Campbell Law Review

Volume 43
Issue 1 *Winter 2021*

Article 2

2021

For the Sake of the Child: Parental Recognition in the Age of Assisted Reproductive Technology

The Honorable Beth S. Dixon

For the Sake of the Child: Parental Recognition in the Age of Assisted Reproductive Technology A Framework for North Carolina

THE HONORABLE BETH S. DIXON,
DISTRICT COURT JUDGE*

"Although someone may suffer, it should never be the child, who is totally innocent and who has no control over or conception of the environment into which he or she has been placed."[1]

ABSTRACT

Assisted Reproductive Technology has expanded the ways in which families may be created. Some intended parents of ART-conceived children, however, are not recognized as legal parents under existing North Carolina law. This Article explores why this lack of parental recognition is unjust for ART-conceived children, and how legislative codification of the Uniform Parentage Act will provide a framework for just and consistent decisions across North Carolina courts tasked with resolving critical family law issues.

*North Carolina District Court Judge for Judicial District 19C. LL.M., 2019, Nottingham Trent University; J.D., 1989, University of South Carolina School of Law; B.A., 1986, Converse College.

1. *In re* Ross, 783 P.2d 331, 339 (Kan. 1989).

INTRODUCTION

North Carolina has long relied on biology or adoption as the only pathways to legal parenthood.[2] More and more, however, children are conceived without sexual intercourse, and families are created outside of biology or adoption utilizing Assisted Reproductive Technology ("ART"). Children conceived via sexual intercourse have easily identifiable legal birth parents. For ART-conceived children, the identification of legal parents is not quite as easy. One or both of the intended parents—individuals who plan, prepare for, and conceive a child utilizing ART—may have no biological or adoptive relationship with the conceived child, yet there are no other identifiable legal parents at birth. Since the first child conceived via ART was born in 1978,[3] over nine million babies worldwide have been born as a result of these technologies.[4] The first American baby conceived via ART was born in 1981,[5] and at least one million babies conceived via ART have since been born in the United States.[6] ART births represent just below 2% of all live births in the United States each year.[7] North Carolina currently has twelve fertility clinics operating throughout the state that report success rates to the United States Department of Health

2. *See* Seyboth v. Seyboth, 554 S.E.2d 378, 381 (N.C. Ct. App. 2001); Heatzig v. MacLean, 664 S.E.2d 347, 352 (N.C. Ct. App. 2008).

3. Louise Brown of the United Kingdom, born July 25, 1978, was the world's first baby born from in vitro fertilization. Remah Moustafa Kamel, *Assisted Reproductive Technology after the Birth of Louise Brown*, 14 J. REPROD. & INFERTIL. 96, 96–109 (2013).

4. *See ART Fact Sheet*, EUR. SOC'Y OF HUM. REPROD. & EMBRYOLOGY (2020), https://www.eshre.eu/-/media/sitecore-files/Press-room/ART-fact-sheet-2020-data-2016.pdf [https://perma.cc/NJA2-JGHC].

5. Elizabeth Carr was born on December 28, 1981, in Norfolk, Virginia. Victor Cohn, *First U. S. Test-Tube Baby Is Born*, WASH. POST (Dec. 29, 1981), https://www.washingtonpost.com/archive/politics/1981/12/29/first-us-test-tube-baby-is-born/a6f3de2f-422f-43bd-9b45-0d798ed18e8e/ [https://perma.cc/QAB6-JAEC].

6. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, 2015 ASSISTED REPRODUCTIVE TECHNOLOGY: NATIONAL SUMMARY REPORT 50 (Oct. 2017), https://www.cdc.gov/art/pdf/2015-report/art-2015-national-summary-report.pdf [https://perma.cc/29GD-VF7Z]; *see also* Maggie Fox, *A Million Babies Have Been Born in the U.S. With Fertility Help*, NBC NEWS (Apr. 28, 2017, 12:08 PM), https://www.nbcnews.com/health/health-news/million-babies-have-been-born-u-s-fertility-help-n752506 [https://perma.cc/3ZZX-USB3].

7. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, 2016 ASSISTED REPRODUCTIVE TECHNOLOGY: NATIONAL SUMMARY REPORT 7 (Oct. 2018), https://www.cdc.gov/art/pdf/2016-report/ART-2016-National-Summary-Report.pdf [https://perma.cc/FEE4-JCBE] [hereinafter 2016 NATIONAL SUMMARY REPORT].

and Human Services.[8] This clinical data indicates that North Carolina's birth rate resulting from ART procedures is similar to the national average.[9]

With the institution of same-sex marriage, as well as a growing population rate,[10] North Carolina can soon expect to see the legal issues of nontraditional families, including the issue of legal parentage of ART-conceived children, arriving in its courtrooms. Current common law, case law, and North Carolina statutory authority fail to provide judges with a sufficient framework to ensure any uniformity in dealing with these sensitive and important family law issues. North Carolina is not alone; there is no uniformity among states on the determination of legal rights for a non-biological, intended parent of a child created using ART.[11]

Legal parents are the only individuals vested with caretaking and decision-making authority upon the birth of a child.[12] ART-conceived children may have only one legal parent identified at birth, which is typically a biological parent. Public policy should mandate, however, that ART-conceived children have two legal parents identified at birth who are vested with the same rights and responsibilities at law as parents of children conceived through sexual intercourse. When parentage is not identified at birth, and instead litigated years later, children are the casualties. As an unintentional consequence of a custody dispute, children may suffer the loss of a parental bond,[13] health insurance, financial support, or other socioeconomic benefits that generally flow from a non-biological, intended parent.[14] For the sake of the child, North Carolina courts need to be prepared to address these emerging issues. As this is a matter of public

8. CTRS. FOR DISEASE CONTROL & PREVENTION, 2016 ASSISTED REPRODUCTIVE TECHNOLOGY: FERTILITY CLINIC SUCCESS RATES REPORT 365–76 (Oct. 2018), https://ftp.cdc.gov/pub/Publications/art/ART-2016-Clinic-Report-Full.pdf [https://perma.cc/LM6U-LYE6].

9. *See id.*

10. Between 2010 and 2017, the population of North Carolina increased by 7.8% and is predicted to reach over 10.5 million residents in 2019. *2017 Certified County Population Estimates, N.C. St. Demographer*, OFF. OF ST. BUDGET & MGMT. (Dec. 3, 2018), https://files.nc.gov/ncosbm/demog/countygrowth_cert_2017.html [https://perma.cc/3G9T-KAR4].

11. *See* Gary A. Debele & Susan L. Crockin, *Legal Issues Surrounding Embryos and Gametes: What Family Law Practitioners Need to Know*, 31 J. AM. ACAD. MATRIM. L. 55, 59 (2018).

12. *See* Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("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.").

13. *See* Boseman v. Jarrell, 704 S.E.2d 494, 503 (N.C. 2010).

14. *See* Diane E. Walton, *Securing Legal Parentage for Same-Sex Couples*, TRIAL BRIEFS (N.C. Advocs. for Just., Raleigh, N.C.), Apr. 2018, at 23.

policy, however, it should first be addressed by the legislature and not the courts.[15]

This Article explores the procedures available in reproductive medicine and identifies the deficiencies in North Carolina law concerning the identification of legal parentage. It demonstrates how the application of current precedent is harmful to ART-conceived children and discusses the constitutional implications from the disparate treatment of children. Finally, this Article offers model legislation to bring clarity and consistency to family courts. The purpose of this Article is to encourage the North Carolina General Assembly, as well as other state legislative bodies, to adopt the child-centered framework of the Uniform Parentage Act ("UPA"), which grants intended parents legal parent status upon the birth of an ART-conceived child. By adopting the UPA, the General Assembly will prevent both unnecessary litigation and inconsistent decisions across our state courts.[16] The statutory framework promulgated by the UPA comports with North Carolina's long-cherished public policy and compelling state interests of protecting the welfare of children.

I. OVERVIEW OF ASSISTED REPRODUCTIVE TECHNOLOGY AND LEGAL PARENTAGE

ART is defined by the United States Code as "all treatments or procedures which include the handling of human oocytes or embryos."[17] The UPA defines assisted reproduction more broadly as "a method of causing pregnancy other than sexual intercourse."[18] ART procedures currently utilized in human reproductive medicine are in vitro fertilization ("IVF"), gamete intrafallopian transfer ("GIFT"), zygote intrafallopian transfer ("ZIFT"), and intracytoplasmic sperm injection ("ICSI").[19]

IVF is the process by which an egg is fertilized with sperm outside a woman's body and the resulting embryo is then transferred to the uterus.[20] GIFT places unfertilized eggs and sperm directly into a woman's fallopian

15. *See, e.g.*, *In re* N.T., 715 S.E.2d 183, 188 (N.C. Ct. App. 2011) ("Normally, questions regarding public policy are for legislative determination." (quoting Cochrane v. City of Charlotte, 559 S.E.2d 260, 265 (N.C. Ct. App. 2002)).

16. *See* Courtney G. Joslin, *Nurturing Parenthood through the UPA (2017)*, 127 YALE L.J. F. 589, 611 (2018).

17. 42 U.S.C. § 263a-7 (2012).

18. UNIF. PARENTAGE ACT § 102(4) (amended 2017), 9B U.L.A. 42 (1973).

19. Jillian Casey et al., *Assisted Reproductive Technologies*, 17 GEO. J. GENDER & L. 83, 85 (2016).

20. *Id.*

tube in anticipation of fertilization happening inside the body.[21] ZIFT is similar to IVF in that the embryo is created outside the body, but is then transferred to the fallopian tube instead of the uterus.[22] In the ICSI procedure, a physician injects a single sperm into an egg, and the embryo matures in the laboratory for a few days before it is placed in the uterus.[23] Artificial insemination ("AI") is a procedure where sperm is inserted directly into a woman's cervix, by means other than sexual intercourse, to achieve pregnancy.[24]

Utilizing these procedures, a woman may be a genetic mother, a gestational mother, or both. A woman utilizing AI is both the genetic and the gestational mother of the resulting child as she uses her own eggs and carries the pregnancy to term. If a birth mother utilizing IVF, GIFT, ZIFT, or ICSI is also using her own eggs, then she too is genetically related to the resulting child and is both the gestational and genetic mother. If the sperm utilized in any of these procedures is from the mother's male partner, then he also is genetically related to the child. Much like children conceived via sexual intercourse, there is no question as to parentage, and both the mother and her male partner are recognized as legal parents at the birth of the child through the biological connection.

The legal waters begin to get murky, however, when the egg, sperm (gamete), or both are utilized to conceive a child and are not the genetic material of the individuals planning to create a child through ART. For example, same-sex couples that wish to conceive using their own reproductive tissue, the biological certainty is that the child will only have gametes from, and therefore a biological connection to, one of the intended parents. North Carolina law is currently void of any child-centered protections for families created in this manner.

This problem is further highlighted in the case of a birth mother via an ART procedure using a donor egg. In such a situation, the birth mother is not genetically related to the resulting child. She is the gestational mother but does not share a biological connection and is therefore not the genetic mother. Existing North Carolina law is unclear whether a gestational mother, who is an intended parent of the child, is conferred legal parent status upon the birth of the child. If the birth mother uses both donor eggs

21. *Id.*

22. *Id.* at 86.

23. *Id.*

24. *See id.*; Charles Thomas, *Novel Assisted Reproductive Technologies and Procreative Liberty: Examining In Vitro Gametogenesis Relative to Currently Practiced Assisted Reproductive Procedures and Reproductive Cloning*, 26 S. CAL. INTERDISC. L.J. 623, 625 (2017).

and sperm, resulting in neither her nor her partner having a biological connection to the child, then both intended parents have tenuous legal parent status.

Surrogacy adds yet another level of complexity to the legal parentage inquiry.[25] In traditional surrogacy, a female is artificially inseminated.[26] She carries the resulting pregnancy and then delivers the child for the intended parents to raise. The surrogate uses her own egg and is therefore the biological mother of the child and is recognized as a legal parent even though she has no intention of parenting the child. The sperm donor is the biological father of the child. If the biological father is also the intended parent, he is recognized as a legal parent due to biology. The biological father's partner, however, although an intended parent, is not genetically related to the child and is not vested with any parental status upon the birth of the child. This results in the legal parentage of the child remaining in a state of uncertainty and the child being denied the security of two legal parents.

Another form of surrogacy is gestational surrogacy, in which a woman serving as the birth mother undergoes an ART procedure using both donor eggs and sperm.[27] This gestational mother has no genetic connection to the resulting child. She may or may not be recognized as a legal parent, regardless of her intentions to not parent the child. The genetic mother is the woman whose egg was fertilized. If the genetic mother is also an intended parent, she will likely be recognized as the legal parent due to the biological connection. The genetic mother's partner has no biological connection to the child unless his sperm was used for fertilization. If his sperm was used for fertilization, then he will also be recognized as a genetic, legal parent. Otherwise, the genetic mother's partner has no clear parental status.

When utilizing surrogacy, there is typically a written contract between the intended parents and the surrogate.[28] However, enforceability of such contracts varies greatly across the nation ranging from strict construction to prohibition.[29] North Carolina has no existing law concerning the legality or enforceability of surrogacy contracts. Should there be a disagreement

25. Surrogacy and AI fall outside of the definition of ART in the United States Code as they may not include the handling of human eggs or embryos but are included within the parameters of the UPA. The legal issues of parentage of children born via AI and surrogacy mirror those of ART children and necessitate inclusion in this work.

26. *See* Casey et al., *supra* note 1919, at 86.

27. *See id.*

28. *See id.* at 99.

29. *See id.* at 100–06.

between the gestational mother and the genetic mother over the resulting child's legal parentage, there is no legislative guidance to assist North Carolina courts in resolving this dispute.

A hybrid of gestational surrogacy and IVF is embryo adoption. Embryo adoption occurs when a woman has a previously frozen embryo, not genetically related to her, implanted in her uterus.[30] The frozen embryos are typically excess from another couple's ART cycles and are donated by the genetic parents for use by others.[31] The resulting child has no genetic connection to the gestational mother or her partner. While the gestational mother is likely recognized as a legal parent, the law has not solidified this status.

The above ART procedures are all current, medically accepted treatments for individuals unable to conceive through sexual intercourse.[32] Research in reproductive medicine continues, however, and other countries are utilizing evolving procedures, including spindle nuclear transfer ("SNT").[33] SNT requires DNA material from three persons—two different egg donors and a sperm donor—and uses cloning technology to avoid passing along genetic defects that transfer through mitochondrial DNA.[34] The resulting child has genetic links to three individuals.[35] This procedure has not yet been approved in the United States, but it is an approved procedure in Great Britain.[36] As SNT illustrates, reliance on genetic links alone will not help the legal parentage determination of this form of ART-conceived child.

Another emerging technology is In Vitro Gametogenesis ("IVG"). IVG is similar to reproductive cloning in that it may allow skin cells to be converted through somatic cell nuclear transfer[37] to sperm and ova.[38] The implications of this technology are that eggs may be created from male skin

30. *See Adoption FAQs*, NAT'L EMBRYO DONATION CTR., https://www.embryodonation.org/adoption/ [https://perma.cc/6P78-X5D7].

31. *See id.*

32. *See* Thomas, *supra* note 2424, at 639.

33. *See* J. Zhang, et al., *Live Birth Derived from Oocyte Spindle Transfer to Prevent Mitochondrial Disease*, REPRODUCTIVE BIOMEDICINE ONLINE 361, 363–64 (Jan. 31, 2017), https://www.rbmojournal.com/article/S1472-6483(17)30041-X/pdf [https://perma.cc/HP7Y-EUFV].

34. *See id.*

35. *See* Maggie Fox, *Baby Born Using 'Three Parent' Technique, Doctors Say*, NBC NEWS, http:/www.nbcnews.com/health-news/baby-born-using-three-parent-technique-doctors-say-n655701 [https://perma.cc/3RT2-9CH2] (Sept. 28, 2016, 9:41 AM).

36. *See id.*

37. *See* Thomas, *supra* note 24, at 627.

38. *See id.* at 628.

cell donors and sperm from female skin cell donors.[39] Therefore, same-sex couples may soon be able to create a child with genetic material from both intended parents.[40] This procedure illustrates the need for contemporary legislation to reduce reliance on gendered terms, such as "mother" and "father," and utilize gender-neutral terms such as "parent."

The science of reproductive medicine continues to evolve, but parentage law has not kept pace with the realities of ART-conceived children. Family courts need guidance on identifying the legal parents of these children and resolving competing parentage claims. By adopting appropriate legislation, the North Carolina General Assembly will prevent judicial activism and promulgate uniformity in decisions across our family courts because "[i]f 'the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must give the statute its plain and definite meaning, and are without power to interpolate, or superimpose, provisions and limitations not contained therein.'"[41] If the legislature fails to act, these issues will necessarily be litigated on a case-by-case basis, likely resulting in inconsistent decisions across the state.

II. PARENTAGE LAW IN NORTH CAROLINA AND THE SHIFTING LEGAL LANDSCAPE

Numerous North Carolina decisions are detrimental to the best interests of ART-conceived children.[42] For example, in *Boseman v. Jarrell*, the Supreme Court of North Carolina held that the non-biological intended parent of a child jointly created via ART with her same-sex partner did not have legal parent status in a custody action.[43] Boseman and Jarrell were a lesbian couple in a domestic partnership in North Carolina.[44] From the beginning of their relationship, the two discussed having a child.[45] They decided that Jarrell would bear the child, and they were both involved in the

39. *See id.* at 629

40. *See id.*

41. Boseman v. Jarrell, 704 S.E.2d 494, 500 (N.C. 2010) (quoting *In re* D.L.H., 694 S.E.2d 753, 757 (N.C. 2010)).

42. *See id.* at 502; Mason v. Dwinnell, 660 S.E.2d 58, 64 (N.C. Ct. App. 2008); Heatzig v. Maclean, 664 S.E.2d 347, 353 (N.C. Ct. App. 2008), *aff'd*, 670 S.E.2d 564 (N.C. 2008). *See also* Benjamin S. Paulsen, *A Stranger in the Eyes of the Court: How the Judicial System is Failing to Protect Nonbiological LGBTQ Parents*, 2018 U. ILL. L. REV. 311, 317 (2018) (showing statistics of LGBTQ couples facing denial of parentage rights, even after *Obergefell*).

43. *Boseman*, 704 S.E.2d at 505.

44. *See id.* at 496–97.

45. *Id.* at 496.

selection of an anonymous sperm donor.[46] After the baby's birth in 2002, they jointly chose a first name and used a hyphenated last name for the child.[47] The parties equally participated in parenting and together "held themselves out as the parents of the minor child."[48] The child called Boseman "Mom" and Jarrell "Mommy."[49] However, when the couple separated in 2006, Jarrell limited Boseman's time with the minor child.[50]

Boseman filed an action seeking custody.[51] Each party testified that the other was a good parent, and it was undisputed that the child loved and was bonded with each woman.[52] Jarrell enjoyed parental status as the genetic birth mother, but Boseman did not, and could only pursue her custody action as a third-party litigant.[53] The court declined to recognize Boseman as a legal parent but did grant her some visitation privileges, finding that Jarrell's actions in sharing decision-making authority with a nonparent constituted actions inconsistent "with her paramount parental status."[54] Despite the facts that both women jointly decided to create a child via ART and together co-parented that child for four years, the child only had one legal parent.[55]

This case highlights the inequities of existing North Carolina law. The child at issue was denied the benefit and security of having two legal parents.[56] Boseman was clearly an intended parent from conception.[57] She was, in fact, the primary financial support for Jarrell and the child.[58] Upon separation, however, Boseman had no legal parental responsibilities, and thus, she had no obligation of financial support for the child that she helped create.[59] If Boseman died without a will, the child would neither receive an inheritance from her estate or any social security survivor benefits, nor have any ability to recover wrongful death proceeds.[60] If Jarrell died, Boseman

46. *Id.* at 497.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at 498.
51. *Id.*
52. *See id.* at 497–98.
53. *See id.* at 502.
54. *See id.* at 505.
55. *See id.*
56. *See id.*
57. *See id.* at 497.
58. *See id.* at 498.
59. *See* N.C. GEN. STAT. § 50-13.4(b) (2019) (providing that only parents are primarily liable for the support of a minor child).
60. *See* Walton, *supra* note 1414, at 23.

would not have automatic custody rights as the surviving parent.[61] As these outcomes illustrate, current law is detrimental to the health and welfare of ART-conceived children.

The existing common law marital presumption of parentage further complicates the legal parentage conundrum for ART-conceived children. The marital presumption, the purpose of which is to promote and protect the integrity of the family, provides that any child born to a married woman is presumed to be the child of the woman's spouse.[62] Presumptions, of course, may be rebutted,[63] so they are not a sturdy foundation upon which to build an impervious parental relationship. Their legal precedent cannot, however, be ignored. Following the landmark marriage equality case of *Obergefell v. Hodges*,[64] the United States Supreme Court decided in *Pavan v. Smith* that a state may not deny married same-sex couples equal application of the marital presumption.[65] *Pavan* requires a same-sex spouse to be listed on the child's birth certificate, despite the impossibility of the spouse as a biological parent.[66] Being listed on a birth certificate, however, does not conclusively establish legal parentage of a child.[67] North Carolina responded to the mandates of *Obergefell* by enacting a Technical Corrections Bill, which came into effect on July 12, 2017.[68] This legislation states, in part, which words shall be construed to include two individuals who are lawfully married:

> The words "husband and wife," "wife and husband," "man and wife," "woman and husband," "husband or wife," "wife or husband," "man or wife," "woman or husband," or other terms suggesting two individuals who are then lawfully married to each other shall be construed to include any two individuals who are then lawfully married to each other.[69]

Proper application of the marital presumption for ART-conceived children requires resolution of unanswered legal questions, including (1) how does the marital presumption apply when the genetic mother and the

61. *See id.*

62. *See* Eubanks v. Eubanks, 159 S.E.2d 562, 568 (N.C. 1968).

63. At common law, the marital presumption is rebutted with evidence of sexual non-access to the wife or of impotence. *See id.*

64. Obergefell v. Hodges, 576 U.S. 644 (2015).

65. *See* Pavan v. Smith, 137 S. Ct. 2075, 2077 (2017).

66. *See id.*

67. *See* Cheryl Howell, *New Legislation Acknowledges Same-Sex Marriage*, UNC SCH. OF GOV'T: ON THE CIV. SIDE (Aug. 8, 2017, 8:00 AM), https://civil.sog.unc.edu/new-legislation-acknowledges-same-sex-marriage/ [https://perma.cc/HS34-BZB5].

68. *See* N.C. GEN. STAT. § 12-3 (2019).

69. N.C. GEN. STAT. § 12-3(16).

gestational mother are not the same woman;[70] and (2) since the marital presumption must be extended to a same-sex marriage between two women, is there a violation of the Equal Protection Clause of the United States Constitution, or of the statutory law of North Carolina, if it is not applied to a same-sex marriage between two men?[71]

Gestational surrogacy and embryo adoption, layered with the marital presumption in its current form, create the possibility of a child having multiple individuals with competing legal parentage claims under current North Carolina law: (1) a gestational mother; (2) a gestational mother's spouse; (3) a genetic (non-birth) mother; (4) a genetic mother's spouse; and (5) a genetic father. Scenarios such as this, which are not at all remote, are compelling reasons why the North Carolina General Assembly must promulgate policy in this arena and give direction to our courts concerning parentage determinations for ART-conceived children.

The marital presumption is not, of course, applicable to ART-conceived children born to unmarried intended parents. Nor should it be the basis of conferring rights on some children and not others. The legal rights of all children to entitlements, financial and otherwise, that flow from parents must not be dependent upon the marital status of the parents. In North Carolina, 40% of all children are born to unmarried parents.[72] Children have no say in the circumstances of their birth. The United States Supreme Court has consistently held that children may not be treated differently based upon their parents' marriage status; to do so violates the Fourteenth Amendment.[73]

In *Levy v. Louisiana*, the United States Supreme Court struck down a state law prohibiting illegitimate children from recovering damages after the wrongful death of a parent.[74] The Court stated, "While a State has broad power when it comes to making classifications . . . , it may not draw a line

70. *See* Joanna L. Grossman, *The Ripples After the Splash: Parentage Law Takes Shape After* Obergefell v. Hodges, VERDICT (Oct. 25, 2016), https://verdict.justia.com/2016/10/25/ripples-splash-parentage-law-takes-shape-obergefell-v-hodges [https://perma.cc/C74K-AAMU].

71. Once again, North Carolina is not alone in its absence of legislative guidance in this area. There is no uniformity across the country concerning application of the marital presumption to same-sex couples. *See* June Carbone & Naomi Cahn, *Marriage and the Marital Presumption Post-Obergefell*, 84 UMKC L. REV. 663, 668 (2016).

72. 1 N.C. DEP'T OF HEALTH AND HUM. SERVS., NORTH CAROLINA VITAL STATISTICS 2017: BIRTHS, DEATHS, POPULATION 1-2 (Jan. 2019).

73. *See, e.g.*, Gomez v. Perez, 409 U.S. 535, 538 (1973); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 176 (1972); Levy v. Louisiana, 391 U.S. 68, 72 (1968).

74. *See Levy*, 391 U.S. at 72.

which constitutes an invidious discrimination against a particular class."[75] In another Louisiana case, *Weber v. Aetna Casualty & Surety Co.*, the Court held that it was a violation of the Equal Protection Clause to treat legitimate and illegitimate children differently in the recovery of workmen's compensation benefits following the death of a parent.[76] The Court opined, "The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust."[77] Further, in *Gomez v. Perez*, a Texas law that allowed legitimate children the right to seek support from their fathers, but prohibited illegitimate children from realizing that same right, was struck down as unconstitutional.[78] The Court stated that "a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally."[79]

III. THE CONSTITUTIONAL RIGHT TO PROCREATION

Procreation is a liberty interest, if not an absolute fundamental right, safeguarded by the Fourteenth Amendment to the United States Constitution.[80] The United States Supreme Court stated in *Skinner v. Oklahoma* that the right to reproduce is "one of the basic civil rights of man."[81] Protected procreation should not be limited to only sexual intercourse, but should also include conception through all forms of assisted reproduction.[82] Aspiring parents who cannot conceive through sexual intercourse are able to procreate only by availing themselves of assisted reproduction. Furthermore, procreation decisions also implicate a potential parent's privacy right.[83] Ultimately, "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally

75. *Id.* at 71 (citing Ferguson v. Skrupa, 372 U.S. 726, 732 (1967)).

76. *See Weber*, 406 U.S. at 165.

77. *Id.* at 175.

78. *See Gomez*, 409 U.S at 538.

79. *Id.*

80. *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535, 541 (1942); Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (establishing constitutional protection for an individual's decisions on procreation); Eisenstadt v. Baird, 405 U.S. 438 (1972).

81. *Skinner*, 316 U.S. at 541.

82. For a comprehensive analysis of whether ART should be included under procreative liberty, *see* Thomas, *supra* note 2424, at 633–48.

83. *See id.* at 636.

affecting a person as the decision whether to bear or beget a child."[84] Conceiving a child utilizing ART is an intentional, planned decision by the eventual parents; conception does not occur by chance.

In *Obergefell*, the Supreme Court undoubtedly recognized the right of same-sex couples to procreate.[85] The Court stated:

> A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education .... Without the recognition, stability, and predictability marriage offers ... children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue here thus harm and humiliate the children of same-sex couples.[86]

All forms of ART deserve the same acceptance given AI. Since the 1960's, AI has been widely accepted as a medical treatment for infertility.[87] North Carolina passed its AI statute in 1971.[88] It was a non-controversial statute that has never been amended, evidenced by the fact that it has no legislative history or study reports to be found in the legislative archives.[89] The statute states, "Any child or children born as the result of heterologous artificial insemination shall be considered at law in all respects the same as a naturally conceived legitimate child of the husband and wife requesting and consenting in writing to the use of such technique."[90] This statute creates legal parenthood for a non-biological intended parent without the necessity of adoption.[91] Thus, it protects the privacy interest of the intended parent as well as the child's right to a legal parent and the obligations and benefits flowing therefrom. Aspiring parents utilizing other forms of ART should be afforded these same basic protections.

---

84. *Eisenstadt*, 405 U.S. at 453 (citations omitted).

85. Obergefell v. Hodges, 576 U.S. 644, 669 (2015).

86. *Id.* at 667–68.

87. *See* Gaia Bernstein, *The Socio-Legal Acceptance of New Technologies: A Close Look at Artificial Insemination*, 77 WASH. L. REV. 1035, 1083–84 (2002).

88. N.C. GEN. STAT. § 49A-1 (2019).

89. *See* Howell, *supra* note 67.

90. N.C. GEN. STAT. § 49A-1.

91. *See id.*

IV. WHY PARENTAL RECOGNITION IS IMPORTANT

Parents are essential to the healthy development of a child's physical, emotional, social, and psychological wellbeing.[92] The import of a parent-child bond and the social capital of security and permanence that it carries are not questioned in society.[93] Furthermore, emotional relationships between children and parents have been proven more inviolable than those between children and other permanent caregivers.[94] Parents are their children's earliest teachers and help them shape their identities, cultural attitudes, behaviors, and social customs.[95]

Not only is it important for children and parents that every child have, at birth, identifiable legal parents, but it is also important for society. It is crucial that parents, from the moment of birth, be vested with all the legal rights and protections that flow from parenthood. For children, it is equally crucial to identify the individuals legally responsible for the child's support and wellbeing, and from whom the child's entitlements flow. Society must also be able to identify legal parents so as to know which individuals to hold accountable should there be a breach of societal values or laws such as child abuse, abandonment, or nonsupport.

Legal parents are the only individuals with a constitutionally-protected right to the exclusive care, custody, and control of their minor children.[96] This constitutional right means that fit parents enjoy a protected status and can never be put in jeopardy of losing custody of their children to third parties such as grandparents or other relatives.[97] There is a long-standing legal presumption that the best interests of a child will be served by being in the care of his or her parents, and only parents are entitled to make decisions with important and long-lasting consequences on behalf of their minor children.[98] These include decisions and choices regarding matters such as discipline, education, health care, and religious upbringing.[99] Legal

92. *See* Tali Marcus, *Cutting Off the Umbilical Cord - Reflections on the Possibility to Sever the Parental Bond*, 25 J. L. & POL'Y 583, 583–84 (2017).

93. *See id.* at 589.

94. *See* Dara E. Purvis, *Intended Parents and the Problem of Perspective*, 24 YALE J. L. & FEMINISM 210, 213 (2012).

95. *See* Marcus, *supra* note 92, at 588–89.

96. *See* Price v. Howard, 484 S.E.2d 528, 530 (N.C. 1997).

97. *See* Peterson v. Rogers, 445 S.E.2d 901, 904 (N.C. 1994). *See also* Troxel v. Granville, 530 U.S. 57, 66 (2000) (discussing the constitutional right of parents to raise their children).

98. *In re* Jones, 188 S.E.2d 580, 583 (N.C. Ct. App. 1972).

99. *See* Diehl v. Diehl, 630 S.E.2d 25, 27–28 (N.C. Ct. App. 2006); Patterson v. Taylor, 535 S.E.2d 374, 378 (N.C. Ct. App. 2000).

parental status is an extremely powerful shield against outside intrusion into the family. All presumptions and protections favoring parents are designed to be viewed through the lens of the best interests of a child so as to protect and promote stability for children and families.[100]

In North Carolina, intended parents who have raised children as their own, regardless of the length of time the child and intended parent have been a family, remain third-party litigants in custody disputes.[101] Although many such litigants have obtained custody or visitation with the child at issue, custody rights are not a substitute for parental rights.[102] As the United States Supreme Court recognized in *Stanley v. Illinois,* "legal custody is not parenthood or adoption."[103] Custody rights allow an individual to exercise control over some aspects of a child's life, but they are not reciprocal to the child—the child is not vested with any legal entitlements, financial or otherwise, from a nonparent custodian.[104]

A nonparent third-party seeking custody of a child must prove that the parents have either waived their protected status or forfeited it due to unfitness.[105] Since this impacts a parent's constitutional right, a third-party litigant must prove waiver or unfitness by the higher "clear, cogent, and convincing evidence" standard of proof.[106] If a third-party litigant fails to meet this burden, he or she may not be awarded custody or visitation.[107] Parenthood and family are, by law, impervious to outside interference without a compelling reason.[108] If North Carolina, through the authority of a county department of social services, seeks custody of a child, the state too must adhere to the clear and convincing evidence standard.[109] The law protects a parent's right to his or her children. It protects that right so

100. *See* Eubanks v. Eubanks, 159 S.E.2d 562, 568 (N.C. 1968).

101. *See* Mason v. Dwinnell, 660 S.E.2d 58, 65 (N.C. Ct. App. 2008).

102. *See* Stanley v. Illinois, 405 U.S. 645, 648 (1972).

103. *See id.*

104. *See* Boyd v. Boyd, 343 S.E.2d 581, 585 (N.C. Ct. App. 1986); N.C. GEN. STAT. § 50-13.4(b) (2019).

105. *See* Price v. Howard, 484 S.E.2d 528, 530–32 (N.C. 1997)

106. *See* Estroff v. Chatterjee, 660 S.E.2d 73, 77 (N.C. Ct. App. 2008).

107. *See* Seyboth v. Seyboth, 554 S.E.2d 378, 382 (N.C. Ct. App. 2001).

108. *See In re* R.R.N., 775 S.E.2d 656, 659–60 (N.C. 2015) (concluding that the Department of Social Services must overcome the constitutional right of the parent to direct the upbringing of their child only if the parents have not provided proper care).

109. *See* N.C. GEN. STAT. § 7B-805 (2019) ("The allegations in a petition alleging that a juvenile is abused, neglected, or dependent shall be proved by clear and convincing evidence.").

strongly that, when the government intrudes under child welfare laws, the state provides legal counsel to any indigent parent for free.[110]

Further, the state has a compelling interest in identifying parents as legally responsible for a child's welfare and financial support.[111] This has been so since the mid-1800s when North Carolina began to hold fathers of illegitimate children responsible for support under the state's former Bastardy Act.[112] "The object of the Bastardy Act was to shift the burthen of maintaining the child, from the innocent many to the guilty *one*."[113] "[Chapter 49's] purpose is not to confer rights upon either the mother or the father but to protect the child and to protect the State against the child's becoming a public charge."[114] In 2018, approximately 20% of children in North Carolina lived in poverty.[115] Nonsupport of a child born outside of marriage is still a misdemeanor criminal offense in North Carolina punishable by up to sixty days in jail.[116] By failing to recognize both intended parents as legal parents upon the birth of an ART-conceived child, the state is unnecessarily preventing many such children from accessing adequate financial support.

No child should suffer, or otherwise be treated differently, due to a parent's marital status, sexual orientation, or choice in method of conception. To do otherwise must certainly violate the Equal Protection Clause.[117] North Carolina must continue its strong public policy of protecting the current and future welfare of children by providing all families created with ART the filial stability and permanence achieved through legal parenthood. The framework promulgated by the UPA achieves this goal while upholding the state's important public policy.

---

110. *See* N.C. GEN. STAT. § 7B-602 (2019).

111. *See* N.C. GEN. STAT. § 49-1–2 (2019). *See also* Tidwell v. Booker, 225 S.E.2d 816, 825 (N.C. 1976) ("[The State's] interest is in the prevention of the child's becoming a charge upon the State so as to require the State, itself, to support the child.").

112. *See* N.C. GEN. STAT. § 49-2.

113. State v. Roberts, 32 N.C. 350, 353 (1849).

114. *Tidwell*, 225 S.E.2d at 821.

115. Annie E. Casey Found., *Children in Poverty in North Carolina*, KIDS COUNT DATA CTR., https://datacenter.kidscount.org/data/tables/2238-children-in-poverty?loc=35&loct=2#detailed/2/any/false/37/any/12873,4680 [https://perma.cc/V87D-TK9B] (last updated July 2020).

116. *See* § 49-2.

117. *See* Douglas NeJaime, *The Nature of Parenthood,* 126 YALE L.J. 2260, 2351 (2017).

V. THE GUIDANCE OF THE UNIFORM PARENTAGE ACT

The UPA is model legislation promulgated by the National Conference of Commissioners on Uniform State Laws ("The Uniform Law Commission" or "ULC").[118] The original version of the UPA was introduced in 1973, with a stated purpose of ensuring that "all children and all parents have equal rights with respect to each other."[119] The goal was to provide all children similar treatment regardless of whether the parents were married or unmarried.[120] The UPA was updated in 2002 to address emerging parentage issues concerning ART, including surrogacy contracts.[121] The 2017 version of the UPA ("UPA 2017") was revised in response to the legalization of same-sex marriage in *Obergefell*.[122] UPA 2017 removes gendered terms, provides equal treatment for children born to both opposite-sex and same-sex couples, establishes legal parentage for intended parents of ART-conceived children, and updates surrogacy provisions.[123] The UPA contains excellent proposed legislation to assist states in promulgating policy to prevent harmful and protracted litigation concerning children.

One of the first matters of policy that must be addressed by the North Carolina General Assembly is whether or not a child may be adjudicated to have more than two legal parents. In section 613, the UPA provides two alternatives to be considered: Alternative A limits a child to two legal parents, and Alternative B allows courts latitude to adjudicate more than two legal parents when special circumstances present.[124] Alternative A would draw a bright line for courts and prevent any inconsistencies in the exercise of judicial discretion. At least four jurisdictions, however, authorize adjudication of more than two legal parents.[125] Again, as this is a matter of public policy, the General Assembly should address the issue first and not leave it to the courts for determination on a case-by-case basis.

Another troubling issue that can be immediately addressed by enactment of the UPA concerns the ability of gamete donors to seek parental recognition. Current North Carolina parentage law is heavily centered upon

118. *See generally* UNIF. PARENTAGE ACT (UNIF. LAW. COMM'N 2002).

119. UNIF. PARENTAGE ACT § 2 cmt. (amended 2017), 9B U.L.A. 287 (2017).

120. *See id.*

121. *See* UNIF. PARENTAGE ACT.

122. *See* UNIF. PARENTAGE ACT Prefatory Note (amended 2017), 9B U.L.A. 34–36 (2017).

123. *See id.*

124. *See* UNIF. PARENTAGE ACT § 613(c) (amended 2017), 9B U.L.A. 84–86 (2017).

125. *See id.* The jurisdictions are California, Delaware, the District of Columbia, and Maine.

biological connection. While gamete donors and recipients in past decades enjoyed a veil of anonymity, that is no longer the case. Popular mail-away DNA testing services such as 23andme and ancestry.com are making it much easier for gamete donors to locate biological offspring.[126] The shroud of confidentiality that once protected intended parents from intrusion from egg and sperm donors, and vice versa, no longer exists.[127]

Websites such as Donor Sibling Registry and DonorChildren, as well as several Facebook pages, exist to help donors connect with their offspring, and for donor-conceived children to locate their biological families.[128] Many gamete donors as well as donor-conceived children and their parents believe that donors should not be anonymous.[129] This is in part due to the need for sharing of genetic health information. Research on adoptive families and ART has also shown, though, that the urge to seek one's genetic origins is not uncommon and that such urge is in no way a rejection of their current family.[130] Anonymous gamete donation was outlawed in the United Kingdom in 2005, and many are advocating for the United States to follow suit.[131]

These issues are clearly addressed in the UPA. Section 702 of the UPA definitively states that "[a] donor is not a parent of a child conceived by assisted reproduction."[132] A donor is further defined in the Act as "an individual who provides gametes intended for use in assisted reproduction, whether or not for consideration."[133] The definition specifically excludes the birth mother of an ART-conceived child (unless otherwise bound by a surrogacy agreement) as well as intended parents of ART-conceived children and children born to a surrogate.[134]

The most impactful action that the North Carolina General Assembly can take to protect the welfare of ART-conceived children is to enact Article 7 "Assisted Reproduction Other Than Surrogacy" and Article 8 "Surrogacy

126. *See* Aaron Long, *First I Met My Children, Then My Girlfriend. They're Related.*, N.Y. TIMES: MODERN LOVE (Sept. 28, 2018), https://www.nytimes.com/2018/09/28/style/modern-love-how-i-met-my-children.html [https://perma.cc/9RC4-XSWC].

127. *See id.*

128. *See, e.g.*, Stephanie Pappas, *Genetic Testing and Family Secrets*, 49 MONITOR ON PSYCH. (June 2018), https://www.apa.org/monitor/2018/06/cover-genetic-testing [https://perma.cc/4F9X-VTC6].

129. *See id.*

130. *See id.*

131. *See id.*

132. UNIF. PARENTAGE ACT § 702 (amended 2017), 9B U.L.A. 95 (2017).

133. UNIF. PARENTAGE ACT § 102(9) (amended 2017), 9B U.L.A. 42 (2017).

134. *See id.*

Agreements" of the UPA.[135] This legislation sets forth a thoughtful child-centered framework to designate legal parentage at birth and provides clear direction to trial judges across the state when encountering these issues in their family courts. Article 7 states, in part:

> **SECTION 703. PARENTAGE OF CHILD OF ASSISTED REPRODUCTION.** An individual who consents under Section 704 to assisted reproduction by a woman with the intent to be a parent of a child conceived by the assisted reproduction is a parent of the child.[136]
>
> **SECTION 704. CONSENT TO ASSISTED REPRODUCTION.**
>
> (a) Except as otherwise provided in subsection (b), the consent described in Section 703 must be in a record signed by a woman giving birth to a child conceived by assisted reproduction and an individual who intends to be a parent of the child.
>
> (b) Failure to consent in a record as required by subsection (a), before, on, or after birth of the child, does not preclude the court from finding consent to parentage if: (1) the woman or the individual proves by clear-and-convincing evidence the existence of an express agreement entered into before conception that the individual and the woman intended they both would be parents of the child; or (2) the woman and the individual for the first two years of the child's life, including any period of temporary absence, resided together in the same household with the child and both openly held out the child as the individual's child, unless the individual dies or becomes incapacitated before the child attains two years of age or the child dies before the child attains two years of age, in which case the court may find consent under this subsection to parentage if a party proves by clear-and-convincing evidence that the woman and the individual intended to reside together in the same household with the child and both intended the individual would openly hold out the child as the individual's child, but the individual was prevented from carrying out that intent by death or incapacity.[137]

If enacted, this legislation will apply to ART-conceived children without regard to whether the birth mother is the genetic mother, the sex of the other intended parent, or the marital status of the individuals. This language clarifies previously uncertain parentage and protects a child's right to have two legal parents identified at birth. By providing three mechanisms of proving parentage—(1) written consent, (2) express agreement, and (3) residing and holding out—a child's family structure is given stability and preference. A child's right to receive benefits that may

135. *See* UNIF. PARENTAGE ACT art. 7, 8 (UNIF. L. COMM'N 2017).

136. UNIF. PARENTAGE ACT § 703 (amended 2017), 9B U.L.A. 95 (2017).

137. UNIF. PARENTAGE ACT § 704 (amended 2017), 9B U.L.A. 95–96 (2017).

flow from an intended parent are well protected even if written consent is not present. Had this been the law at the time of the *Boseman* case, the child at issue would have two legal parents.[138]

Despite the sweeping changes that Article 7 of the UPA will bring, it alone does not eradicate the need to address surrogacy. As Article 7 necessitates a birth mother as one of the intended parents, the provisions contained therein do not cover all ART-conceived children. Some intended parents are unable to procreate without the assistance of a surrogate. A surrogate is necessary for women who, desiring a biological child, are unable to carry a pregnancy due to serious health or genetic conditions. A surrogate is also necessary for men in a same-sex relationship who wish to conceive a child having some shared biology with at least one of the intended parents. According to the Centers for Disease Control's National ART Surveillance System, about 2% of all ART cycles use a gestational surrogate.[139] More than 18,000 babies were born to gestational carriers in the United States between 1999 and 2013.[140] During this same timeframe, the number of gestational surrogacy cycles increased from 727 to 3,432 per year.[141] No statistics are collected and reported on traditional, or genetic, surrogacy.[142]

As previously discussed, procreation is a protected liberty interest.[143] The United States Supreme Court reiterated this in *Obergefell*, stating that "[l]ike choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make."[144] The Court also stated, "[M]any same-sex couples provide loving and nurturing homes to their children, whether biological or adopted," and that "[most states allowing same sex-sex couples to adopt] provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families."[145] Based upon the rhetoric used by the Supreme Court in *Obergefell* and its progeny, it is quite possible that banning surrogacy may be an impermissible abridgement of an individual's

138. *See* Boseman v. Jarrell, 704 S.E.2d 494, 504 (N.C. 2010).

139. *See* Perkins K.M. et al., *Trends and Outcomes of Gestational Surrogacy in the United States*, 106 FERTILITY & STERILITY 435, 435–42 (2016).

140. *See id.*

141. *See id.*

142. *See* Magdalina Gugucheva, *Surrogacy in America*, COUNCIL FOR RESPONSIBLE GENETICS 6 (2010), http://www.thelizlibrary.org/surrogacy/Surrogacy-in-America.pdf [https://perma.cc/Y8LV-W3BC].

143. *See* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

144. Obergefell v. Hodges, 576 U.S. 622, 666 (2015).

145. *Id.* at 668.

constitutionally protected right of procreation. North Carolina would do well to adopt the UPA surrogacy provisions and provide courts with guidance at this time.

Article 8 of the UPA applies to both genetic and gestational surrogacy.[146] Recognition of the important biological distinction between the two, however, necessitates some difference in regulation. The most notable distinction is that a genetic surrogate has the right to terminate the surrogacy agreement any time before the resulting child is 72 hours old.[147] A gestational surrogate may terminate the agreement any time prior to implantation of the embryo.[148] After the expiration of the termination period, surrogacy agreements are enforceable by the courts.[149] Regardless of the type of surrogacy agreement, every surrogate retains complete control over all health care choices for herself and the fetus throughout the pregnancy.[150]

The UPA's guidance on surrogacy agreements mandates that the intended parents, the surrogate, and the surrogate's spouse, if any, are all necessary and required parties to the contract.[151] Besides setting forth requirements to be a surrogate[152] and required elements of a valid surrogacy agreement,[153] the proposed model legislation clearly grants intended parents legal parent status upon the birth of the child. For gestational surrogacy agreements, the Act states:

> **§ 809. Parentage under Gestational Surrogacy Agreement.** (a) Except as otherwise provided . . . on birth of a child conceived by assisted reproduction under a gestational surrogacy agreement, each intended parent is, by operation of law, a parent of the child. (b) Except as otherwise provided . . . neither a gestational surrogate nor the surrogate's spouse or former spouse, if any, is a parent of the child.[154]

For genetic surrogacy agreements, the Act states:

> **§ 815. Parentage under Validated Genetic Surrogacy Agreement.** (a) Unless a genetic surrogate exercises the right under Section 814 to terminate a genetic surrogacy agreement, each intended parent is a parent of a child

146. *See* UNIF. PARENTAGE ACT § 801(3) (amended 2017), 9B U.L.A. 101 (2017).

147. *See* UNIF. PARENTAGE ACT § 814(a)(2) (amended 2017), 9B U.L.A. 113 (2017).

148. *See* UNIF. PARENTAGE ACT § 808(a) (amended 2017), 9B U.L.A. 107 (2017).

149. *See* UNIF. PARENTAGE ACT §§ 812(c), 818(a) (amended 2017), 9B U.L.A. 110–18 (2017).

150. *See* UNIF. PARENTAGE ACT § 804(a)(7) (amended 2017), 9B U.L.A. 103–05 (2017).

151. *See* UNIF. PARENTAGE ACT § 803(3) (amended 2017), 9B U.L.A. 102 (2017).

152. *See* UNIF. PARENTAGE ACT § 802 (amended 2017), 9B U.L.A. 101–02 (2017).

153. *See* UNIF. PARENTAGE ACT §§ 803, 804.

154. UNIF. PARENTAGE ACT § 809(a)–(b) (amended 2017), 9B U.L.A. 108 (2017).

> conceived by assisted reproduction under an agreement validated under Section 813.[155]

If there is a termination of the genetic surrogacy agreement after the implantation of the embryo or the birth of the child, the Act further provides guidance to the courts on adjudicating parentage of the resulting child.[156] The surrogate is a legal parent and any other claims of parentage are adjudicated in the same manner as a non-ART-conceived child.[157] This proposed legislation effectively addresses all the competing claims for parentage that may arise from a disputed surrogacy agreement and provides trial courts with a clear and cohesive mechanism for adjudicating any such claims.

Without necessary legislation such as Articles 7 and 8 of the UPA, intended parents will have no way of securing legal parentage of the children they create starting from the moment of birth. Children do not have any input into their method of conception, and no child should be treated differently under the law simply due to the circumstances of birth.[158] Current North Carolina law, however, treats ART-conceived children differently. The North Carolina General Assembly has the opportunity to rectify this inequity with the adoption of the UPA.

The Uniform Law Commission is a nonpartisan group of legal experts who work to draft clear and comprehensive legislation on matters critical to state law.[159] The ULC has been working for the betterment of state laws since 1892.[160] All ULC members are licensed attorneys appointed to the commission by governors across the United States.[161] Members work on a volunteer basis and receive no remuneration for their service.[162] The works of the ULC are many and include familiar laws, including the Uniform Commercial Code, the Model Rules of Evidence, the Uniform Probate Code, and the Uniform Residential Landlord and Tenant Act.[163]

---

155. UNIF. PARENTAGE ACT § 815 (amended 2017), 9B U.L.A. 114–15 (2017).

156. *See* § 815(c).

157. *See id.*

158. *See* Taylor R. Kramer, *Where the Sidewalk Ends: An Update to the Kansas Assisted Reproductive Technology Statute to Give All Children Legal Rights to Their Parents*, 54 WASHBURN L.J. 329, 349 (2015).

159. *See About ULC, Overview*, UNIF. L. COMM'N, https://www.uniformlaws.org/aboutulc/overview [https://perma.cc/5NXU-4GK].

160. *See id.*

161. *See id.*

162. *See id.*

163. *See Current Acts*, UNIF. LAW COMM'N, https://www.uniformlaws.org/acts/catalog/current [https://perma.cc/YK76-RYHD].

The ULC is also the body that provided states with the essential Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), codified in North Carolina as N.C. Gen. Stat. Section 50A, and adopted in all fifty states and the District of Columbia.[164] The UCCJEA prevents forum shopping in child custody proceedings and provides uniformity in enforcing custody orders across state lines.[165] One of the primary purposes of this law is to promote the welfare and best interests of children and reduce the harmful effects of litigants moving children from state to state seeking different custody outcomes.[166] Adoption of the model legislation promulgated by the UPA will accomplish these same goals, as well as solidify rights for ART-conceived children and their intended parents.

VI. ADOPTION IS AN INADEQUATE REMEDY

Adoption is a valued mechanism for creating a family and procuring a legal parent-child relationship. It is not, however, an adequate remedy for securing parentage of ART-conceived children. The general provisions of North Carolina's adoption statutes state:

> The primary purpose of this Chapter is to advance the welfare of minors by (i) protecting minors from unnecessary separation from their original parents, (ii) facilitating the adoption of minors in need of adoptive placement by persons who can give them love, care, security, and support, (iii) protecting minors from placement with adoptive parents unfit to have responsibility for their care and rearing, and (iv) assuring the finality of the adoption.[167]

The adoption laws presume a child to be in need of parents different than their parents of origin; ART-conceived children, however, do not have this need. They do not seek replacement parents but instead for their parents of origin, their creators, to be recognized as legal parents.

Procuring legal parentage by statute through enactment of the UPA is a better mechanism of securing parental rights for ART-conceived children since parental status is recognized at birth instead of conferred months or years later pursuant to court order.[168] The adoption process has been found

164. *See Uniform Child Custody Jurisdiction and Enforcement Act: Guide for Court Personnel and Judges*, 2 NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES 1 (Jul.18, 2018), https://www.ncjfcj.org/wp-content/uploads/2018/07/UCCJEA_Guide_Court_Personnel_Judges_Final.pdf [https://perma.cc/C8KZ-8LFH].

165. *See* N.C. GEN. STAT. § 50A-101 cmt. (2019).

166. *See id.*

167. N.C. GEN STAT. § 48-1-100(b)(1) (2019).

168. *See* Dara E. Purvis, *Intended Parents and the Problem of Perspective*, 24 YALE J.L. & FEMINISM 210, 213 (2012).

by many to be "time-consuming, costly, and invasive."[169] If intended parents are required to adopt their children, they are subjected to court oversight and evaluations, such as home visits and interviews, that are not required of parents who create children through sexual intercourse.[170] This creates unnecessary work for courts. North Carolina public policy should promote less, not more, government intrusion into the family structure.

Adoption, furthermore, is not available for all families created using ART. North Carolina law allows stepparent adoption,[171] but does not authorize second-parent adoption for unmarried individuals.[172] Absent enactment of the UPA, an unmarried couple in North Carolina who create a child via ART utilizing donor gametes have no ability to both be recognized as a legal parent of the child.[173] As previously discussed, this may leave a child vulnerable to loss of a parental bond or critical financial resources in the event of death or separation. The UPA draws no such detrimental distinction between married and unmarried intended parents and fully comports with North Carolina's public policy of preventing unnecessary separation of a child and his or her original parents.

CONCLUSION

Approximately 120,000 children are born in North Carolina each year.[174] As ART accounts for approximately 2% of these births,[175] North

169. Michael J. Higdon, *The Quasi-Parent Conundrum*, 90 U. COLO. L. REV. 941, 962 (2019) (quoting NeJaime, *supra* note 117, at 2264).

170. *See* N.C. GEN. STAT. §§ 48-2-501–03 (2019).

171. *See* N.C. GEN STAT. § 48-4-100 (2019).

172. *See* Boseman v. Jarrell, 704 S.E.2d 494, 503 (N.C. 2010).

173. *See id.*

174. In each year from 2016 through 2019, the number of births in North Carolina were above 120,000. *See CY2016 North Carolina Birth Occurrences by Place of Birth and Month*, N.C. DEP'T OF HEALTH & HUM. SERVS. (Sept. 7, 2017), https://schs.dph.ncdhhs.gov/data/provisional/Birth/2016/CY2016%20PB1%20Place%20by%20Month.html [https://perma.cc/W755-8ZGW]; *CY2017 North Carolina Birth Occurrences by Place of Birth and Month*, N.C. DEP'T OF HEALTH & HUM. SERVS. (Sept. 6, 2018), https://schs.dph.ncdhhs.gov/data/provisional/Birth/2017/CY2017%20PB1%20Place%20by%20Month.html [https://perma.cc/TG75-5S6X]; *CY2018 North Carolina Birth Occurrences by Place of Birth and Month*, N.C. DEP'T OF HEALTH & HUM. SERVS. (Aug. 21, 2019), https://schs.dph.ncdhhs.gov/data/provisional/Birth/2018/CY2018%20PB1%20Place%20by%20Month.html [https://perma.cc/R4EL-Y9HA]; *CY2019 North Carolina Birth Occurrences by Place of Birth and Month*, N.C. DEP'T OF HEALTH & HUM. SERVS. (Aug. 26, 2020), https://schs.dph.ncdhhs.gov/data/provisional/Birth/2019/CY
2019%20PB1%20Place%20by%20Month.html [https://perma.cc/RRG5-R7RF].

175. *See* 2016 NATIONAL SUMMARY REPORT, *supra* note 7.

Carolina has 2,400 children annually who are created outside of sexual intercourse. North Carolina law, as required by the United States Constitution, favors and supports children remaining with their family of origin.[176] The exigent problem, however, is that intended parents who intentionally create a child utilizing ART may not be legally recognized as the family of origin. This is detrimental to the welfare, security, and best interests of ART-conceived children and must be corrected by the North Carolina General Assembly through enactment of the UPA.

The benefits of the UPA are many. Enactment of this model legislation will remove gendered terms such as "mother" and "father" and replace them with "parent," much as the Technical Corrections Bill of 2017 replaced "husband" and "wife" with "spouse."[177] It provides equal treatment for all children without regard to the marital status of the parents. It will provide ART-conceived children with two legal parents by mandating that non-biological intended parents be vested with legal parent status at birth. The framework of the UPA will allow for predictable and consistent decisions across our family courts and prevent the possibility of judicial activism by promulgating public policy to resolve these emerging issues.

No child's parentage should be uncertain. Enactment of the UPA will bestow upon all ART-conceived children the same protections currently enjoyed by all other children. The time is now for North Carolina to be proactive and become a leader in the nation by providing equality for all of her children.

176. *See* Peterson v. Rogers, 445 S.E.2d 901, 904 (N.C. 1994).

177. *See* N.C. GEN STAT. § 12-3(16).