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PROCREATION THROUGH ART: WHY THE ADOPTION PROCESS SHOULD NOT APPLY

MELANIE B. JACOBS*

The Supreme Court has long recognized a “private realm of family life which the state cannot enter.”¹ For me, in evaluating whether assisted reproductive technology (ART) should be governed by adoption principles, the question is whether assisted reproduction should be viewed as an extension of family and procreative privacy or whether assisted reproduction bears greater similarity to adoption and should be subjected to a more extensive and invasive legal process. More specifically, should an intended parent of a child born through use of sperm or egg donation be obligated to adopt the child? Must parties adopt a child whose birth they intended through use of a surrogate? My short answer is “no.” Assisted reproduction falls closer to the procreation end of the spectrum than the adoption end—parties intentionally use this technology to have a child of their own. As such, ART should fall within the constitutional purview of protected family privacy and should not be subjected to the greater regulation and screening of adoption law.

Rather than having to use the adoptive process, parties should instead be able to rely on the Uniform Parentage Act (UPA)² or relevant state parentage laws to establish their parentage at the child’s birth. Waiting six or more months to adopt a child who was born through the emotional and financial efforts of intended parents seems counterintuitive. The UPA does not in all instances provide complete privacy for families and may require some investigative and legal process, similar to adoption.³ Overall, however, the UPA assures greater privacy and less state intrusion than the adoption process. Moreover, by including concepts of intentional parenthood within its provisions, the UPA more realistically establishes parentage for persons using assisted reproduction: the UPA establishes

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* Associate Professor of Law, Michigan State University College of Law. My appreciation to the members of the Capital University Law Review for inviting me to participate in this stimulating symposium.

¹ Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

² UNIF. PARENTAGE ACT (2000) (amended 2002), 9B U.L.A. 299 (2001).

³ See *infra* notes 56–58 and accompanying text (describing the process courts use to validate a gestational agreement under the UPA).

them as the legal parents of their intended child, not the adoptive parents of someone else's child.⁴

I see this symposium as an opportunity to discuss our preferred or ideal mode of legal decisionmaking for assisted reproduction, so I will now briefly make an argument for application of the UPA and similar parentage laws, rather than the adoption process. I do not disagree with Professor Carbone's contention that the adoption process has merit for same-sex couples and that it can provide a certain measure of security for those families.⁵ But the adoption process does not accurately reflect that couples use ART to have their own children. For instance, a lesbian couple who purposefully plans to have a child and to use a sperm donor for insemination of one party should not need adoption to legalize the parentage of the non-birth mother. Or, if a married couple uses both sperm and egg donors and a gestational surrogate to have a child, adoption is not the best process by which to validate the couple's parentage. Unlike the typical adoption scenario, there is not an existing child whose parents have had their parental rights terminated and for whom new parents are sought. The sperm and egg come together because of the intent of this particular couple to create their own child.

When parties employ assisted reproduction to have their own children, I find it hard to argue that the adoption process should apply, regardless of whether the parents are an opposite-sex or a same-sex couple. In previous writings, I have urged courts to apply the UPA to same-sex parents by focusing on their intentional and functional parenthood.⁶ Here, I suggest that because assisted reproduction falls within the ambit of family and procreative privacy, parentage principles that determine parentage from birth—like the UPA—best recognize and protect nontraditional families who must use ART (rather than traditional coitus) to have their own children.⁷

⁴ See UNIF. PARENTAGE ACT § 801(a)(3) (amended 2002), 9B U.L.A. 56 (Supp. 2006) (providing that “the intended parents” become the parents of a child born through gestational surrogacy).

⁵ Videotape: Wells Conference on Adoption Law, held by the Capital University Law Review (Apr. 7, 2006) (on file with the Capital University Law Review).

⁶ See generally Melanie B. Jacobs, *Applying Intent-Based Parentage Principles to Nonlegal Lesbian Coparents*, 25 N. ILL. U. L. REV. 433 (2004).

⁷ I have previously argued that using the UPA to establish parentage for lesbian coparents is preferable to second-parent adoption. See Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFF. L. REV. 341, 352–54 (2002) (listing several reasons why adjudication

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Assisted reproduction is an extension of procreative privacy,⁸ and couples who use ART should not be required to adopt the resulting child. Family privacy has been a lynchpin of American jurisprudence for more than a century. Beginning in the early 1900s, the Supreme Court made several rulings that confirmed the “sanctity” of family life and affirmed that states had authority to intervene in family matters only in limited instances.⁹ The concept of family privacy has been deemed to extend to privacy in many family planning matters, such as the right to procreate,¹⁰ use contraception,¹¹ seek an abortion,¹² or engage in private, consensual sexual activity.¹³ The parameters of family privacy were at times unclear in the Court’s reasoning: How far does privacy extend? Just to married couples?¹⁴ To heterosexual couples?¹⁵

pursuant to the UPA is better for children and parents than second parent adoption). I expand that argument here to include both lesbian and gay parents and various forms of ART.

⁸ There is not perfect consensus on this issue. As Professor Richard Storrow explained, some courts and commentators believe that assisted reproduction is constitutionally protected procreation, although some older cases and other commentators do not agree. See Richard F. Storrow, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. DAVIS L. REV. 305, 327–28 (2006).

⁹ See *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (holding that parents’ liberty interest includes the right “to direct the upbringing and education of children under their control”); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (holding that parents’ liberty interest includes the right to bring up children and “to control the education of their own”).

¹⁰ See *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (holding Oklahoma’s Habitual Criminal Sterilization Act unconstitutional because “procreation [is] fundamental to the very existence and survival of the race”).

¹¹ See *Eisenstadt v. Baird*, 405 U.S. 438, 454–55 (1972) (holding that Massachusetts statute permitting married couples to obtain contraceptives but prohibiting individuals from obtaining contraceptives violated the Equal Protection Clause); *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (finding Connecticut’s statute that prohibited the use of contraceptives unconstitutionally infringed upon the marital right to privacy).

¹² See *Roe v. Wade*, 410 U.S. 113, 154 (1973) (concluding that “the right of personal privacy includes the abortion decision, but that this right is not unqualified”).

¹³ See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (finding a Texas statute that prohibited same-sex sexual activity intruded upon the liberty guaranteed by the Due Process Clause).

¹⁴ The *Griswold* Court considered the sanctity of the marital bedroom to be of paramount importance when striking down the law banning contraception. See *Griswold*, 381 U.S. at 485–86.

When the Court decided *Lawrence v. Texas* in 2003, those questions were answered. The Court articulated that a person's liberty interest "presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."¹⁶ The Court concluded that two members of the same sex are permitted to engage in intimate conduct pursuant to that liberty interest.¹⁷ In analyzing the right of same-sex individuals to engage in intimate conduct, the Court looked beyond the specific acts proscribed by the Texas statute and noted that the Constitution must respect personal autonomy in a wide array of decisionmaking, such as procreation and family relationships.¹⁸ When citing its decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court wrote:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.¹⁹

Lawrence thus broadly defines family privacy: privacy applies to married and unmarried couples, to heterosexual and homosexual individuals, and to a wide range of personal decisionmaking, including decisions regarding the creation of families. Read this way, procreative privacy should include ART. In addition, presuming that ART falls within the constitutional purview of procreative privacy, it should apply to opposite-sex and same-sex couples equally. If opposite-sex couples are able to use assisted reproduction without the need for the adoption process, so too should same-sex couples be permitted to do so.

There are various ways in which a person becomes a legal parent, some of which are more private than others. At one end of the spectrum,

¹⁵ See *Bowers v. Hardwick*, 478 U.S. 186, 191–96 (1986) (holding that there is no fundamental privacy right to engage in homosexual sodomy).

¹⁶ *Lawrence*, 539 U.S. at 562.

¹⁷ *Id.* at 578.

¹⁸ *Id.* at 574.

¹⁹ *Id.* (quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 851 (1992)).

parenthood is established by biology or marriage.²⁰ Giving birth to a child has long determined parentage,²¹ and historically a woman's husband has been presumed to be the child's legal father.²² At the opposite end of the spectrum, adoption creates a legal relationship between a child and her adoptive parents where no relationship would otherwise exist. It is a public process: prospective adoptive parents are thoroughly screened and evaluated prior to adoption. Parties who intentionally cause the birth of a child should not be obligated to adopt their "own" child.

Courts are split regarding the applicability of adoption statutes to surrogacy. In one of the first surrogacy cases—the incredibly well-publicized *Baby M* case—the New Jersey Supreme Court refused to enforce a surrogacy agreement and determined that such agreements violated New Jersey adoption laws²³ and public policy.²⁴ The Court decided *Baby M* when surrogacy arrangements were still relatively new to courts and society; however, there remains no clear mandate legalizing surrogacy.²⁵

The *Buzzanca* case²⁶ provided a very different view of surrogacy, and one, I argue, that better reflected the intentions of the parties. *Buzzanca* illustrated the advances of assisted reproductive technology and the legal complications that can arise therefrom. John and Luanne Buzzanca

²⁰ Jacobs, *supra* note 7, at 344.

²¹ See UNIF. PARENTAGE ACT § 201(a)(1) (amended 2002), 9B U.L.A. 15 (Supp. 2006) (providing that a mother-child relationship is established by a woman "having given birth to the child").

²² See *id.* § 204(a)(1)–(4) (providing that a man who is married to the child's mother at the time of the child's birth, who was married to the child's mother within 300 days of the child's birth, or who attempted to marry the mother before the child's birth is presumed to be the child's father). The marital presumption operates such that biology is less significant than the marital relationship, and even in the absence of a biological connection between the husband and the child, the husband is the child's legal father.

²³ *In re Baby M*, 537 A.2d 1227, 1240 (N.J. 1988) ("The surrogacy contract conflicts with: (1) laws prohibiting the use of money in connection with adoptions; (2) laws requiring proof of parental unfitness or abandonment before termination of parental rights is ordered or an adoption is granted; and (3) laws that make surrender of custody and consent to adoption revocable in private placement adoptions.").

²⁴ *Id.* at 1246–47 (holding that the surrogacy agreement erroneously permitted the natural parents to make custody decisions in advance of the child's birth and without a consideration of the child's best interest).

²⁵ See Storrow, *supra* note 8, at 328–39.

²⁶ *In re Buzzanca*, 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998).

contracted with a surrogate to have an embryo implanted that was genetically unrelated to either of them.²⁷ Subsequent to the fertilization, implantation, and pregnancy, Luanne and John's marriage disintegrated.²⁸ In his divorce complaint, John alleged that there were no children of the marriage, but Luanne contended that the child due to be born pursuant to the surrogacy contract was indeed a child of the marriage.²⁹ In fact, the child, Jaycee, was born six days after the filing of John's complaint.³⁰

The trial court had many parties available to consider as Jaycee's parents: Luanne, John, the egg donor, the sperm donor, the surrogate, and the surrogate's husband.³¹ Regardless, the trial court held that neither John nor Luanne was Jaycee's parent, rendering Jaycee without any legal parent.³² The trial court relied in large part on the fact that neither John nor Luanne was genetically related to Jaycee, nor did Luanne give birth to Jaycee.³³

The appellate court vigorously rejected this "adoption-default model." The court explained:

The legal paradigm adopted by the trial court . . . is one where all forms of artificial reproduction in which intended parents have no biological relationship with the child result in legal parentlessness. It means that, absent adoption, such children will be dependents of the state. One might describe this paradigm as the "adoption default" model: The idea is that by not specifically addressing some permutation of artificial reproduction, the Legislature has, in effect, set the default switch on adoption. The underlying theory seems to be that when intended parents resort to artificial reproduction without biological tie the Legislature wanted them to be *screened* first through the adoption system The "adoption default" model is, however, inconsistent with both statutory law and [precedent].³⁴

²⁷ *Id.* at 282.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *See id.* The surrogate made clear that she asserted no parental claim to Jaycee. *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 289.

Significantly, the *Buzzanca* court saw surrogacy as an extension of the Buzzancas' right to procreate: "Parents are not screened for the procreation of their *own* children; they are screened for the adoption of *other* people's children."³⁵ Rejecting outright the adoption default model as applied to assisted reproduction, the court concluded, "The adoption default model is essentially an exercise in circular reasoning, because it assumes the idea that it seeks to prove; namely, that a child who is born as the result of artificial reproduction is somebody else's child from the beginning."³⁶

Rather than relying on an adoption model, the court instead looked to California's version of the Uniform Parentage Act (California UPA) to determine Jaycee's legal parents.³⁷ The California UPA provides that the parent and child relationship may be established between mother and child either by her giving birth or "under this part," and the relationship between father and child may be established "under this part."³⁸ Previously, the California Supreme Court determined that provisions in the California UPA that apply to paternity should also apply to maternity; in so doing, the court expanded the ways in which maternity could be legally established.³⁹

In *Johnson v. Calvert*, a couple used the husband's sperm and wife's egg and had the embryo implanted in a gestational surrogate.⁴⁰ The gestational surrogate sought to keep the baby, and the court was required to decide whether the intended mother/egg donor or the birth mother/gestational surrogate was the child's legal mother.⁴¹ Focusing largely on the couple's intent and the California UPA, which allows for a parentage determination based on birth, genetic relation, or other reason, the court determined that the intended mother/egg donor was indeed the child's legal mother.⁴²

³⁵ *Id.* at 291.

³⁶ *Id.*

³⁷ *See id.* at 284.

³⁸ *Id.* (referring to the UPA and CAL. FAM. CODE § 7610 (West 2004)).

³⁹ *Id.* at 284–85 (citing *Johnson v. Calvert*, 851 P.2d 776, 781–82 (Cal. 1993)). The UPA specifically provides, "Provisions of this [Act] relating to determination of paternity apply to determinations of maternity." UNIF. PARENTAGE ACT § 106 (amended 2002), 9B U.L.A. 308 (2001).

⁴⁰ *See Johnson*, 851 P.2d at 778.

⁴¹ *Id.* at 778–79.

⁴² *Id.* at 782. Interestingly, the *Johnson* court also referenced the importance of respecting procreational privacy. Taking issue with the dissent, which advocated a best interest analysis to determine maternity, the majority wrote, "Such an approach raises the repugnant specter of governmental interference in matters implicating our most
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Using the reasoning of *Johnson* and analogizing maternity and paternity, the *Buzzanca* court was able to rely on several provisions of the California UPA to determine Jaycee's legal parents.⁴³ First, the court focused on paternity and on a portion of the California UPA that provides, "If . . . 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."⁴⁴ The court freely recognized that the consent in this case differed, because two unknown genetic donors contributed genetic material to a gestational surrogate.⁴⁵ However, the court emphasized, "[T]he two kinds of artificial reproduction are *exactly* analogous in this crucial respect: Both contemplate the procreation of a child by the consent to a medical procedure of someone who intends to raise the child but who otherwise does not have any biological tie."⁴⁶ Thus, the court determined that John was Jaycee's legal father.⁴⁷

Second, the court concluded that Luanne was Jaycee's legal mother because, like a man who consents to the artificial insemination of his wife, she consented to medical procedures that resulted in a pregnancy and eventual birth of a child.⁴⁸ Her consent, coupled with her intent, allowed the court to determine the maternal relationship "under this part."⁴⁹ Pursuant to the reasoning in *Johnson*, the court was particularly persuaded by Luanne's intent to parent.⁵⁰

Not all cases are as complex as *Buzzanca*. But the case is particularly useful to illustrate the ways in which the UPA can be employed to establish legal parentage of a child from birth and avoid a more cumbersome adoption process. The UPA is not without any state intervention and oversight, especially concerning surrogacy.⁵¹ But unlike

fundamental notions of privacy . . ." *Id.* at 782 n.10. Instead, the court advocated respecting the agreement of the parties to stabilize the litigation process. *Id.*

⁴³ *In re Buzzanca*, 72 Cal. Rptr. 2d at 284–86.

⁴⁴ *Id.* at 285 (citing CAL. FAM. CODE § 7613 (West 2004)).

⁴⁵ *Id.* at 289.

⁴⁶ *Id.* at 286.

⁴⁷ *Id.* at 293.

⁴⁸ *Id.* at 288.

⁴⁹ *Id.*

⁵⁰ *See id.* In *Johnson*, the court used intent as a "tie-breaker" in determining which woman was the child's legal mother. *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993).

⁵¹ *See generally* UNIF. PARENTAGE ACT § 803 (amended 2002), 9B U.L.A. 58 (Supp. 2006) (court approval required to validate surrogacy agreement).

the adoption process, the UPA at least provides a mechanism whereby parentage can be established for a child at birth, rather than months thereafter.⁵²

Several UPA provisions relevant to assisted reproduction are minimally intrusive and provide certainty for intended parents. The UPA provides that “[a] donor is not a parent of a child conceived by means of assisted reproduction.”⁵³ As the comment to the section explains, “[T]his section clarifies that a donor (whether of sperm or egg) is not a parent of the resulting child. The donor can neither sue to establish parental rights, nor be sued and required to support the resulting child.”⁵⁴ Furthermore, the UPA clarifies that if a man consents to his wife’s use of assisted reproduction, whether his sperm is used or the sperm of another man, he is the legal father of the resulting child.⁵⁵ These provisions lend certainty to the assisted reproduction process by ensuring that donors will not seek parental rights and interfere with the intended parents’ legal status. Moreover, by specifically articulating that donors have no parental status, the UPA clarifies that it is the intended parents who have legal parental rights.

The UPA does include greater state oversight and less privacy in the context of gestational surrogacy agreements. Article Eight of the UPA contains several provisions governing the surrogacy process. First, the UPA specifically authorizes gestational agreements and establishes that the intended parents of the child are the legal parents and the donors and gestational mother relinquish all rights and duties of parenthood.⁵⁶ Second,

⁵² *Id.* § 807 (“Upon birth of a child to a gestational mother,” the intended parents should seek a court order that they are the legal parents, and “[t]hereupon, the court shall issue [the] order.”).

⁵³ UNIF. PARENTAGE ACT § 702 (amended 2002), 9B U.L.A. 355 (2001).

⁵⁴ *Id.*

⁵⁵ UNIF. PARENTAGE ACT § 703 (amended 2002), 9B U.L.A. 50 (Supp. 2006) (“A man who provides sperm for, or consents to, assisted reproduction by a woman as provided in Section 704 with the intent to be the parent of her child, is a parent of the resulting child.”). UPA section 704 states, “Consent by a woman, and a man who intends to be a parent of a child born to the woman by assisted reproduction must be in a record signed by the woman and the man.” *Id.* § 704.

⁵⁶ UPA § 801 provides, in relevant part:

- (a) A prospective gestational mother, her husband if she is married, a donor or the donors, and the intended parents may enter into a written agreement providing that:

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the UPA provides a procedure for validating the gestational agreement and firmly ensuring that at birth, the intended parents are the legal parents of the child with full parental rights and duties.⁵⁷ The procedure for validating the agreement is akin to adoption,⁵⁸ and it is the most intrusive aspect of the UPA.

To validate a gestational agreement, the court must find that the parties have voluntarily entered into the agreement and understand its terms, that adequate provisions have been made for all health care expenses related to the agreement and potential termination of the gestational agreement, and, most significantly, that “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 suitability applicable to adoptive parents.”⁵⁹ Although the home study is an intrusive process and mirrors the adoption process, a significant difference between the processes is that the intended parents have the opportunity to establish their parentage before the child’s birth.⁶⁰ The provision also allows for the possibility that

(1) the prospective gestational mother agrees to pregnancy by means of assisted reproduction;

(2) the prospective gestational mother, her husband if she is married, and the donors relinquish all rights and duties as the parents of a child conceived through assisted reproduction; and

(3) the intended parents become the parents of the child.

(b) The man and the woman who are the intended parents must both be parties to the gestational agreement.

Id. § 801.

⁵⁷ *Id.*

⁵⁸ *Id.* § 803 cmt.

⁵⁹ *Id.* § 803(b)(2). UPA section 803 provides that if the criteria enumerated above are satisfied, then “a 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 of the [sic] agreement.” *Id.* § 803(a).

Had California adopted this provision of the UPA, the *Buzzanca* case would have been decided in the same way, but with less legal maneuvering. See *supra* notes 43–50 and accompanying text. The intent of the parties is paramount in both analyses, but section 803 allows for a more straightforward determination of parentage. See *supra* note 57 and accompanying text.

⁶⁰ I do not support the home study requirement because it intrudes too much on procreative privacy. Just as the *Johnson* and *Buzzanca* courts rejected a best interest analysis to determine parentage, I would advocate that the UPA eliminate the home study

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the home study can be waived;⁶¹ perhaps some courts will allow for the introduction of other evidence to meet the “standards of suitability” for adoption in lieu of the home study.

The above provisions demonstrate the ways in which the UPA seeks to provide certainty for children and parents by the time of the child’s birth. Although the provisions suggest applicability to opposite-sex couples, the UPA has been applied to establish parental rights for same-sex couples, too. In August 2005, the California Supreme Court decided a trio of cases in which it determined that the UPA applies to same-sex couples to determine legal parentage.⁶² In *K.M. v. E.G.*, K.M. provided her ova to E.G., and the couple had twin girls.⁶³ When the girls were five, K.M. sought to establish her legal maternity, but E.G. argued that she alone was the child’s mother.⁶⁴ The court disagreed and concluded that both women were the legal mothers of the twins.⁶⁵ The court held that K.M.’s genetic relationship to the twins constituted evidence of the mother and child relationship, as did E.G.’s giving birth to the twins.⁶⁶ Unlike the *Johnson* tie-breaker situation, only two people in this case sought to have their parentage determined, and the court agreed that both K.M. and E.G. were the twins’ legal parents.⁶⁷ The court also distinguished K.M.’s ova donation from sperm and egg donation, which precludes parentage.⁶⁸ The court found that because K.M. donated her ova so that she and her partner

provision. Even with this requirement, however, the UPA allows for parentage determinations at birth, which to me makes it a superior process to adoption.

⁶¹ UNIF. PARENAGE ACT § 803(b)(2) (amended 2002), 9B U.L.A. 58 (Supp. 2006).

⁶² See *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005); *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005); *Kristine H. v. Lisa R.*, 117 P.3d 690 (Cal. 2005). In *Kristine H.*, the court did not evaluate the legality of the lesbian couple filing a joint complaint to declare parental rights pursuant to the UPA (which they had filed prior to the child’s birth). *Kristine H.*, 117 P.3d at 695. Rather, the court held that the birth mother was estopped from challenging the legal maternity of the nonbiological mother, given that she had lived with the child for two years and actively coparented. *Id.* at 695–96. The court also did not specifically address the applicability of the presumption of parentage regarding holding oneself out as a parent, as it did in *Elisa B.* See *Elisa B.*, 117 P.3d at 667–69. Because of the lack of discussion in *Kristine H.* regarding the UPA, I will not address this case further.

⁶³ *K.M.*, 117 P.3d at 675.

⁶⁴ *Id.*

⁶⁵ *Id.* at 678.

⁶⁶ *Id.*

⁶⁷ *Id.* at 681.

⁶⁸ *Id.* at 679.

could raise children jointly in their home, the section denying parentage to sperm donors did not apply, and K.M.'s maternity was established.⁶⁹

The court also used the UPA to establish maternity in *Elisa B.* In this case, a woman agreed to raise children with her partner, supported her partner's use of ART, and then held the children out as her own.⁷⁰ Later, however, she argued that she was not responsible for the children.⁷¹ Both Elisa and Emily wished to give birth, and because Elisa earned more money than Emily, they agreed that Emily would stay at home and be the primary caretaker of the children while Elisa would be the primary wage earner.⁷² Elisa gave birth to one child, and months later Emily gave birth to twins.⁷³ When the couple separated less than two years later, Elisa promised to support Emily and the twins, but Emily was ultimately required to apply for public aid, and the state brought a child support proceeding against Elisa.⁷⁴ Analogizing paternity to maternity, the court looked to the UPA, which includes a presumption of paternity for a man who receives a child into his home and openly holds the child out as his own.⁷⁵ Despite Elisa's lack of genetic connection to the children, the court held that she was their other legal mother.⁷⁶ Her intent to have and parent the children, coupled with holding them out to family and friends as her own, provided a legal basis to establish her maternity under the UPA.⁷⁷ Moreover, as with a man who consents to artificial insemination of his wife, Elisa could not later deny responsibility for the twins.⁷⁸ Finally, the court disapproved of several appellate court decisions in which the courts said that the UPA had no applicability to lesbian coparents, thus making clear that the UPA is indeed a proper mechanism for determining parentage for same-sex couples.⁷⁹

Although the California cases address questions of parentage that were raised several years after the birth of the children, the principles discussed therein may apply from the child's birth. Parentage determined at birth,

⁶⁹ *Id.*

⁷⁰ *Elisa B. v. Superior Court*, 117 P.3d 660, 662 (Cal. 2005).

⁷¹ *Id.* at 663–64.

⁷² *Id.* at 663.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.* at 666–68.

⁷⁶ *Id.* at 668.

⁷⁷ *Id.* at 668–70.

⁷⁸ *Id.* at 670.

⁷⁹ *Id.* at 670–72.

rather than adoption, better represents the principles of family and procreative privacy. Furthermore, the principles of intentional parenthood fall within the purview of procreative privacy and should be given deference accordingly. Even though it may be impossible to exclude the state entirely from the parentage determination process, the UPA streamlines the process in many instances, and even where greater state intrusion is required, the UPA provides parental certainty from the moment of the child's birth. Reliance on the UPA does not require parents to subsequently prove why they should be the child's parents, as opposed to genetic donors or a gestational surrogate.

As I noted at the outset of this piece, I hoped to make an argument why the UPA is a preferred method of establishing parentage in cases of ART, rather than adoption. I urge state legislatures to adopt the provisions of the UPA, and I encourage courts to focus on intentional parenthood and use the UPA to establish parentage at birth. Procreative privacy includes ART; the adoption process should not apply.

