying genetic testing. However, if test results are admissible, those results control unless other test results create a conflict rebutting the admitted results.[310]

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304. Johnson v. Calvert, 851 P.2d 776, 781 (Cal. 1993).

305. *See* Angela R. Arkin, *Evidentiary and Related Issues in Paternity Proceedings*, *in* 1 DISPUTED PATERNITY PROCEEDINGS 3-15 (Lexis Publishing 5th ed. 2003). "At least one state, California, has a presumption of legitimacy that is 'conclusive' if the child is born to a married woman living with her husband at the time of conception and which may be rebutted only in limited circumstances." *Id.* Also, there was no conclusive presumption of paternity in the Uniform Parentage Act when it was adopted in California.

306. UNIF. PARENTAGE ACT (2000) § 607 cmt, 9B U.L.A. 341 (2001).

307. *Id.* § 631(1), 9B U.L.A. 348 (2001).

308. *Id.* § 631(2) (2001).

309. *Id.* § 631(4), 9B U.L.A. 349 (2001).

310. *Id.* § 631 cmt., 9B U.L.A. 349 (2001). There are other sections in the UPA (2000) that acknowledge the supremacy of the genetic test in determining parentage. In section 204, concerning the presumptions of paternity, the framers of the UPA (2000) removed the former presumption, which is still found in Family Code section 7611(d). The Comment to section 204 says that originally section 204 had stated that a man was a presumed father if he "receive[d] the child into his home and openly h[eld] out the child as his natural child," but this portion was taken out "because genetic testing is a far better means of determining paternity." *See id.*

2. *California's Own Tradition*

The modification to the genetic baseline for parentage would not be a radical departure from traditional California law. Despite Justice Scalia's insistence in *Michael H.* that the purpose of the conclusive presumption was the protection of the family, it is obvious from the historical development of the conclusive presumption and, indeed, from the face of the statute itself at every stage of its development, that California law has always been concerned with determining the biological relationship between father and child. Why else has there always been criteria included in the statute to exclude certain married men from being the father of their wife's child? [311] Even Justice Scalia admitted that, at common law, the "presumption could be rebutted . . . by proof that a husband was incapable of procreation or had no access to his wife during the relevant period."[312] When the presumption was codified in California, it contained the provisions for excluding both impotent and absentee husbands as fathers.[313] Later, there was also a judicial exception which allowed racial traits to be used to rebut the presumption;[314] in 1954, husbands who were sterile were judicially excluded as possible fathers.[315]

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§ 204 cmt., 9B U.L.A. 311 (2001). Additionally, the provision of the UPA (1973) section 4(b) which corresponds to Family Code section 7612, dealing with the requirement of clear and convincing evidence and instances where two presumptions conflict, has been substantially removed from the UPA (2000) because "[t]he existence of modern genetic testing obviates this old approach to the problem of conflicting presumptions when a court is to determine paternity." *See id.* The only additional protection that the UPA (2000) provides for the presumed father who is not the genetic father is found in the two-year statute of limitations placed on the right of the alleged father found in section 607:

> (a) Except as otherwise provided in subsection (b), a proceeding brought by a presumed father, the mother, or another individual to adjudicate the parentage of a child having a presumed father must be commenced not later than two years after the birth of the child.
>
> (b) A proceeding seeking to disprove the father-child relationship between a child and the child's presumed father may be maintained at any time if the court determines that:
>
> (1) the presumed father and the mother of the child neither cohabited nor engaged in sexual intercourse with each other during the probable time of conception; and
>
> (2) the presumed father never openly treated the child as his own.

Id. § 607, 9B U.L.A. 341 (2001).

311. Technically, the exclusions were really facts which, if they existed, prevented the presumption from arising.

312. Michael H. v. Gerald D., 491 U.S. 110, 124 (1989).

313. CAL. CIV. PROC. CODE § 1962(5) (1872) (repealed 1965) "[T]he issue of a wife cohabiting with her husband, *who is not impotent*, is indisputably presumed to be legitimate." (emphasis added).

314. *See In re* McNamara's Estate, 183 P. 552 (Cal. 1919).

> There is one class of cases where it is recognized in this country at least, that the husband is not to be taken as the father of the child, even though he had intercourse with his wife during the normal period of conception. That instance is where the husband and wife are of the same race, as for instance, white, and it appears that the wife has had intercourse with a man of another race, as, for instance, a negro, and the child is of mixed blood. The reason why the conclusive presumption is not applied in such instances is that the element of indeterminability which is the reason for the presumption in the ordinary case is absent. It is clear that the husband is not the father. The actual fact, in other words, is capable of definite determination, and for this reason the conclusive presumption which is a substitute for such determination is not properly applicable.

Although the Legislature in 1955,[316] and the California Supreme Court in 1960,[317] bolstered the conclusive presumption against attack by evidence derived from blood tests, there is some evidence that the reason for this rejection was the unreliability of the tests and even fear that a man who was not married to the mother might be falsely accused of fathering her child.[318]

However, starting in 1975, the Legislature began to make truly significant inroads into the application of the conclusive presumption, inroads which ultimately demonstrated faith in blood tests. In that year the judicial exception for sterility was codified,[319] and the word "legitimate" was replaced with the phrase "child of the marriage" in keeping with the reform of the law to remove the stigma of illegitimacy.[320] This change also manifested the modern statutory concern for the determination of parentage. In 1980, the Legislature created a two-year window of time in which the presumption was rebuttable by the presumed husband and the mother through the use of blood tests.[321] And,

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Id. at 557-58; *see also In re* Walker's Estate, 181 P. 792, 794 (Cal. 1919). This exception has now been rejected in California. *See* San Diego County v. Brown, 145 Cal. Rptr. 483, 484-86 (Ct. App. 1978); Hess v. Whitsitt, 65 Cal. Rptr. 45, 47 (Ct. App. 1967).

315. Hughes v. Hughes, 271 P.2d 172 (Cal. Ct. App. 1954). The Court of Appeal stated:

> [s]terility is a condition which, if established, renders it impossible to procreate and it is clear that a husband who is sterile during the period of conception cannot become a father. The same reasoning applies in such a case as is found in the McNamara decision. Where sterility is capable of definite determination, the conclusive presumption of legitimacy which is a substitute for such determination is not properly applicable.

Id. at 175; *accord* Groner v. Groner, 99 Cal. Rptr. 765, 765-66 (Ct. App. 1972).

316. *See* CAL. CIV. PROC. CODE § 1962(5) (1963), *amended by* 1955 Cal. Stat. 948 (1955) (repealed 1965) (stating, "*[n]otwithstanding any other provision of law*, the issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate.") (emphasis added).

317. Kusior v. Silver, 354 P.2d 657, 668 (Cal. 1960) (holding that blood test results were not admissible to rebut the conclusive presumption).

318. *See* Hill v. Johnson, 226 P.2d 655 (Cal. Ct. App. 1951). The rationale for not allowing blood test evidence seems somewhat unusual in this case:

> It was error to admit the evidence since it is contrary to the conclusive presumption of legitimacy. This is as it should be, since in the absence of a presumption that is conclusive, uncontestable and uncontradictable, an innocent man, whose only defense might be his uncorroborated denial of improper relations with the mother of a child, could easily be made the victim of blackmail by the collusive, false testimony of a husband and wife who are living together and having normal sexual relations.

Id. at 656; *see also* Arais v. Kalensnikoff, 74 P.2d 1043 (Cal. 1937); Berry v. Chaplin, 169 P.2d 442 (Cal. Ct. App. 1946). In 1953, California adopted the Uniform Act on Blood Tests to Determine Paternity, which established procedures for the use of blood test evidence in paternity actions. However, California did not adopt section 5 of that act, which allowed blood test evidence to rebut presumptions of paternity.

319. 1975 Cal. Stat. 1244 § 13. "Notwithstanding any other provision of law, the issue of a wife cohabiting with her husband, who is not impotent *or sterile*, is conclusively presumed to be *a child of the marriage*." *Id.* (emphasis added).

320. *See* CAL. FAM. CODE § 7602 (West 1994) ("The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents.").

321. CAL. EVID. CODE § 621(a)-(d) (1986) (repealed 1992):

> (a) Except as provided in subdivision (b), the issue of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage.

following the United States Supreme Court decision in *Michael H. v. Gerald D.*,[322] the California Legislature allowed a man who was not the presumed father under the conclusive presumptions to bring an action to rebut the conclusive presumptions if he was a presumed father under the California version of the UPA.[323]

The most important conclusion to be drawn from this historical analysis is that the conclusive presumption always has been concerned with whether the mother's husband was the biological father of the child. Both under the common law and under the presumption as it developed in California, when there was a means to prove that the mother's husband was not the child's father, the husband was excluded from consideration. In modern times, the Legislature and the courts have gradually expanded the methods for determining that a woman's husband is not the father of her child. This expansion is a strong, although incomplete, endorsement of the view that the child's father is actually the genetic-biological father, to the point where, during the two-year window of time to challenge the presumption, the genetic test is the preeminent criteria for fatherhood. Today, at least in litigated cases of paternity and child support other than those cases following dissolution, the genetic test is the one most commonly used to determine parentage in California. First, it is used almost exclusively in those cases in which a woman and child seek to enforce a support order against an alleged father.[324] During the first two years of a child's life, the conclusive and

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(b) Notwithstanding the provisions of subdivision (a), if the court finds that the conclusions of all the experts, as disclosed by the evidence based upon blood tests . . . are that the husband is not the father of the child, the question of paternity of the husband shall be resolved accordingly.

(c) The notice of motion for blood tests under subdivision (b) may be raised by the husband not later than two years from the child's date of birth.

(d) The notice of motion for blood tests under subdivision (b) may be raised by the mother of the child not later than two years from the child's date of birth if the child's biological father has filed an affidavit with the court acknowledging paternity of the child.

Id.

322. 491 U.S. 110 (1989).

323. CAL. FAM. CODE § 7541(b) (West 1994 & Supp. 2003). The proximity of this modification of the statute to the Supreme Court's decision in *Michael H.* easily leads to the conclusion that the change was in response to *Michael H.* See Halpern, *supra* note 38, at 277 (citing Marcia Coyle, *After the Gavel Comes Down: It's Never Quite Over When It's Over, Parties Before the Supreme Court Find Out*, 2/25/91 NAT'L L.J. 1 (1991), stating:

> [I]n August 1990 the California legislature amended California's conclusive presumption to enable a putative father or child, in addition to the husband or wife, to attempt to rebut the presumption under certain conditions. The amendment seems to have been inspired in large part by the United States Supreme Court's affirmance in 1989 of the California Court of Appeal decision in *Michael H. v. Gerald D.*, and the subsequent lobbying of the California legislature by Michael H., the non-victorious party in that case.

324. *See In re* Marriage of B., 177 Cal. Rptr. 429 (Ct. App. 1981); Murphy v. Myers, 560 N.W.2d 752 (Minn. Ct. App. 1997); *In re* Paternity of M.J.B., 425 N.W.2d 404 (Wis. 1988); Jessica G. v. Hector M., 653 A.2d 922 (Md. 1995).

rebuttable presumptions are ineffective as the basis for support if the child is not the genetic-biological child of the woman's husband. Second, the genetic-biological test for parentage serves as the baseline for determining parentage when anyone with standing seeks to prove that a presumed father is not the child's parent or when a presumed father seeks to establish his own paternity when there is another presumed father.[325]

3. Contemporary California Appellate Decisions

In keeping with this tradition of concern for the genetic-biological relationship, several contemporary California appellate courts have narrowed and limited the effect of the conclusive presumption, and, indeed, marital presumptions in general, in a manner which supports the genetic-biological parental relationship. The *California Practice Guide: Family Law*, which may give some insight into how trial courts treat the conclusive presumption, tells us that, in applying the conclusive presumption, the courts have attempted to avoid "absurd results" and therefore adopted "a case-by-case approach that involves a weighing of the competing state and private interests in applying [versus] not applying the presumption; and [would] not apply the presumption under facts that would yield 'absurd results.'"[326] In making this decision, the courts consider both whether the child has a relationship with the presumed father or the genetic-biological father and the child's best interest in terms of receiving support.[327] Moreover, the courts have routinely applied the doctrine of estoppel to lessen the blunt application of the conclusive presumption. Estoppel has been used both to prevent a presumed father from asserting the presumption of paternity[328] and to prohibit the denial of a genetic-biological father's paternity.[329]

The apparent source of this rebellion against the conclusive presumption is a 1975 case which did not even apply the conclusive presumption. In *In re Lisa R.*,[330] an alleged father sought to establish his paternity at a juvenile court annual dependency review of Lisa, a child in foster care.[331] He had never been married to Lisa's mother, who at the time of the child's birth was actually married to another man deceased at the time of the proceedings.[332] The record on appeal established that Lisa had been thriving in foster care and that the alleged father

325. CAL. FAM. CODE § 7541(a) (West 1994 & Supp. 2003).

326. HOGOBOOM & KING, *supra* note 203, § 6.4 (citing *In re* Lisa R., 532 P.2d 123, 131-33 (Cal. 1975)).

327. *Id.* (citing *In re* Kiana A., 113 Cal. Rptr. 2d 669 (Ct. App. 2001); Brian C. v. Ginger K., 92 Cal. Rptr. 2d 294 (Ct. App. 2000)).

328. *In re* Guardianship of Ethen S., 271 Cal. Rptr. 121 (Ct. App. 1990).

329. *In re Lisa R.*, 532 P.2d 123.

330. *Id.*

331. *Id.* at 124-27.

332. *Id.* at 125.

had only had sporadic visitation with her.[333] When the alleged father appeared at the annual review, the court ruled that he had no standing to establish his paternity and was excluded from the hearing.[334] The statutory impediment to the alleged father's ability to establish his paternity was not the conclusive presumption, which at that time was Evidence Code section 621, but rather former Evidence Code section 661, a forerunner of the present day Family Code section 7611.

Former Evidence Code section 661 provided:

> A child of a woman who is or has been married, born during the marriage or within 300 days after the dissolution thereof, is presumed to be a legitimate child of that marriage. This presumption may be disputed only by the people of the State of California in a criminal action brought under Section 270 of the Penal Code or by the husband or wife, or the descendant of one or both of them. In a civil action, this presumption may be rebutted only by clear and convincing proof.[335]

Because of the limitation on who could rebut the presumption, the presumption was conclusive as to the alleged father. However, the California Supreme Court declined to preclude the alleged father from establishing his paternity, basing its decision on *Stanley v. Illinois*[336] and a now familiar line of United States Supreme Court cases supporting parental rights.[337]

The court held that the decision to apply the presumption must be based upon a balancing of interests: "[t]he question whether appellant, as one claiming to be Lisa's natural father, can rebut the presumption that Lisa is the issue of her mother's marriage must thus be resolved by weighing the competing private and state interests."[338] In the end, the court found in favor of the alleged father's interest in establishing his paternity. While the court's balancing regarding former

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333. *Id.* at 126. The record indicated that the lack of visitation may have been due to the fact that social workers who knew of his paternal relationship with Lisa had discouraged his visits.

334. *Id.*

335. *Id.* at 130 n.12.

336. 405 U.S. 645 (1972).

337. The exact quote from the case is as follows:

> The rights to conceive and to raise one's children have been deemed "essential," Meyer v. Nebraska, . . . "basic civil rights of man," Skinner v. Oklahoma, . . . and "(r)ights far more precious . . . than property rights," May v. Anderson, ... "It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." Prince v. Massachusetts, ... The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, . . . the Equal Protection Clause of the Fourteenth Amendment, Skinner v. Oklahoma, . . . and the Ninth Amendment, Griswold v. Connecticut, ...

Id. at 651 (citations omitted).

338. *In re Lisa R.*, 532 P.2d at 131.

Evidence Code section 661 is historically interesting,[339] the most important point is that this balancing approach has now been applied by the appellate courts to the present day conclusive presumption of Family Code section 7540 in a manner which has supported the genetic-biological relationship.

This support for the genetic-biological relationship has manifested itself both in cases in which the courts have refused to allow a genetic-biological father to avoid the responsibilities of paternity even though there was a conclusively presumed father, and in a case in which the genetic-biological father was allowed to assert his paternity despite the existence of a conclusively presumed father. Following *In re Lisa R.*, the Court of Appeal for the Fourth District, in *County of Orange v. Leslie B.*,[340] refused to apply the conclusive presumption where the genetic-biological father had sought to use the conclusive presumption to bar the establishment of his own paternity. The court found that the presumed father had not known of the child's conception or birth, at least not until the hearing when the child was twelve, and had never lived with the mother and child. The Court of Appeal quoted the trial court in concluding, "[a]pplying the [presumption] leads to an absurd result that defies reason and common sense. To apply the [presumption] is to rely upon a fiction to establish a legal fact which we know to be untrue, in order to protect policies which in this case do not exist."[341]

The same result was reached in *Alicia R. v. Timothy M.*,[342] where the facts were similar to those in *Leslie B.*

> [B]lood tests have established that M. is the child's father and that S. is not. There has been a judgment of nullity of the "marriage" between R. [the mother] and S. . . . R. no longer resides with S. and there is no longer a parent/child relationship between S. and the child.[343]

M. sought to impose the conclusive presumption to prevent S. from establishing his paternity. The Court of Appeal for the Second District following *Leslie B.* concluded: "[w]hile the state has a legitimate interest in promoting marriage and not impugning a family unit, that interest cannot be served here where there is no marital union or family unit to disrupt."[344]

Perhaps the most interesting of these cases is one in which the court declined to apply the conclusive presumption to prevent the genetic-biological father from establishing his paternity. The facts are amazingly similar to those of *Michael H. v. Gerald D.*[345] In *Brian C. v. Ginger K.*,[346] the trial court found that the child,

339. *Id.* at 132-33.
340. 17 Cal. Rptr. 2d 797 (Ct. App. 1993).
341. *Id.* at 801.
342. 34 Cal. Rptr. 2d 868 (Ct. App. 1994).
343. *Id.* at 871.
344. *Id.*
345. 491 U.S. 110 (1989).
346. 92 Cal. Rptr. 2d 294 (Ct. App. 2000).

Kennedy, was conceived while the mother, Ginger, was living with her husband, William, who was not impotent or sterile, and that Brian lived with Ginger and Kennedy during the first year of the child's life and held the child out to be his own.[347] At some point around the time that Kennedy was one year old, Ginger left Brian and returned to William.[348] Brian brought an action to establish his paternity, and Ginger and William filed a motion for summary judgment more than two years after Kennedy's birth based upon the conclusive presumption claiming that William was the child's father.[349] The trial court granted summary judgment.[350] No genetic tests were done to determine the paternity of either William or Brian.[351] The Court of Appeal for the Fourth District steadfastly refused to apply either of the presumptions which would make William the natural father, either the conclusive presumption to the present situation or the rebuttable presumption of Family Code section 7611(a) that the man who is married to the mother is the natural father. The court held that Family Code section 7630(b) gave Brian standing to establish his own paternity under section 7611(d), despite express language of the statute to the contrary,[352] and standing to rebut the presumption of 7611(a) because, using the reasoning of *Stanley v. Illinois* and *In re Lisa R.*, "a conclusion that the statutory conclusive presumption (Fam. Code, § 7540) automatically cuts off a man in Brian's position from asserting paternity is unconstitutional."[353] Because Brian had standing to assert his own paternity and to rebut the marriage-related presumptions, the court concluded that ultimately DNA tests would determine paternity.[354]

While the result in *Brian C. v. Ginger K.* is admirable, this case and the others mentioned above demonstrate how the appellate courts in California have led a small rebellion against the marital presumptions. *Brian C.* itself is strong support for the genetic-test approach to determine paternity. While there are, of course, appellate cases which have applied the statutory presumption more literally,[355] the cases discussed here indicate a willingness to avoid the present California statutory scheme. Although the courts have had to use a constitutional rationale to revise, in effect, the present statutory scheme, the real problem is that the present scheme is outmoded in a day when genetic evidence of paternity is readily available.

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347. *Id.* at 297.
348. *Id.*
349. *Id.*
350. *Id.* at 297-98.
351. *Id.* at 298.
352. *Id.* at 301.
353. *Id.* at 312.
354. *Id.*
355. *See, e.g.*, Susan H. v. Jack S., 37 Cal. Rptr. 2d 120 (Ct. App. 1994); Rodney F. v. Karen M., 71 Cal. Rptr. 2d 399 (Ct. App. 1998); Miller v. Miller, 74 Cal. Rptr. 2d 797 (Ct. App. 1998).

4. Acceptance of Genetic-Biological Testing

The willingness of contemporary courts to put their faith in genetic testing is fully justified by the reliability of modern testing procedures. If at one time the rebuttable presumptions were not made fully rebuttable because of a fear of false results from blood tests,[356] this concern should no longer play a role in the policy decision not to make them rebuttable. Contemporary DNA testing can exclude a man as the father of a child,[357] and, when statistical techniques are applied to the DNA tests, they become "very powerful" and economically feasible tools to determine that a particular man is a child's father.[358] Even older testing methods "such as blood grouping, red cell enzyme analysis, and serum protein and antigen analysis, and HLA analysis" can still play a valuable role in determining parentage, and they may be even more cost-effective.[359] Although California has not allowed a nonpresumed genetic father to use these tests to rebut the presumptions, it has strongly endorsed the admissibility and reliability of these tests by adopting Family Code sections 7550-7558.[360] These provisions set standards for testing procedures and for the admission of the results of genetic testing.[361] Section 7555 resolves one issue that has often caused problems in the presentation of the results of a genetic test to the trier of fact by adopting the Paternity Index as the statistical tool to be used for evidentiary purposes.[362] More importantly, this section establishes the evidentiary threshold for establishing paternity by creating a presumption of paternity when the paternity index is greater than 100.[363] In California, the statutory foundation clearly has been laid for the use of genetic testing as the baseline for paternity and maternity determinations.

This faith in genetic testing has been exhibited nationally. The federal government has mandated that "states provide for genetic testing of all parties in contested paternity actions,"[364] and that "genetic test results must be admissible as

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356. *See supra* note 318 and accompanying text.

357. Arkin, *supra* note 305, at 3-07. "If the DNA does not match, the alleged father or suspected perpetrator cannot be the individual sought." *Id.*

358. Kamrin T. MacKnight, *Scientific Aspects of DNA Testing*, *in* 1 DISPUTED PATERNITY PROCEEDINGS 13-08 (Lexis Publishing 5th ed. 2003). "The cost of DNA testing is significant, currently ranging from approximately $500-600 per trio of mother, child, and alleged father. The cost increases in direct proportion to the complexity of the case." *Id.* at 13-08 n.1.

359. *Id.* at 13-08.

360. *See* CAL. FAM. CODE §§ 7550-7558 (West 1994 & Supp. 2003).

361. *Id.* §§ 7552, 7552.5, 7553.

362. *See* Arkin, *supra* note 305, at 3-10: "A standard inclusionary genetic test result in a paternity case will lead to two figures related to the likelihood that the alleged father is the true biological father: the paternity index and the probability of paternity. Although there has been very little controversy concerning the admissibility of the paternity index, the probability of paternity calculation is regularly challenged." *See also* Plemel v. Walter, 735 P.2d 1209 (Or. 1987); *In re* Paternity of M.J.B., 425 N.W.2d 404 (Wis. 1988); *In re* M. v. Marvin S., 656 N.Y.S.2d 802 (Fam. Ct. 1997).

363. CAL. FAM. CODE § 7555(a) (West 1994).

364. PETER N. SWISHER, ANTHONY MILLER & JANA B. SINGER, FAMILY LAW: CASES, MATERIALS, AND PROBLEMS 357 (Matthew Bender 2d ed. 1998) (citing 42 U.S.C. § 666(a)(5)(B) (1998)).

evidence as long as they are of a type generally acknowledged as reliable and are performed by an accredited laboratory."[365] As a result, virtually every state allows the admission of genetic and other forms of blood testing evidence to prove paternity.[366] The UPA, in two provisions which California did not adopt, allows a court to order blood tests[367] and authorizes the use of blood test results in paternity decisions.[368] Likewise, the UPA (2000) has extensive provisions for the use of genetic evidence,[369] and section 631 specifically provides that genetic testing rebuts the presumptions of paternity and requires that an adjudication of paternity be based upon genetic testing.[370] Regarding UPA (2000) section 631, the commissioners of the Uniform Act state:

> [t]his section establishes the controlling supremacy of admissible genetic test results in the adjudication of paternity. Other matters such as statute of limitations, equitable estoppel and res judicata may preclude the matter from reaching trial or the court denying genetic testing. However, if test results are admissible, those results control unless other test results create a conflict rebutting the admitted results.[371]

5. Universality of the Genetic-Biological Relationship

As a matter of policy, the law of California should be structured in a manner that allows every natural parent of a child the opportunity to develop a personal relationship with his or her child. The California statutory law should embody the principle set forth in the California Supreme Court case of *Adoption of Kelsey S.*[372] This case is a logical extension of a line of four United States Supreme Court cases, *Stanley v. Illinois*,[373] *Quilloin v. Walcott*,[374] *Caban v. Mohammed*,[375] and *Lehr v. Robertson*,[376] which collectively stand for the proposition that a natural father who has participated in his child's life has a constitutional right to have a relationship with his child.[377] While these cases do not directly support the

365. *Id.* (citing 42 U.S.C. § 666(a)(5)(F)(i) (1998)).

366. *See* D.H. Kaye & Ronald Kanwischer, *Admissibility of Genetic Testing in Paternity Litigation: A Survey of State Statutes*, 22 FAM. L. Q. 109 (1988); SWISHER, MILLER & SINGER, *supra* note 364, at 347.

367. UNIF. PARENTAGE ACT (1973) § 11, 9B U.L.A. 445 (2001).

368. *Id.*

369. UNIF. PARENTAGE ACT (2000) §§ 501-511, 9B U.L.A. 329-337 (2001).

370. *Id.* § 631, 9B U.L.A. 348 (2001).

371. *Id.* § 631 cmt., 9B U.L.A. 349 (2001).

372. 823 P.2d 1216 (Cal. 1992).

373. 405 U.S. 645 (1972).

374. 434 U.S. 246 (1978).

375. 441 U.S. 380 (1979).

376. 463 U.S. 248 (1983).

377. In *Stanley*, the Supreme Court held that an unwed natural father who had lived with and supported his three children when their mother died had a right to a hearing on fitness before the children could be removed from his custody, despite an Illinois statute which provided that, "the children of unwed fathers

proposition that the law should protect the genetic-biological relationship, the dissent in *Lehr* asked the following question: does a natural father who has been prevented from developing a relationship with his child have a constitutional right to have the opportunity to develop that relationship?[378] *Adoption of Kelsey S.* answered this question:

> If an unwed father promptly comes forward and demonstrates a full commitment to his parental responsibilities—emotional, financial, and otherwise—his federal constitutional right to due process prohibits the termination of his parental relationship absent a showing of his unfitness as a parent. Absent such a showing, the child's well-being is presumptively best served by continuation of the father's parental relationship. Similarly, when the father has come forward to grasp his parental responsibilities, his parental rights are entitled to equal protection as those of the mother.[379]

In addition, the court stated that "[t]he biological connection between father and child is unique and worthy of constitutional protection if the father grasps the opportunity to develop that biological connection into a full and enduring

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become wards of the State upon the death of the mother." *Stanley*, 405 U.S. at 646, 649. In *Quilloin*, the Court held that there is no constitutionally protected interest for an unwed natural father who had never legitimated the child, never had custody, nor ever "shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child." 434 U.S. at 256. The Court in *Caban* further refined the position of *Stanley* and *Quilloin* as to the appropriate standard to be applied to determine when an unwed father is entitled to constitutional protection. The biological relationship was still not enough: "In those cases where the father never has come forward to participate in the rearing of his child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child." *Caban*, 441 U.S. at 392. The Court found that constitutional protection adhered to a biological father who "has established a substantial relationship with the child and has admitted his paternity . . ." and viewed *Quilloin* as emphasizing "the importance in cases of this kind of the relationship that in fact exists between the parent and child." *Id.* at 393 & n.14. Although *Lehr v. Robertson* concluded that the natural father's rights had not been violated, it also supported the view that the natural father's relationship with his child is what counts constitutionally. 463 U.S. 248. The biological connection plus a participation in the rearing of his child creates a more profound right, one that is constitutionally protected, to have a relationship with the child:

> The difference between the developed parent-child relationship that was implicated in *Stanley* and *Caban*, and the potential relationship involved in *Quilloin* and this case, is both clear and significant. When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child," his interest in personal contact with his child acquires substantial protection under the Due Process Clause.

Id. at 261 (quoting *Caban*, 441 U.S. at 392 (citation omitted).).

378. *Id.* at 268-76. This issue arose in *Lehr* because, according to the dissent, the natural father had been unable to develop this relationship due to the mother's concealment of herself and the child. The majority never reached this issue because it concluded that due process was satisfied by the existence of a putative father registry of which Lehr had not availed himself, although he had filed a paternity action. *See generally* Elizabeth Buchanan, *The Constitutional Rights of Unwed Fathers Before and After* Lehr v. Robertson, 45 OHIO ST. L. J. 313 (1984) (discussing *Lehr v. Robertson* and focusing on termination of parental interests in adoption proceedings where the termination is undertaken to free the child for adoption).

379. Adoption of Kelsey S., 823 P.2d 1216, 1236 (Cal. 1992).

relationship."[380] Of course, the same is true regarding the mother and child relationship.

For too long, either because of the inability to determine the genetic parent or the misplaced belief that the marital relationship must be protected, California has failed to realize that the genetic-biological relationship is fundamental to the parent-child relationship. *Adoption of Kelsey S.* impliedly recognized that the genetic-biological relationship is a real world connection between parent and child. A recent statement by the California Legislature summarizes the fundamental nature of the genetic-biological relationship:

> (a) There is a compelling state interest in establishing paternity for all children. Establishing paternity is the first step toward a child support award, which, in turn, provides children with equal rights and access to benefits, including, but not limited to, social security, health insurance, survivors' benefits, military benefits, and inheritance rights. Knowledge of family medical history is often necessary for correct medical diagnosis and treatment. Additionally, knowing one's father is important to a child's development. . . .[381]

Although this statement is made in support of voluntary declarations of paternity, it is clear from the reference to medical history that when the Legislature said "paternity," it meant genetic-biological paternity, and there is no reason that it should not apply to maternity as well.

Now, when technology is possibly on the brink of developing radical new methods of creating children, the genetic-biological relationship must be recognized by law as the starting place for the determination of parentage. This relationship is a connection which exists in nature. It is a physically tangible connection that every person has with only two other people. Not only is it possible to scientifically establish this connection, but most people, to varying degrees, feel the connection of biological kinship. They feel it not only with parents, but with more distant relations, such as brothers and sisters, aunts and uncles, grandparents, and cousins who have more distant genetic-biological relationships. People who do not have the genetic-biological relationship with parents often long for it. Adopted children often search for their birth mothers; children often long, and even search for, an absent father, even one they have never known. The very terms "parent," "mother," and "father" mean the genetic-biological—or "blood"—relationship. While there are other definitions of these terms, some of which may be more meaningful or important to some people, everyone accepts the genetic-biological meaning of the terms "parent," "mother," and "father." Even when people are angry with their genetic-biological parents, reject their parents, never want to see them again, have adoptive parents, have

380. *Id.* at 1228.

381. CAL. FAM. CODE § 7570 (West 1994).

psychological parents, have new and better parents by whatever method, they still accept that the term "parent" means, at least by one definition, the person with whom they have a genetic-biological connection. As a society, we recognize that biological parents have an obligation to support and rear their children, hence, the almost universal acceptance of the principle that the man who begets a child should pay for that child's support and upkeep. Indeed, the world would be a better place if all parents took care of their biological offspring. The naturalness of this real-world connection and the emotions attached to it without doubt mean that, no matter how much we favor nurture over nature in the development of the human psyche, we cannot ignore the genetic-biological relationship. The parent and child relationship based upon the genetic-biological connection can be lost through neglect or abuse, but it is not something which must be perfected. It exists and the law should recognize it.

6. The Psychological Relationship

In recent years, there has been significant concern with the psychological parent-child relationship. Even the presumptions of paternity have been defended on the grounds that they preserve the psychological relationship. Nevertheless, the use of the genetic-biological baseline for determining parentage is not a threat to the preservation of psychological relationships. One way to protect psychological parent-child relationships would be to place a limit on the amount of time that a genetic-biological parent has to assert his or her rights. Presently, there is a two-year limitation under the statutes which allow for rebuttal of the conclusive and rebuttable presumptions.[382] An even shorter period might be appropriate. It simply is not asking too much to require a genetic-biological parent to act promptly to establish parental rights. However, an allowance, by tolling the time limit or availability of estoppel, should be made for biological parents who are unaware of their child or who, through no fault of their own, are unable to comply. Another means of protecting the psychological parent-child relationship would be by drawing a distinction between the parental relationship and the custodial relationship. If a child has formed a relationship with another person, such as a spouse or partner of a natural parent, the child can still remain in the custody of the natural parent and non-parent while the biological parent has the opportunity to visit and have a relationship with the child. Finally, there are situations, discussed below, when parentage must be determined by use of the best interest standard. In those situations, it is very likely that this standard will dictate that the person with the strongest psychological relationship with the child should be declared the parent.

382. *See, e.g., id.* § 7541(b)-(c).

B. The Bright-Line for Assisted Conception: The Judicially Pre-Validated Contract

As mentioned above, other than for artificial insemination, California has no statutory law dealing with the parentage of children conceived through assisted conception.[383] The few cases which have dealt with the more advanced forms of surrogacy have not created a bright-line standard for the determination of parentage after assisted conceptions.[384] Adoption law[385] provides just this sort of bright-line certainty; however, potential parents contemplating assisted reproduction want more certainty about their future parentage than the mere possibility of adopting the child after it is born. Nevertheless, adoption may serve as a model situation in which a child will have parents other than its genetic-biological parents. The process of adoption recognizes that this change in parentage is a significant event, one which requires the operation of law, and which provides not only certainty, but also protection, for the child. There are other models for the operation of law in the area of assisted conception. Both the Uniform Status of Children of Assisted Conception Act[386] (USCACA) and the UPA (2000)[387] have proposed that, for assisted conception, there be a judicially pre-validated contract between the surrogate and the intended parents which establishes the parent-child relationship. The test or criteria for parentage is whomever the pre-validated contract designates as parent. While this approach has already been proposed for surrogacy contracts, it would also work for future technology even where children are conceived through cloning and gestated in an artificial womb. This article proposes that California adopt a pre-validated contract requirement for assisted conception modeled after the UPA (2000); however, it also suggests an important modification of the UPA (2000). Donors should be made a party to the pre-validated contract for assisted conception, and, in situations in which there is no pre-validated contract or the contract fails to provide a parent—for example, where the contractual parents die—the donor should be one of the possible parents considered by a court in applying the best interest of the child standard.

1. Surrogacy

At the outset of this discussion of surrogacy, it is important to mention that there are situations in which it is not necessary to have a special rule to determine parentage of a child born to a surrogate mother. In other words, the establishment of the genetic-biological test as the baseline criteria for determining parentage resolves issues of parentage. The best example of this result is the form of

383. *See supra* Part II.C.

384. *See supra* Part II.C.3.

385. *See* CAL. FAM. CODE §§ 8500-9340 (West 1994 & Supp. 2003).

386. *See* UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 5, 9C U.L.A. 373, 383 (2001).

387. UNIF. PARENTAGE ACT (2000) §§ 801-803, 9B U.L.A. 362-64 (2001).

gestational surrogacy found in *Johnson v. Calvert,*[388] where there was ovum donation and sperm donation from parties to the surrogacy contract.[389] The Calverts were the genetic-biological parents of the child.[390] The problems arose simply because the court was unwilling to place the genetic-biological test foremost. I also believe that the genetic-biological test resolves issues of maternity in traditional surrogacy which is accomplished by artificial insemination of the surrogate mother. The genetic-biological test would establish the surrogate as the mother. I believe this would be the proper result in traditional surrogacy, and adoption is the appropriate method for establishing a new mother of the child, someone other than the genetic-birth surrogate mother.[391]

There are, of course, surrogacy situations in which the parties to the surrogacy contract seek to have someone other than the genetic-biological parent ultimately serve as the child's parent. Indeed, in situations where the parentage of an IVF donor has been cut off because the donor has donated the genetic material to a licensed physician, there may be no genetic-biological parents under the law. For these situations, the bright-line pre-validated contract for determining parentage is readily available. As mentioned above, this approach has been proposed, at least for surrogacy contracts, by both the USCACA[392] and by the UPA (2000).[393] While the National Conference of Commissioners on Uniform State Laws appears to consider the UPA (2000) to be the successor of the USCACA, either statute could serve as a model for the California Legislature.[394] The USCACA Alternative A section 5[395] allows surrogate contracts, requires

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388. 851 P.2d 776 (Cal. 1993).

389. *Id.* at 778.

390. *Id.*

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

392. UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 5, 9C U.L.A. 373, 383 (2001).

393. UNIF. PARENTAGE ACT (2000) §§ 801-809, 9B U.L.A. 360-370 (2001).

394. *Id.* Prefatory Note, 9B U.L.A. 297 (2001) states:

> In addition, in 1988, the Conference also adopted the Uniform Status of Children of Assisted Conception Act. Assisted reproduction and gestational agreements became commonplace in the 1990s, long after the promulgation of UPA (1973). The USCACA resembled a Model Act more than a Uniform Act because it provided two opposing options regarding "gestational agreements." To date, only two States have enacted USCACA, each choosing a different option. With the promulgation of the Uniform Parentage Act (2000), all of the earlier Uniform Acts dealing with parentage have been withdrawn by the Conference, leaving the Uniform Parentage Act (2000) as the single product of the Conference dealing with the subject.

Id.

395. UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 5, 9C U.L.A. 373. The Uniform Status of Children of Assisted Conception Act also provides Alternative B which declares that all surrogacy contracts are void:

> An agreement in which a woman agrees to become a surrogate or to relinquish her rights and duties as parent of a child thereafter conceived through assisted conception is void. However, she is the mother of a resulting child, and her husband, if a party to the agreement, is the father of the child. If her husband is not a party to the agreement or the surrogate is unmarried, paternity of the child is governed by [the Uniform Parentage Act].

Id. § 5, 9C U.L.A. 383 (2001).

judicial pre-approval, and provides that if there is no judicial pre-approval, the surrogate is the mother of the child and her husband is the father.[396]

Article 8 of the UPA (2000) presents a much more comprehensive surrogacy provision, although it replaces the term "surrogate mother" with "gestational mother."[397] This Article does not include an alternative provision which would make all gestational agreements void; rather, it accepts the pragmatic need for such agreements.[398] However, it does make the welfare of the child paramount and, indeed, views the surrogacy process as analogous to adoption.[399] In a sense, the UPA (2000) has opted for regulation rather than prohibition.[400] Gestational agreements are allowed, but, to be enforced, they must be validated by the court. The parties to the contract vary depending upon the nature of the physical arrangements which have been made. The gestational mother and, if she is married, her husband, must be parties. If there are sperm or egg donors, they must also sign the agreement and, of course, the intended parents must also sign.[401] The agreement may provide that the gestational mother, her husband, and any donors relinquish any parental rights and that "the intended parents become

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396. *Id.* § 5, 9C U.L.A. 373 (2001). The entire text of section 5 of Alternative A reads as follows:

(a) A surrogate, her husband, if she is married, and intended parents may enter into a written agreement whereby the surrogate relinquishes all her rights and duties as a parent of a child to be conceived through assisted conception, and the intended parents may become the parents of the child pursuant to Section 8.

(b) If the agreement is not approved by the court under Section 6 before conception, the agreement is void and the surrogate is the mother of a resulting child and the surrogate's husband, if a party to the agreement, is the father of the child. If the surrogate's husband is not a party to the agreement or the surrogate is unmarried, paternity of the child is governed by [the Uniform Parentage Act].

Id.

397. "'Gestational mother' means a woman who gives birth to a child under a gestational agreement." UNIF. PARENTAGE ACT (2000) § 102(11), 9B U.L.A. 304 (2001).

398. *See id.* § 801, 9B U.L.A. 362 (2001). The Comment to Article 8 states:

The previous Uniform Act on this subject, USCACA, proposed two alternatives, one of which was to declare that gestational agreements were to be void. Subsection (a) rejects that approach. The scientific state of the art and the medical facilities providing the technological capacity to utilize a woman other than the wife as the gestational mother, guarantee that such agreements will continue to be written.

Id. § 801 cmt., 9B U.L.A. 362 (2001).

399. The Comment to U.P.A. (2000) section 803 states:

This pre-conception authorization process for a gestational agreement is roughly analogous to adoption procedures in place in most jurisdictions as of December, 2000. Just as adoption contemplates the transfer of parentage of a child from the natural to the adoptive parents, a gestational agreement involves the transfer from the gestational mother to the intended parents. UPA (2000) is designed to protect the interests of the child to be born under the gestational agreement as well as the interests of [the] gestational mother and the intended parents.

Id. § 803 cmt., 9B U.L.A. 364-65 (2001).

400. *See id.* art. 8, prefatory cmt., 913 U.L.A. 360 (2001).

401. *See id.; see also id.* § 801(a), 9B U.L.A. 362.

the parents of the child."[402] The agreement may include valuable consideration for the gestational mother. However, the agreement is unenforceable unless it has been validated by the court, and the statute requires the court to make seven specific findings in support of validation. Each of these findings covers an important area of concern in the surrogacy process: does the court have jurisdiction; is the intended mother unable to bear a child;[403] has a home study demonstrated that the intended parents meet the standard of fitness of adoptive parents; have the parties voluntarily entered into the contract with an understanding as to its consequences; is there a physical or mental health risk to the gestational mother; are there adequate provisions for health care expenses; and is the consideration for the gestational mother adequate?[404] If the court determines that each of these concerns is properly resolved, the "court may issue an order validating the gestational agreement and declaring that the intended parents will be the parents of a child born during the term of the . . . agreement."[405] Finally, Article 8 provides that, if the agreement is not enforceable, the parentage of the child must be determined by Article 2 of the Act;[406] however, there is an additional provision which states that parties to a non-validated, and hence unenforceable, agreement may still be liable for the support of the child.[407]

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402. *Id.* § 103(d), 9B U.L.A. 306 (2001).

403. *See id.* § 803(b)(2), 9B U.L.A. 364 (2001). The inclusion of this item emphasizes a desire on the part of the authors of the UPA (2000) to limit the use of surrogacy. The authors also require that couples who obtain a child through surrogacy should be married. *See id.* § 801(b), 9B U.L.A. 362. The California Legislature could, of course, reconsider these limitations.

404. UPA. section 803(b) requires that seven findings must be made by the court in order to validate the agreement:

> (1) the residence requirements of Section 802 have been satisfied and the parties have submitted to the jurisdiction of the court under the jurisdictional standards of this [Act];
>
> (2) medical evidence shows that the intended mother is unable to bear a child or is unable to do so without unreasonable risk to her physical or mental health or to the unborn child;
>
> (3) unless waived by the court, the [relevant child-welfare agency] has made a home study of the intended parents and the intended parents meet the standards of fitness applicable to adoptive parents;
>
> (4) all parties have voluntarily entered into the agreement and understand its terms;
>
> (5) the prospective gestational mother has had at least one pregnancy and delivery and her bearing another child will not pose an unreasonable health risk to the unborn child or to the physical or mental health of the prospective gestational mother;
>
> (6) adequate provision has been made for all reasonable health-care expense associated with the gestational agreement until the birth of the child, including responsibility for those expenses if the agreement is terminated; and
>
> (7) the consideration, if any, paid to the prospective gestational mother is reasonable.

Id. § 803(b), 9B U.L.A. 364 (2001).

405. *Id.* § 803(a), 9B U.L.A. 364 (2001).

406. *Id.* § 809(b), 9B U.L.A. 369 (2001).

407. *See id.* § 809(c), 9B U.L.A. 369 (2001). "Individuals who are parties to a nonvalidated gestational agreement as intended parents may be held liable for support of the resulting child, even if the agreement is otherwise unenforceable. The liability under this subsection includes assessing all expenses and fees as provided in Section 636." *Id.*

The pre-validated contract provides a much greater degree of certainty than the intent test of *Johnson v. Calvert*.[408] It also provides an assurance that the child's welfare has been protected. The authors of the UPA (2000) were right when they took "the position that entering into a gestational agreement is a significant legal act that should be reviewed by a court, just as an adoption is judicially reviewed."[409] By contrast, under present California law[410] as Justice Kennard pointed out in her dissent in *Johnson v. Calvert*, there is great uncertainty regarding even the definition of intent in this context.[411] Under the approach of the UPA (2000) Article 8, the written contract is a tangible manifestation of the intent of the parties. The statute sets forth guidelines for the contract, requirements for the petition to be validated, a requirement that there be a hearing, a list of specific findings which must be made, and the requirement of a court order.[412] The bright-line is established and it is clear to everyone. Not only is there a possibility of easy enforcement,[413] but enforcement is less likely to be necessary. The judge will have had the opportunity to measure the resolve of the parties' obligations, to question them about their consent, to root out fraud,[414] and to ascertain whether they consented voluntarily with full understanding of the consequences.[415] Whatever natural respect the parties have for the contract is reinforced by the validation process and even more by the order of the court. More importantly, the approach of the UPA (2000) Article 8 allows the judge to make a reasoned and compassionate decision as to how to best insure that the

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408. 851 P.2d 776 (Cal. 1993).

409. UNIF. PARENTAGE ACT, art. 8, prefatory cmt., 9B U.L.A. 361 (2001).

410. "In deciding the issue of maternity under the Act we have felt free to take into account the parties' intentions, as expressed in the surrogacy contract, because in our view the agreement is not, on its face, inconsistent with public policy." *Johnson*, 851 P.2d at 783.

411. *Id.* at 795-800 (Kennard, J., dissenting). Whatever certainty exists in the use of the intent test is actually provided by the underlying contract. Indeed, the intent test merely serves as a conceptual substitute for the surrogacy contract, unless the court in *Johnson* actually believed that there will be situations in which the intended parent is someone other than the contractual parent. If the court takes this possibility seriously, then there is no certainty at all in the intent test and a hearing must be held.

412. UNIF. PARENTAGE ACT (2000) §§ 801-803, 9B U.L.A. 362-64 (2000).

413. Under U.P.A. section 807, enforcement merely requires the filing of a notice with the court that the child has been born:

> (a) Upon birth of a child to a gestational mother, the intended parents shall file notice with the court that a child has been born to the gestational mother within 300 days after assisted reproduction. Thereupon, the court shall issue an order:
>
> (1) confirming that the intended parents are the parents of the child;
>
> (2) if necessary, ordering that the child be surrendered to the intended parents; and
>
> (3) directing the [agency maintaining birth records] to issue a birth certificate naming the intended parents as parents of the child.
>
> (b) If the parentage of a child born to a gestational mother is alleged not to be the result of assisted reproduction, the court shall order genetic testing to determine the parentage of the child.

Id. § 807, 9B U.L.A. 368 (2001).

414. *See id.* § 803 cmt., 9B U.L.A. 365 (2001).

415. *Id.* § 803(b)(4), 9B U.L.A. 364 (2001).

child will be raised in a wholesome and fit environment. If California used the approach of the UPA (2000), a study of the intended parents' home would be required and the intended parents would have to meet the standards of adopting parents.[416] In contrast, the intent test, at least as it stands now, makes no attempt to provide for the welfare of the child and follows the erroneous assumption that awarding a child to the intended parent insures the child's welfare.[417]

2. *Cloning and Future Technology*

As mentioned above, cloning is illegal in California, and Presidential Commissions under the administrations of both President Clinton and President George W. Bush have recommended at least a temporary ban on cloning for reproductive purposes.[418] However, if the history of reproductive technology is any indication, this process will not be resisted forever. While there are good reasons for the cloning of humans to remain illegal, the approach to determining the parentage of a child who was born as a result of cloning, if cloning were legal, is not difficult. If cloning remains illegal, however, the process of determining the parentage of a child born as a result of cloning will be more complicated and, indeed, additional laws may be required.

If cloning is ever legalized, the approach suggested in this article for surrogacy will work perfectly. For anyone other than the genetic parent to be the parent of the child, the specific legal requirement of a judicially pre-validated contract would have to be met, and the standards established under the rules of the UPA (2000) or similar rules for validating or approving such contracts would apply. There would, of course, be cases in which the contract was not needed. The primary genetic donor,[419] the birth mother, and the intended parent could be the same woman. She would, of course, be the mother of the child under both the genetic test and the giving birth test; her husband would be the father under the "married-to-the-mother" presumption. Additionally, the genetic donor could be the husband of the gestational mother; he would be the child's father under the genetic test and she would be the mother under the giving-birth presumption. However, if there were an intended parent other than the primary genetic donor and the gestational mother, a judicially pre-validated contract should be required.

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416. *Id.* § 803(b)(3), 9B U.L.A. 364 (2001).

417. *See* Johnson v. Calvert, 851 P.2d 776, 783 (Cal. 1993). *Johnson* states:

> Moreover, as Professor Shultz recognizes, the interests of children, particularly at the outset of their lives, are "[un]likely to run contrary to those of adults who choose to bring them into being." Thus, "[h]onoring the plans and expectations of adults who will be responsible for a child's welfare is likely to correlate significantly with positive outcomes for parents and children alike."

Id. (quoting Shultz, *supra* note 165, at 309).

418. *See supra* note 280 and accompanying text.

419. While there is a small hitch in that the donor's parents would also pass the genetic test, this would not present a significant problem.

If there were no contract or if the contract had not been judicially pre-validated, and, therefore, was unenforceable, then the best interest of the child standard would apply.[420] In both cases, the genetic parent, the surrogate mother, and the contractual parent would vie for the right to establish the parent-child relationship; the intended parent, however, would face the financial responsibility of raising the child under a provision similar to section 809 (c) of the UPA (2000).[421]

If cloning remains illegal, the scenario becomes more complicated and very difficult to resolve at this time, since the exact culpability of each party to the cloning arrangement has not been established. In other words, are the donor, the gestational mother, and the intended parents all at the same level of culpability? One possible answer to this question is that the intended parent in a cloning situation is the party of greatest culpability, since he/she is in essence the prime mover of the child's creation; it is easily possible to imagine scenarios including a futuristic black market, in which the creation of a child is the result of an agreement between the intended parents and a physician or an organization that performs the cloning procedure, in which the donor and the gestational mother might not even know of the child's origin.

So what can be said about determining the parentage of a child who comes into this world as a result of illegal cloning? It is not impossible to develop a working model for such a determination. Of course, in any model based on illegal cloning, the requirement of a judicially pre-validated contract for assisted conception becomes meaningless. Also, in any model, as a matter of both deterrence and of insuring the financial well-being of the child, the intended parents and the person (and/or organization) who performs the cloning should remain financially responsible for the child, as would all intended parents under the UPA (2000). As to the gestational mother and the donor, they should both have the opportunity to establish the parental relationship. Both of these potential parents have a significant real-world connection with the child, and it should not make any difference if they have developed their desire to raise the child late in the process.[422] The UPA (2000) states a definite preference for the gestational mother over the donor.[423] Under the UPA (2000), where there is an unenforceable contract of surrogacy, the gestational mother is considered to be the child's mother,[424] and in all cases donor parents have no opportunity to establish a parental relationship. There is, however, no reason for this automatic assignment

420. *See* discussion *infra* Part III.C.

421. "Individuals who are parties to a nonvalidated gestational agreement as intended parents may be held liable for support of the resulting child, even if the agreement is otherwise unenforceable." UNIF. PARENTAGE ACT (2000) § 809(c), 9B U.L.A. 369 (2001).

422. As mentioned several times in this article, California recognizes the right of a genetic birth mother who has agreed to the adoption of her child to rescind her consent after the child's birth. *See* CAL. FAM. CODE §§ 8500-9340 (West 1994 & Supp. 2003).

423. *See* UNIF. PARENTAGE ACT (2000) § 201, 9B U.L.A. 309 (2001).

424. *Id.*

of parentage; it assumes that the gestational parent is fit and the donor is not. Why not, in this extraordinary situation, make an actual determination of the child's best interest?

The greatest difficulty in formulating a model is deciding whether the intended parents should be considered in determining the parentage of the child. As a matter of deterrence, the intended parents should be barred from being declared the child's parents so that they do not receive the benefit of their illegal act. But, at the same time, it is not impossible to imagine a scenario where the best interests might dictate that the intended parents should be declared the child's parents. Indeed, it is possible that the intended parents are the only ones who want to raise the child. There is a compromise between these two views: the intended parent would be considered as a possible parent only if there was no other potential parent, donor, or gestational mother available. The overall model, one based upon the principles enunciated in this article, for the determination of parentage of an illegally cloned child would contain a provision stating that any contract regarding this form of assisted reproduction would not be valid. Where the donor and intended parent coincide, there would be no need for a special provision; the donor is the genetic-biological parent of the child. Where the intended parent is someone other than the donor, the best interest standard would prevail, but the contest is only between the gestational mother and the donor.[425] The intended parent would be considered only if there was no other potential parent available.

3. Status of Donors

In considering the requirement of a judicially pre-validated contract for assisted conception, a question arises regarding the status of donors: should donors be automatically excluded as parents of a child created through assisted conception? California already excludes one category of donors: "[t]he donor of semen provided to a licensed physician and surgeon for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived."[426] However, California law is entirely silent regarding the status of both egg donors and sperm donors where artificial insemination is not used as the means of assisted conception.

Section 702 of the UPA (2000) severs all ties between donor and child: "[a] donor is not a parent of a child conceived by means of assisted reproduction."[427] The view of the framers of the UPA (2000) was that this approach is more in

425. In the cloning scenario, the donor may either be a man or a woman.

426. CAL. FAM. CODE § 7613(b) (West 1994). For situations involving homologous artificial insemination, that is, where the donor is the husband or partner of the impregnated woman, there is no need for a special criteria to determine parentage of the donor; the genetic test is sufficient. For heterologous artificial insemination, the present rule operates to sever the parental relationship of donor and child.

427. UNIF. PARENTAGE ACT (2000) § 702, 9B U.L.A. 355 (2001).

keeping with modern assisted reproduction practices and "provides certainty of nonparentage for prospective donors."[428] There are several important reasons for not adopting this provision. It encourages at-home artificial insemination and all of the ills which may be associated with private artificial insemination.[429] At-home artificial insemination does not allow for even the most rudimentary screening for health-related problems. At best, a medical history is taken informally, and no medical tests are taken.[430] Moreover, there are situations in which the donor may want to establish a parental relationship with the child. The most likely situation would be where there has been improper use of the donor's genetic material through fraud, theft or even negligence.[431] Also, there is the problem of the involuntary donor. While the involuntary donor might not be a problem with sperm and egg donation, it may be a significant problem with cloning, where almost any cell can provide the genetic material needed for cloning. The involuntary donor should be included in the group of potential parents who have standing to assert parentage rights.

California should reject the position of the UPA (2000) and it should not broaden the approach of Family Code section 7613,[432] allowing automatic severance of the parent-child relationship for sperm donors only in cases of artificial insemination. The effect of this limitation is that donors[433] must be

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428. *Id.* § 702 cmt., 9B U.L.A. 355 (2001).

429. *See* Jhordan C. v. Mary K., 224 Cal. Rptr. 530, 535 (Ct. App. 1986).

430. Additionally, the automatic severance of the parental rights can lead to absurd results when at-home artificial insemination is involved. If a couple decides to engage in sexual intercourse and the woman gets pregnant, her partner is the father. If they use artificial insemination, the man has no relationship to the child. If they have adequately protected sex and then use artificial insemination, then the donor has no relationship with the child. Evidentiary problems could arise. The partner seeking to establish paternity would say that they had sexual intercourse; the party seeking to deny paternity would say that they used artificial insemination.

431. The California Legislature has recognized this problem and made it a crime to improperly use sperm, ova, or embryos. *See also* CAL. PENAL CODE § 367g (West 1999 & Supp. 2003). *See* Historical and Statutory Notes to Penal Code section 367g, *supra* note 226. Also, two very recent cases have tackled the problem of parentage following the improper use of genetic material. In the first, Prato-Morrison v. Doe, 126 Cal. Rptr. 2d 509 (Ct. App. 2002), the trial court refused to allow the putative genetic parents to present evidence that they were related to the child. In the second case, Robert B. v. Susan B., 135 Cal. Rptr. 2d 785 (Ct. App. 2003), the trial court's decision to declare the genetic father to be the child's father was upheld by the court of appeal.

432. There is little harm in California keeping its present section 7613 of the Family Code. The present approach does involve the operation of law, albeit on a rather low level. Also, the present approach is very well established. Sperm banks have been active for many years and many children have been conceived in this manner and not many legal issues have arisen out of the process. *Contra* Jenna H. Bauman, Note, *Discovering Donors: Legal Rights to Access Information About Anonymous Sperm Donors Given to Children of Artificial Insemination in* Johnson v. Superior Court of Los Angeles County, 31 GOLDEN GATE U. L. REV. 193 (2001). Finally, in the process of artificial insemination, the genetic-biological mother, who is also the birth mother, is still involved. In effect, if section 7613 remained in the code it would be an exception to the rule requiring a donor in assisted conception to be a party to the judicially pre-validated contract.

433. In some situations the genetic test, if adopted as the baseline for determining parentage, would serve adequately to determine parentage. Examples include where the genetic mother may actually carry the child conceived with her own and her husband's genetic material and where the genetic mother and father would also be the intended parents as in *Johnson v. Calvert*. *See* Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).

parties to the judicially pre-validated assisted-conception contracts and they must expressly consent to the severance of their parental rights.

C. The Best Interest Test

While either the USCACA or the UPA (2000) could serve as an adequate model for California legislation enforcing surrogacy contracts, there is a common problem with both acts, at least as they apply to gestational surrogacy. Under the USCACA section 5 Alternative A, if there is no judicial pre-approval, the surrogate mother and her husband, if he is a party to the surrogacy agreement, are the child's parents by default.[434] The UPA (2000) reaches this same result by the application of Article 2 and other provisions.[435] Although neither act states a rationale for adopting this position, there are two likely rationales: the first is to follow traditional presumptions of parentage (the mother is the birth mother and the father is the man married to her); the second is to provide a deterrent to those who seek to have a child by surrogacy without judicial validation. If intended parents do not follow the rules, they lose the child they sought. Nevertheless, this approach may place onerous economic and psychological burdens on the gestational mother and her husband, the parties to the surrogacy contract who are the most likely to have been exploited by it, the least likely parties to be represented by counsel, and the least likely to intuitively realize that they must have the contract pre-validated by a court. The UPA (2000) mitigates the economic burden on the gestational mother and her husband by requiring that "[i]ndividuals who are parties to a non-validated gestational agreement as intended parents may be held liable for support of the resulting child, even if the agreement is otherwise unenforceable."[436] But the problem of collecting support and the psychological burden both remain, and, while the gestational mother may want to raise her child, the UPA approach makes no provision for situations where she has no interest in raising the child. A better approach would be simply to use the best interest standard to determine the parentage of a child born as a result of an un-validated surrogacy contract. Indeed, in all cases of assisted conception where there is no judicially pre-validated contract, or where, because

434. UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 5, 9C U.L.A. 373 (2001).

435. In Article 2, section 201 provides for the determination of maternity by giving birth, adjudication, or adoption, and for paternity by presumption, adjudication, or adoption. The gestational mother would be the child's mother by virtue of having given birth. Section 201 also provides that paternity may be determined by unrebutted presumption, acknowledgment, adjudication, adoption or consent to assisted reproduction. UNIF. PARENTAGE ACT (2000) § 201, 98 U.L.A. 309 (2001). While section 631 requires that a man be identified as the father by genetic test under section 505 and that this evidence rebuts a presumption or acknowledgment of paternity, the genetic test could not be used to establish the paternity of the donor because section 702 states that, "A donor is not a parent of a child conceived by means of assisted reproduction." *Id.* § 702, 9B U.L.A. 355 (2001). Ultimately, the mother's husband would then be the child's father because of the presumption of paternity created by the fact that he is married to the birth mother under section 704(a). *See id.* § 704(a), 9B U.L.A. 356 (2001).

436. *Id.* § 809(c), 9B U.L.A. 369 (2001).

of subsequent events such as the death of the contractual parents,[437] the contract is unenforceable, the test for determining parentage should be the traditional best interest of the child standard.

While the best interest standard is not normally the standard for determining parenthood, there are good reasons for using this standard. The application of the best interest standard would make the welfare of the child paramount. A court using the best interest standard could determine which of the potential parents, donors, surrogate mother and her husband, or intended parents actually want to rear the child. Unlike the approach of the USCACA and the UPA (2000), under this standard, the court could also factor in the surrogate mother's psychological relationship with the child developed during gestation and the days spent with the child following birth. This standard would take into account the fitness of the potential parents, their economic and psychological resources, their parenting skills, and the suitability of their home. This concern for the welfare of the child would be similar to that expressed in adoption law and in the requirement for a pre-validated contract itself.[438]

While it may be novel to use the best interest standard to determine parentage, California already has a well-developed body of law to determine the actual best interest of the child. In fact, the court would be utilizing a very familiar standard indeed—one which has been judicially applied and perfected over many years.[439] A statutory framework for custody decisions already exists. California Family Code section 3011 states specific factors to be considered in determining the best interest of the child, including "[t]he health, safety, and welfare of the child,"[440] a parent's history of child abuse,[441] "[t]he nature and amount of contact with both parents,"[442] and "the habitual or continual illegal use of controlled substances or habitual or continual abuse of alcohol. . . ."[443] Other provisions allow consideration of factors which may not be appropriate for determining parentage of a newborn, but which demonstrate that there is a well-thought-out legislative approach to the best interest standard.[444] Most importantly, the statutory framework has extensive provisions for investigating and evaluating potential parents and their homes.[445] In

437. The best interest standard could also be used where the contractual parents change their minds about wanting to rear the child. While the contractual parent should still be financially responsible for the child, the best interest of the child might dictate that the gestational mother or the donor parents should rear the child.

438. UNIF. PARENTAGE ACT (2000) § 803, 9B U.L.A. 364 (2001).

439. For early applications of the best interest standard, *see* De La Montanya v. De La Montanya, 44 P. 354 (Cal. 1896); Sargent v. Sargent, 39 P. 931 (Cal. 1895); Luck v. Luck, 28 P. 787 (Cal. 1892). Perhaps the oldest case applying the best interest standard to custody is State *ex rel.* Paine v. Paine, 23 Tenn. 523 (1843).

440. CAL. FAM. CODE § 3011(a) (West 1994 & Supp. 2003).

441. *Id.* § 3011(b).

442. *Id.* § 3011(c).

443. *Id.* § 3011(d).

444. *See id.* § 3040(a)(1) (allowing consideration of a parent's willingness to "allow the child frequent and continuing contact with the noncustodial parent"); *id.* § 3042(a) (allowing consideration of the child's preference).

445. *Id.* §§ 3110-3118.

addition to these statutory provisions, there is extensive case law on the best interest standard. California has significant case law on the effect of a parent's disability,[446] unconventional lifestyle,[447] sexuality of a parent,[448] religious beliefs,[449] and disparate income.[450]

The deterrent effect will not be lost if the best interest standard is adopted. The use of this test will still discourage the parties, especially the intended parents, from ignoring the requirement of judicial pre-validation. The intended parents will not want to run the risk of a hearing and the possible loss of the child. The cost of not following the statutory guidelines will be great in terms of both money and emotional capital. Without this deterrent effect, the requirement of a hearing for pre-validated contracts would become meaningless if an intended parent could become the parent of the child after the child's birth without a hearing.

Moreover, if a hearing is held, the court really would have no choice but to determine what is in the best interest of the child. Once the child is born, it becomes unimaginable for the court to do anything other than that which is in the child's best interest. While courts sometimes have to make difficult or even fine-line distinctions when applying the best interest standard, they would not be expected to consciously place children in situations which are bad for them.

Finally, if the best interest standard is used to determine parentage, the court will be able to consider all potential parents of the child including the donor or donors, the gestational mother and her husband if she is married, and the intended parents. One might expect, because of the strong support for the genetic relationship expressed herein, that this article would advocate that donors should be given priority. Just as the USCACA and the UPA (2000) designate the surrogate and her husband as the default parents when there is an unenforceable contract,[451] it would be possible to make a similar rule in favor of the genetic-biological parents. However, such a blanket rule in favor of genetic donors would be unfair in this situation simply because the genetic donors may not have contemplated raising a child at the time that they agreed to become donors. These expectations, or lack of expectations, should be honored. However, if the donor

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446. *See In re* Marriage of Carney, 598 P.2d 36, 42 & n.8 (Cal. 1979) (holding that a custody determination may not be based solely on the existence of a parent's disability).

447. *See id.* at 44-45 (holding that an unconventional lifestyle of one parent is an insufficient basis for a decision granting custody to the other parent).

448. *See* Nadler v. Superior Court, 63 Cal. Rptr. 352, 354 (Ct. App. 1967) (holding that, while a court may consider homosexuality of a parent, it may not serve as the exclusive basis for a custody decision).

449. *See In re* Marriage of Urband, 137 Cal. Rptr. 433, 433-34 (Ct. App. 1977) (holding that the religious beliefs of a parent may not serve as a basis of a custody decision unless there is a showing of actual detriment to the child).

450. *See* Burchard v. Garay, 724 P.2d 486, 491-92 (Cal. 1986) (holding that disparate income may not serve as a factor in custody decisions). This case would be especially relevant to the issue of parentage if the legislature chose to keep the provision of the UPA (2000) which mandates financial responsibility for the intended parents.

451. *See* discussion *supra* Part III.B.

has at some point formulated a desire to raise the child—for example, where the genetic material of the donor has been used by fraud or mistake—the donor should have the opportunity to make his or her case that he or she should be the child's parent. The same is true regarding a surrogate mother and her husband. While they should not be precluded from asserting a parentage claim, it is unfair to require, as does the UPA (2000), that the gestational mother assume the role of mother. California public policy, embodied in statute, favors a birth mother's change of heart regarding her decision to raise her child during gestation over giving the child up for adoption. So a decision during gestation that she would like to raise the child should at least afford the birth mother the opportunity to prove that it would be in the child's best interest for her to raise the child.

The intended parents should have the same opportunity[452] to establish parentage; however, they should receive no special benefit from having been the intended parents. It should make no difference that they formed their desire to raise the child first, or that they were the prime movers of the child's creation. Under the pre-validated contract system, they had their opportunity to perfect their parental relationship through a procedure that took into account the welfare of the child. If it is not in the best interest of the child to be raised by the intended parents, then they should not be considered the parents. While the courts favored intended parents in both *Johnson v. Calvert*[453] and *In re Marriage of Buzzanca*,[454] they did so because they assumed that the best interests of the child were co-extensive with the desire to have a child. They used an imputed best interest standard, but such a standard is both foolish and unnecessary if there is a hearing at which the actual best interests can be determined. The use of the best interest test does not mean that in determining parentage the court will not consider the facts that the intended parents have diligently sought to have a child, possibly for a long time, that they have taken the trouble to arrange for assisted conception, that they have made other preparations to welcome the child into their home, and that they have a great capacity to love and care for the child. All of these factors weigh heavily in their favor, but the mere fact that these people are the intended parents should not *decide the case* in their favor. At the same time, the position of the USCACA and the UPA (2000) is too harsh. While the intended parents, as the prime movers, have had the opportunity to assert their parental rights by simply having their contract for assisted conception validated by the court, their failure to follow statutory procedures should not automatically preclude them from serving as the child's parents.

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452. In a sense, the use of the best interest test is a benefit for the intended parents. Otherwise, the intended parent would be out of the picture entirely. The gestational mother would be the child's mother under the birth mother presumption, which could be rebutted by a donor mother using the genetic test, and the child's father would be the donor.

453. 851 P.2d 776 (Cal. 1993).

454. 72 Cal. Rptr. 2d 280 (Ct. App. 1998).

In a sense, the best interest requirement serves as a sufficiently strong deterrent against ignoring the judicial validation requirement. If the intended parents do not follow the judicial validation requirement, they run the risk of losing the child. As an additional deterrent, California should adopt the UPA (2000) approach regarding support—that the intended parents will be exposed to the possibility of ongoing support for the child whether or not they are declared the parents of the child.[455]

IV. CONCLUSION

The goal of this article has been to present a practical model for establishing the parent and child relationship in California—a model that attempts to provide for the welfare of children and at the same time provide certainty and consistency in the California law dealing with children born both with and without assisted conception. This article recognizes that there is a very strong interest on the part of couples, married and unmarried, heterosexual and homosexual, and single people, as well, to use the various means of assisted conception to aid them in having children. At the same time, this article assumes that the ethic of the marketplace should not be the sole factor in determining a child's parentage, that this decision is suitable for state regulation and court intervention. Three basic proposals have been made herein. First, the genetic-biological relationship should be considered the baseline for the determination of a child-parent relationship. In all situations, the genetic-biological relationship should serve as the basis of the parent and child relationship unless another person is designated as the parent by operation of law. This proposal does not mean that presumptions no longer play a role in determining the parent-child relationship, but that California should abolish the conclusive presumption and make all other presumptions regarding paternity and maternity fully rebuttable. Second, for situations involving assisted conception other than artificial insemination, there should be a bright-line rule analogous to that in adoption law to determine when someone other than the genetic-biological parent should be designated as the natural parent. California should enact legislation requiring that there be a written contract among donors, surrogate mothers, and intended parents; for this contract to be enforceable, it must be judicially validated prior to the conception of the child. This legislation should include specific requirements, which should be designed to insure the welfare of the child, and which must be met in order for courts to approve or validate such contracts. Finally, for all situations of assisted conception where there is no enforceable pre-validated contract, the court must determine the parentage of the child according to the best interest of the child standard.

455. *See* UNIF. PARENTAGE ACT (2000) § 809(c), 9B U.L.A. 369 (2001).

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