Table of Contents

The Doctrine of Intentional Parenthood

Geri C. Sjoquist

All children's relationships with the people whom they view as their parents, regardless of marital status deserve to be protected. Indeed, such a result is constitutionally required.

The Principles of Equality

The fundamental right to parent under the Fourteenth Amendment is outlined in the U.S. Supreme Court's decision in *Troxel v. Granville*, 530 U.S. 57 (2000). The plurality opinion in *Troxel* defined a fit parent as someone who "adequately cares for his or her children," (*Id*. at 69) and further stated that a parent's right to make decisions concerning the care, custody, and control of his or her children is a protected fundamental right. *Id.* at 65. Writing for the majority, in *Lawrence v. Texas*, 539 US 558 (2003), Justice Anthony Kennedy cited *Planned Parenthood v. Casey*, 505 US 833 (1992):

> *"The Casey decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. In explaining the respect the Constitution demands for the autonomy of the person in making these choices, we stated as follows: These matters, involving the most intimate and personal choices a person may make in 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. Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." Id.*

Also, in 2015, in its ruling in *Obergefell v Hodges,* 135 S Ct 2584 (2015), the U.S. Supreme Court declared the right to form families and rear children by same-sex couples to be a fundamental human right. "The fundamental liberties protected by the Fourteenth Amendment extend to certain personal choices central to individual dignity and autonomy, including intimate choices defining personal identity and beliefs." *Id*. at 2597.

In Minnesota, custody decisions are based on the best interests of the child. Since the focus in applying the best-interests standard is *on the child* the standard ought to therefore apply equally to all parents regardless of their marital status or sexual orientation. Moreover, the Minnesota Supreme Court has concluded that "the relationship of love and duty in a recognized family unit is an interest in liberty entitled to constitutional protection." *Soohoo v. Johnson*, 731 N.W.2d 815 (Minn. 2007), quoting *Lehr v. Robertson,* 463 U.S. 248, 258 (1983). The parental presumptions found in our statutes have allowed our courts to recognize

that a biological connection is neither necessary nor even sufficient at times for the court to confer legal rights and legal duties. *Richards v. Reiter (In re D.T.R.)* (Minn. App., 2012) (unpublished) ("A district court's paternity adjudication will be affirmed if it is based on the facts of the case and is supported by policy and logic."). Unfortunately, these presumptions do not extend to same-sex couples.

The Legal (Moral?) Firewall

To begin, in Minnesota, our statute restricts procreation (and the definition of the parent and child relationship) to either biology or adoption. The "*legal relationship existing between a child and the child's biological or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations*." Minn. Stat. §257.52. This is true despite the fact that twenty-five years ago, the court noted the possible staleness of biologically based portions of the Minnesota Parentage Act and encouraged the legislature to amend the Act.

> "*When the parentage act was first adopted in 1980, it was assumed that the effort was to find the biological father and then to adjudicate that person the legal father. The precision with which the biological father can now be identified and the recognition of other considerations has since made the search something more than a search for a biological father. This is demonstrated by the fact that when the legislature added the presumption established under the genetic test presumption, Minn. Stat. Sec. 257.55, subd. 1(f), it did not make that presumption conclusive, but rather treated it simply as the sixth presumption. Thus, though "policy and logic" may originally have been directed at how to measure the likelihood of biological parenthood, it now has a different objective. We note that sections 257.52 and 257.54 still define parent-child relationships in a biologically restrictive (and circular) fashion… Accordingly, we believe that the legislature should remove these traces of the original lodestar of the parentage act - that is, biological*." *In re Matter of Welfare of C.M.G.*, 516 N.W.2d 555 (Minn. App., 1994) (Footnote 8).

Nevertheless, we have staunchly clung to the idea that children (and families) are best created through coitus when in fact there is no basis for this belief. In fact, the number of biological parents who abuse or maim and even kill their biological children is staggering. *See, e.g.*, Child Abuse Prevention and Treatment Act of 1974, 42 U.S.C. § 5101 (1974). Therefore, although we still seem to prefer to measure the aptness of a family against our romantic albeit antiquated ideas of what constitutes a 'normal' family form (which the court has referred to as a 'recognized family unit'), we know there is no factual basis upon which to decide that a biological connection between a parent and a child will automatically result in a loving *in loco parentis* relationship. And, although adoption, as a rather imperfect legal fiction, is almost the antithesis of our common understanding of family since it defies our notions of family connections through blood and genes, according to our current statute, it is the only other choice for Minnesotans who want to become parents. The problem with our rather

restrictive definition of parenthood is that it excludes those parents who - out of necessity - choose to use some form of assisted reproduction to create their children and families.

Perhaps the judicial difficulties of accepting same-sex parents to be on par with their heterosexual counterparts stems from our restrictive normative notions of what constitutes 'a family.' For example, Minn. Stat. §257.56, our artificial insemination statute, only applies to married women. Likewise, we tend to presume that single parent families are somehow inherently deficient. In two cases, *Jhordan C. v. Mary K.*, 179 Cal. App. 3d 386, 224 Cal. Rptr. 530 (1986), and in *C.M. v. C.C.*, 152 N.J. Super. 160, 377 A.2d 821 (1977), the court allowed a challenge by the sperm donors to the parties' agreements because of the court's aversion to and presumptions about the inadequacy of a single mother and her single parenthood.

On the other hand, perhaps our difficulties stem from our reluctance to allow ourselves to be comfortable with the idea that procreation can be separated from sexual intimacy. The issue of being unable to procreate is much more common than most people realize. This is not just an LGBTQ issue. Since the first 'test tube' baby dominated the news forty years ago, in vitro fertilization (IVF), and related technologies have produced some 7 million babies who might otherwise never have existed.

The Practice of Inequality

Despite the rights, obligations and privileges extended to married parents under Minnesota law, in practice, same-sex parents find their parentage is typically not recognized and they are often relegated to a sort of 'separate but equal' second-class status.

For example, under Minn. Stat. §257.55, subd. 1(a), if a heterosexual couple are legally married, the husband is presumed to be the legal parent of a child born to his wife. And, the circumstances in which this parental presumption can be rebutted (through, for example, genetic testing) can be limited because the original purpose of the marital presumption was to look past the biology of parenthood to protect marriage, family and the child (i.e., our ideas or convictions regarding what constitutes a normative family and parenthood). Subsequently, our courts decide whenever possible that a determination should be made to provide children with two parents. And, so, as in *In Re Custody of Child of Williams v. Carlson*, 701 NW 2d 274 (Minn. Court of Appeals 2005), despite any genetic testing to the contrary, because no other man could be identified as the child's father, the presumption of paternity was determined to be conclusive.

Meanwhile, Minn. Stat. § 517.201, subd. 2, requires courts to construe our laws in a gender-neutral manner, including the "parentage presumptions based on a civil marriage ...." And, although the 'meaning of civil marriage' is spelled out in Minn. Stat. §517.23, and despite the specific language of the statute restricting or denying "*the rights, obligations, or privileges of a [married] couple under law*," and, despite the very clear statement that any provisions in Minnesota law concerning a married couple "*may not be interpreted to limit or exclude any individual who has entered into a valid civil marriage contract under this chapter*," in practice, the marital presumption does not extend to same-sex couples. Instead,

in order to protect and secure their parental rights, same-sex parents who do not share DNA with the children they cocreated are required to adopt their own children via a 'second parent' adoption process. These parents soon find their personal values and most intimate behaviors subject to intense scrutiny and bureaucratic regulation by a powerful cast of social workers and counselors evaluating their suitability or fitness to parent on the basis of criteria that arguably has little to do with their actual capacity to be loving and competent parents. It is understandable that such parents are resentful that they must endure such an intrusive, offensive and costly process to secure their legal rights. In a similar heterosexual situation, we allow stepparents to waive the background check process to adopt the children they are parenting but are not biologically connected to. In contrast, we do not allow married same-sex parents to waive this arduous and invasive process (in a 'second-parent' adoption) even though they, unlike a stepparent, are not third parties but the second parent to the children they cocreated. They are, in fact, the original intended parents of the child.

Likewise, under Minn. Stat. §257.56, a husband who consents to his wife's insemination is determined to be the legal parent of the resulting child. Moreover, the presumption of his parentage based on his consent to insemination is not rebuttable by evidence of lack of genetic connection. Prior to the enactment of such statutes, various courts across the country applied the doctrine of promissory or equitable estoppel, preventing fathers from attempting to assert nonpaternity based on their consent to the procedure and the wife's reliance to her detriment. These cases are similar in that they examine consent to the procedure, as well as the conduct of the non-bio parent, the husband. *See, People v. Sorenson*, 68 Cal.2d 280 (1968) (applying the doctrine of equitable estoppel to a man who consented to his wife's artificial insemination); *Gursky v. Gursky*, 242 N.Y.S.2d 406 (Sup. Ct. 1963) (husband's declarations and conduct following wife's artificial insemination constituted an implied contract); *L.M.S. v. S.L.S.*, 312 N.W.853 (Wis. Ct. App. 1981) (husband's consent to artificial insemination constituted an implied contract and husband has legal duties and responsibilities of fatherhood).

In contrast, in practice, even though the lack of a genetic tie cannot rebut the presumption of parentage when the parentage presumption is not based on a genetic tie, married same-sex partners are not likewise presumed to be the parents of the children they cocreate through an assisted (or artificial, or alternative) reproductive technology (ART) process in stark violation of their constitutional rights. Instead, as previously stated, they are required to adopt their children through a 'second-parent' adoption process. Meanwhile, the court has ruled that "[t]he equal protection guarantees prevent the government from making distinctions among people when applying the law unless the distinction serves a legitimate governmental interest." *R.B. v. C.S.*, 536 N.W.2d 634, 637 (Minn.App.1995), citing *Reed v. Reed*, 404 U.S. 71, 76 (1971). "The United States Supreme Court has firmly held that, in family life, individuals should be allowed to direct their families' own destinies and that prejudice is not a valid reason for disallowing that autonomy." *Loving v. Virginia*, 388 U.S. 1, 11-12 (1967).

Under our current legal provisions regarding parentage, only two people may have formal legal ties to a child. For example, in an adoption, we terminate the biological parent's rights and any facts regarding the biological parent's heritage are typically suppressed (at least this has been true historically) because we believe this is in the best interests of the children –

that it will encourage them to assimilate. In contrast, most tribal courts do not terminate the rights of the biological parents in what they refer to as a 'customary' adoption since it is their belief that it is not in the child's best interest to sever the biological connection but to instead *expand* the child's circle of caregivers rather than restrict it. Likewise, in the case of a third-party sperm donor, similar to an adoption, we prefer that the biological parent simply 'disappears;' no choices beyond visitation regarding parenthood are allowed (*see*, *LaChapelle v. Mitten*, 607 N.W.2d 151 (Minn. App., 2000)).

Finally, when heterosexual parents are unmarried and decide to split up, under Minn. Stat. §257.55, subd. 1(d), if he has held the child out as though the child were his own biological child and subsequently developed an *in loco parentis* relationship with the child, he may file a paternity action to secure his parental rights alleging his 'presumptive' parenthood. This is true even though the child is *not* genetically related to him, his name is not on the birth certificate and he never signed an ROP. And, because the court is predisposed to making sure children have two parents whenever possible, if there is no other male person alleging fatherhood of the child (no competing presumptions), then the male parent will be adjudicated.

In stark contrast, in a same-sex parental situation, the non-bio parent would not be allowed to even file a paternity (or maternity) action because – having no biological connection and not having adopted the child – unlike his/her male counterpart in a heterosexual situation, the court would deem him/her unqualified to be a presumptive parent before he/she entered the courtroom because of his/her lack of standing based on our restrictive definition of a parent.[1]

The Creation of Babies

Minnesota defines marriage as a civil contract: "[a] civil marriage, so far as its validity in law is concerned, is a civil contract between two persons, to which the consent of the parties, capable in law of contracting, is essential…" Minn. Stat. §517.01. Is it possible that the creation of babies (and the creation of families) could also be viewed through the lens of the principles of contract? That is, is it possible to add the element of intent (and conduct) to our definition of a parent?

Because babies (and families) are created in myriad ways, perhaps our definition of the child/parent relationship should encompass other forms of creation in addition to biology and adoption. Because children who are not created through traditional procreative means oftentimes have a parent who is not biologically related to them, unless they have been legally adopted by their non-bio parent, there is currently no presumptive remedy for them to maintain and continue that relationship. In other words, by restricting our definition of 'parent' to only those children who were created through coitus, we leave a huge swath of children vulnerable and at risk of being cut off from one of the most important relationships in their life if their parents decide to end their intimate relationship. Moreover, without the security of a legal relationship with their second parent, a child has no right of financial

[1] This case is currently pending before the Appellate Court, *In Re the Custody of: N.S.V., L.J.V., E.T.V.*, Case Number A18-0990.

support or inheritance and cannot receive social security, retirement, or state workers' compensation benefits if the nonlegal parent dies or becomes incapacitated. The child may also be ineligible for health or other insurance benefits supplied by the nonlegal parent's employer, and the nonlegal parent could be ineligible for leave under the Family Medical Leave Act if the child became seriously ill. Even in an emergency, the nonlegal parent may not be able to consent to medical treatment or even visit the child in the hospital.

Meanwhile, the U.S. Supreme Court has repeatedly struck down as unconstitutional state laws that burdened or disadvantage children born to unmarried parents, or based on other the circumstances of their birth. *See, e.g., Trimble v. Gordon*, 430 U.S. 762 (1977). *Weber v. Aetna Cas. & Surety Co.*, 406 U.S. 164 (1972); *Levy v. Louisiana*, 391 U.S. 68 (1968); *Plyler v. Doe*, 457 U.S. 202 (1982); *R---- v. R----*, 431 S.W.2d 152, 154 (Mo. banc 1968). "To the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation." *Troxel v. Granville*, 530 U.S. 57, 88 (2000); "Children have a core, constitutionally protected interest in preserving the emotional attachments they develop with adult parent figures from shared daily life." *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 854 (1977).

The Principles of Contract as Applied to Family Law

The elements of a breach of contract claim are: (l) formation of a contract, (2) performance of any conditions precedent to a plaintiff's right to demand performance by a defendant, and (3) breach of the contract. *Park Nicollet Clinic v. Hamann* 808 N.W.2d 828,833 (Minn.2011) (citing *Briggs Transp. Co. v. Ranzenberger*, 299 Minn. 127, 129, 217 N.W.2d 198, 200 (1974)). In the context of family law, the principles of contract might be applied by implementing the elements of an implied contract, a written contract (or a writing), and a social contract.

Implied Contract

The elements of an implied contract (or promissory estoppel) are: (1) a clear and definite promise, (2) intended to induce reliance, (3) and reliance, (4) so that the promise must be enforced to prevent prejudice. *Olson v. Synergistic Technologies Business Systems, Inc.*, 628 N.W.2d 142, 152 (Minn. 2001). The evidence to support such a claim might include the parties' preparations to conceive, the parties' participation in the preparations (for example, evidence of choosing a donor or surrogate and the decision as to who would be inseminated or who would be the donor). In other words, evidence of whether or not the child was planned for, conceived, and raised within the context of a committed relationship.

The insemination process is often very involved. Which is to say that the intent to become a parent by persons who are willing to undergo what is oftentimes a rather arduous process to create a child is obvious. As a result of their efforts, they are *truly* the intended parents. For example, the process requires them to diligently track the future gestational parent's monthly cycle. At around the time of ovulation the parties

go to their clinic for a vaginal ultrasound to see if an egg is ready to be released. If so, semen is ordered and delivered to their doctor. Immediately thereafter, at the right time, the non-bio father/parent (partner) is required to administer a prescribed injection into the buttocks of the future gestational mother to stimulate ovulation. The parties then go back to their clinic for the insemination process. They then wait to see if conception has occurred. If not, they begin the process over again.

Further evidence of the parties' intent might include their attendance at prenatal appointments, ultrasounds, attendance at birthing classes, and whether or not the non-bio father/parent was present for the birth; whether or not the extended family members of both parties attended or visited following the birth; whether the parties resided in the same household thereafter, holding themselves out as a family, dividing expenses and sharing child-rearing responsibilities; whether the non-bio father/parent was listed as a co-parent (or 'other' parent) on daycare, school, and medical/dental forms for the child; whether or not the non-bio father/parent took FMLA after the birth of the child to care for the child and birth mother; whether the non-bio father/parent ever carried the child on his/her medical insurance plan as a dependent, and, after the breakup of their parties' relationship, whether or not the non-bio father/parent continued to exercise 'parenting time' with the child, and whether he/she at any time contributed and supported the child financially (following the breakup). Additionally, did the child refer to him/her as their father (or mother), and did the non-bio father/mother refer to the child as his/her son or daughter, did they (for example) send birthday cards to the child which they signed from 'daddy' or 'mama?' and did the child consider the non-bio parent's parents to be his/her grandparents and vice versa?

In other words, did the gestational parent, through an AI procedure, become pregnant with the full knowledge, participation and consent of the non-bio parent, with whom he/she was at the time romantically involved with as a serious committed lifetime partner? In which case, did the non-bio parent breach his/her agreement or contract to support the child he/she cocreated?

Written Contract

Although the general rule of contracts requires two signatories to an agreement, nevertheless, if there is 'a writing' – *any* writing (including letters, emails, texts) - which reveal the parties' attempts to negotiate their desires to continue to provide for their child's needs before or following the breakup of their relationship, such 'a writing' would therefore constitute evidence of their intent to be a parent. Additionally, any evidence of the parties' performance (even partial performance) of the terms of their negotiations would also be evidence of their intent. "[T]he existence and terms of a contract are questions for the fact finder." *Morrisette v. Harrison Int'l Corp.*, 486 N.W.2d 424, 427 (Minn. 1992).

Although "the general rule for the construction of contracts... is that where the language employed by the parties is plain and unambiguous there is no room for

construction," *Starr v. Starr*, 312 Minn. 561, 562-63 (1977), under Minn. Stat. § 257.72, subd 1, "a person's 'signed' promise to furnish support for a child, growing out of a supposed or alleged parent and child relationship, does not require consideration and is enforceable according to its terms." [emphasis added] Moreover, "[r]egardless of its terms, an agreement, other than an agreement approved by the court … between an alleged or presumed father and the mother, does not bar an action … by the child or the public authority chargeable by law with the support of the child." Minn. Stat. §257.72, subd. 4.

According to the Minnesota Supreme Court, "Absent ambiguity, the interpretation of a contract is a question of law." *Roemhildt v. Kristall Dev., Inc.*, 798 N.W.2d 371, 373 (Minn. App. 2011), *review denied* (Minn. July 19, 2011). "The plain and ordinary meaning of the contract language controls unless the language is ambiguous." *Bus. Bank v. Hanson*, 769 N.W.2d 285, 288 (Minn. 2009). If the language is ambiguous, parol evidence may be presented and considered to better understand and determine the parties' intent.

Social Contract

That a person has volunteered to support a child, either explicitly or implicitly, by having participated in the cocreation of a child and/or by creating an *in loco parentis* relationship with that child, they create a social contract between themselves and the child, and themselves and society.

Following the breakup of a relationship between two parents, every jurisdiction has legislation imposing the duty of support on parents for their minor children. Likewise, in Minnesota, both parents are equally responsible for the support of their children. The general policy underlying the duty of support is that parents and not the taxpayers should be responsible for the support of their children. Under Minn. Stat. § 518.612, rights that flow to the child from the parent and child relationship include financial support. The district court has broad discretion to provide for the support of the parties' children. *Rutten v. Rutten*, 347 N.W.2d 47, 50 (Minn. 1984). And, because the best interests of the child are of paramount consideration, conflicts between the rights of the child and rights of the parents are resolved in favor of the child. Moreover, a child has a right to be supported and such financial support "belongs to the child" and may not be bargained away by the competing parties. As it is the child's right to receive support, any agreement to waive a child support obligation is considered contrary to public policy and unenforceable. *McNattin v. McNattin*, 450 N.W.2d 169 (Minn. Ct. App. 1990).

Because of the changes in our society resulting in the various collections of persons who consider themselves a family, the rights and obligations of parenthood should no longer be grounded in biology. But, rather, the rights and obligations of parents should be viewed as a contract embedded and derived from the structure of our social contract. Such a contract gives rise to the rights and responsibilities of parenthood from a social agreement between the prospective parent(s) and society. Individuals

who consent to take on the very important task of becoming a parent are thereby bound by the obligations of the implicit social contract to care for and provide for the children they bring into existence.

Most people would not consider their family's relationships with one another as a sort of contract. However, the way in which we treat one another and the responsibilities we take on within the confines of a family are things that – although they may be unsaid and unwritten – constitute the basis or foundation of our American society from which sprang forth our jurisprudence.

For example, in this country, and in this state, we, as a society, have agreed to certain structures or institutions as basic and fundamental. When a person is brought into a family, they implicitly agree to take on certain responsibilities. A successful family operates because their member's rights and duties are both structured and respected. For example, many parents consider it to be their main 'job' to keep their family members safe and healthy. Likewise, there are unwritten rules in families that are particular and specific to that family that everyone knows and understands.

Of their own volition (except in cases of rape), individuals choose to be bound by the social contract requiring them to undertake the obligations of parenthood. This way of incurring obligations is not unfamiliar. For instance, an employer takes on certain obligations to another when a person becomes her employee. Spouses take on certain obligations to one another and acquire certain rights with respect to each other via marriage. In these and many other instances, one acquires particular rights and obligations by choice, or voluntary consent. Similarly, then, when an individual voluntarily undertakes the parental role by causing an innocent child to be born, that individual acquires parental rights and obligations as part of the social contract.

From another standpoint, the general idea is that when a person voluntarily engages in a behavior which can produce reasonably foreseeable consequences, and the agent is a proximate and primary cause of those consequences, then it follows that the agent has obligations with respect to those consequences. In the case of procreation, the child needs care. To fail to provide it is to allow harmful consequences to occur. Since the agent is causally responsible for the existence of a child in need of care, the agent is morally responsible under the basic fundamental principles of our society to provide it.

The Otherwise Precarious Plight of Children

Married or unmarried, heterosexual or same-sex non-biological parents whose children are created through ART or surrogacy are not third parties. They are second parents to the children at issue. For example, in the case of *Partanen v. Gallagher*, 475 Mass. 632 (2016), the court articulated a two-step test: the court concluded that the parties had created a family together with shared involvement, consent and intention (satisfying the requirement that the children were 'born to them'), and the parties had "received the children into their home and openly held out the children as

their children" in her assertions that they lived as a family, actively cared and made decisions together for the children, and represented themselves to others as their parents. In 1998, the California Court of Appeals in *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280 (Ct. App. 1998), determined that a divorcing husband and wife were the parents of a child born through ART to whom neither parent was biologically or genetically related. The trial court then left the child without legal parents, a result that clearly irritated the reviewing court. In reversing, the appellate court stressed the couple's "initiating role as the intended parents in [the child's] conception and birth." In 2013, the Colorado court held that you can have both a biological mother and a presumptive mother who has held the child out as her own. *In re Parental Responsibilities of A.R.L.*, 318 P.3d 581, 587 (Colo. App. 2013). In Washington state, the court held that "the state is not interfering on behalf of a third party in an insular family but is enforcing the rights and obligations of parenthood." The court held that "the rights and responsibilities which we recognize as attaching to de facto parents do not infringe on the fundamental liberty interest of the other legal parent in the family unit" and therefore does not violate the policy of parental deference. *In re Parentage of L.B.*, 122 P.3d 161, 178 (Wash. 2005).

Meanwhile, the technology available to persons who are unable to procreate or conceive has at this point *so* far outpaced our laws in this area that the resistance and pushback has reached a point of being a bit nonsensical because the technology *exists* and is not going to go away. Private *unmarried* citizens can buy kits on the internet to accomplish their goals without the assistance of a *physician* (as is currently required by our statute). *See*, Minn. Stat. §257.56.

There is currently no mention of surrogacy in our Minnesota Parentage Act (MPA). In addition to the moral and religious leaders in our communities who are opposed to the idea of the creation of babies by any means other than coitus, the pushback to legislation regarding ART and surrogacy has come from many interesting directions including persons concerned about the commodification of childbirth and creation of designer babies and even feminist groups concerned about the potential stigma associated with women relegated to being defined as 'incubators.'

While these are all valid concerns, currently under Minn. Stat. §257.541, gestation initially bestows upon the (gestational) mother of a child all rights and responsibilities. What happens when one female of an unmarried same-sex couple has her egg implanted in her partner who then gives birth to the child as the gestational mother, and then, as too often happens, the couple's relationship dissolves: who is and who is not the legal parent of the child?

In a 2010 Minnesota case, *A.L.S. v. E.A.G.* (Minn. App., 2010) (unpublished), two men in a same-sex relationship entered into an agreement with a surrogate. The court relied on two provisions of the MPA that explicitly address children produced through assisted reproduction (or artificial insemination) in reversing the district court's decision regarding whether or not the surrogate was the legal mother of the child. *See* Minn. Stat. §§ 257.56 and 257.62, subd. 5. Relying on the plain language

of our state's restrictive definition of a parent as well as our ART statute which specifically references a heterosexual married couple (i.e., a husband giving consent to the insemination of his wife), the court decided that biology prevailed, ignoring the intention and agreement of the parties.

Although neither the U.S. Supreme Court nor federal circuit courts have directly ruled on a case involving ART technology, it appears that such a right may exist under constitutional protections afforded an individual to procreate. A federal district court in Ohio observed that the Supreme Court precedent in the field of privacy rights guarantees a woman the right to control her own reproductive functions and thus her desire to become pregnant by ART insemination. *Cameron v. Board of Education*, 795 F. Supp. 228 (S. D. Ohio 1991). As such, any attempts by government to intrude or otherwise restrict a person's access to procreate via an ART procedure may be limited by the requirement of proving a compelling governmental interest.

Conclusion

The clock is ticking. It is time for us to expand our legal definition of parent to include all procreation and allow for the great diversity of families in our state, where parentage arises from marriage, adoption, genetic ties and also through conduct. Therefore, it is incumbent upon us to acknowledge and provide for the children of the ever-increasing number of Minnesotans whose family structures do not conform to our restrictive statutes.

The ABA Model Act Governing Assisted Reproductive Technology (the Act), equally protects the children of married *and* unmarried couples. The Act defines an "intended parent" as "any person who consents to assisted reproduction with the intent to parent the resulting child is the legal parent of that child ... to be legally bound as the parent of a child resulting from assisted or collaborative reproduction. All intended parents are the same" in recognition of the fact that "that person's conduct has resulted in the birth of a child." The Act recognizes that *all* children need stability and legal protections, regardless of the marital status of their parents. And, all of the parentage provisions of the Act are marital-status neutral and gender and sexual orientation neutral.

For the sake of our children who remain at risk, we must act promptly to ensure that their rights to equality and security are protected under the law.