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"Are You My Mother?": Ohio's Crazy-Making Baby-Making Produces a New Definition of "Mother"

Michelle Pierce-Gealy

"ARE YOU MY MOTHER?":[1] OHIO'S CRAZY-MAKING BABY-MAKING PRODUCES A NEW DEFINITION OF "MOTHER"

"[A] three-parent, two-natural mom . . . situation is ripe for crazy making. . . ."

—Judge Richard N. Parslow, Jr.[2]

INTRODUCTION

Welcome newborn Ohioan, Nicholas Anthony Belsito, to constitutionally-recognized personhood (i.e., birth)![3] Nicholas is no ordinary newborn. He was born to an infertile couple and his birth was the catalyst for altering the way Ohio defines motherhood.[4]

Like other newborns, Nicholas Belsito cannot read his birth certificate. He is unaware that it identifies his mother or that there was ever any doubt about who she is. While the legal community struggled with the definition of

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1. P.D. EASTMAN, ARE YOU MY MOTHER? (1960).

2. R. Brian Oxman, *Maternal-Fetal Relationships and Nongenetic Surrogates,* 33 JURIMETRICS J. 387, 391 n.14 (1993) (citing Johnson v. Calvert, No. X633190 (Orange County Super. Ct. Oct. 22, 1990)).

3. Nicholas was born on October 12, 1994 at Summa Health System in Akron, Ohio. Richard McBane, *Judge Takes Pains, Delivers Change,* AKRON BEACON J., Oct. 16, 1994, at A1; Birth Certificate of Nicholas Anthony Belsito, Oct. 12, 1994, *available at* Akron Health Department, Akron, Ohio.

4. Nicholas, formerly known as "Baby Belsito," was sued in Summit County Common Pleas Court, Probate Division, before his birth in a declaratory action filed by Anthony (Tony) and Shelly Belsito. Belsito v. Clark, 644 N.E.2d 760, 762 (Ohio C.P. 1994). Carol Clark, in whose body Nicholas was gestating, was also named in the suit. *Id.* The Belsitos had contributed their gametes to Nicholas' conception, making them his "genetic parents," and he was placed as an embryo into Carol Clark's womb to gestate. *Id.* at 761. Carol Clark, Nicholas's "gestational mother," is also Shelly's sister and Nicholas' maternal aunt. *Id.*

This collaboration placed Nicholas's "natural" parentage in a legal quandary because Ohio law provides that a natural mother demonstrate her status by either giving birth to or showing her genetic link to the child. OHIO REV. CODE ANN. § 3111.02 (Anderson Supp. 1994). Both Shelly and Carol met the statutory requirements of natural motherhood. The Belsitos brought the suit to clarify their status under Ohio law as Nicholas' natural parents. *Belsito,* 644 N.E.2d at 762. *See infra* notes 121-39 and accompanying text (thoroughly analyzing the *Belsito* decision).

"Law defines parenthood from a curiously adult-centric perspective that gives little currency to the ability of children to recognize and claim their mothers and fathers." Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights,* 14 CARDOZO L. REV. 1747, 1795 (1993). Woodhouse presents a wonderful and thorough discussion of paternal rights from a child's perspective. *See id.* This Comment attempts to follow her lead by focusing on the children produced in collaborative reproduction. Because Nicholas Belsito's parentage dispute triggered this Comment, where pronouns are used to refer to these children, they are intentionally in the masculine form in his honor. No gender slight is intended.

mother, Nicholas went about the business of late gestation and birth.[5] After birth, he slept placidly in his wombless,[6] "natural"[7] mother's arms.[8]

Did *he* recognize Shelly Belsito as his natural mother? He was not familiar with the sounds of her body; had not spent nine months listening to her heart beat, her bowels and other organs function.[9] He had not synthesized his body rhythms with hers.[10] Was he confused by the unfamiliar beat of her heart? Did he wonder, "Are you my mother?"

In the children's book, *Are You My Mother?*[11] a baby bird is born to an empty nest.[12] Baby Bird's mother left the nest to find him some food before he hatched.[13] Baby Bird scours the area trying to locate his mother.[14] Because Baby Bird has no idea what his mother looks like, he asks all kinds of creatures (and even a steam shovel) if they are his mother.[15]

Like the baby bird in this children's story, Nicholas shared an intimate prenatal relationship with his mother, but had never seen her. Yet the "mother" he intimately knew during gestation is not listed as such on his birth certificate.[16] Nicholas was not adopted.[17] He is the product of a modern

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5. The *Belsito* suit was filed approximately one month before Nicholas was born. *Belsito,* 644 N.E.2d at 762.

6. Shelly Belsito was declared Nicholas' natural mother. *Id.* at 768. Shelly Belsito's uterus was removed before Nicholas was conceived. *Id.* at 761.

7. "Natural" is defined as "proceeding from or determined by physical causes or conditions as distinguished from positive enactments of law, or attributable to the nature of man rather than to the commands of law." BLACK'S LAW DICTIONARY 1026 (6th ed. 1990). The *Belsito* court reasoned that those persons who provide the genetic makeup of a child "must be designated as the legal and natural parents." *Belsito,* 644 N.E.2d at 762. For a discussion of the other physical causes or conditions that affect a child, see Oxman, *supra* note 2.

8. *See* Photograph, AKRON BEACON J., Oct. 13, 1994, at A1 (showing Shelly Belsito holding newborn Nicholas while Tony Belsito looks on).

9. *See* Barbara Katz Rothman, *Recreating Motherhood: Ideology and Technology in American Society, in* BEYOND BABY M: ETHICAL ISSUES IN NEW REPRODUCTIVE TECHNIQUES 9 (Dianne M. Bartels et al. eds., 1990) (discussing how the fetus interacts and develops a relationship with its mother during gestation).

10. *See id.* at 20-21 (describing fetal sleep cycles and how they are synthesized with the mother's activities).

11. EASTMAN, *supra* note 1.

12. *Id.* at 9.

13. *Id.* at 6-7.

14. *See id.*

15. *Id.*

16. Birth Certificate of Nicholas Anthony Belsito, Oct. 12, 1994, *available at* Akron Health Department (listing Shelly Belsito as "mother" without reference to Carol Clark).

17. Belsito v. Clark, 644 N.E.2d 760, 768 (Ohio C.P. 1994) (holding that Tony and Shelly Belsito are Nicholas' natural parents and that an adoption proceeding is not necessary to establish their parentage).

reproductive technique that splits the gestational and genetic phases of motherhood.[18] Because Ohio law recognizes both phases as evidence of motherhood,[19] Nicholas's genetic parents sought clarification of their status in court.[20]

Infertility forces couples who crave genetically-related children to collaborate on reproduction.[21] Nicholas and other children of collaborative reproduction are somewhat analogous to those who are adopted.[22] Adults in the legal system have a responsibility to protect the interests of these children. The legal uncertainties of modern reproduction places them in danger.[23] "As the cutting edge of medicine jumps ahead of law and human frailties, it's [sic] inevitable that some people are going to get hurt. . . ."[24] The adults involved in assisted reproduction accept the legal risks for themselves.[25] Those risks should not be their legacy to the resulting children.[26]

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18. *Id.* at 762.

19. OHIO REV. CODE ANN. § 3111.02 (Anderson Supp. 1994). Specifically, that section states:

> The parent and child relationship between a child and the child's natural mother may be established by proof of her having given birth to the child or pursuant to sections 3111.01 to 3111.19 or 3111.20 to 3111.29 of the Revised Code [sections establishing genetic relationship]. . . .

Id. (explanation added).

20. Charlene Nevada, *What Is a Mother? Court Will Decide,* AKRON BEACON J., Sept. 15, 1994, at A1.

21. *See* Lori B. Andrews & Lisa Douglass, *Alternative Reproduction,* 65 S. CAL. L. REV. 623 (1991) (describing infertility and the alternative reproductive techniques now available); Lynn Smith, *Missing Motherhood Oftentimes a Big Shock,* AKRON BEACON J., Nov. 16, 1994, at C1 (briefly describing the grieving process and desperation experienced by infertile women). *See also supra* notes 57-88 and accompanying text (briefly discussing available collaborative reproduction techniques).

22. *See* John A. Robertson, *Decisional Authority Over Embryos and Control of IVF Technology,* 28 JURIMETRICS J. 285, 303 (1988). Anonymous gamete donation and gestation rob these children of their biological heritage. "[K]nowledge of genetic and gestational identity may take on great importance" to children who are denied this knowledge. *See id.*

23. *See infra* part IV.C (discussing the legal uncertainties and dangers children produced through collaborative techniques face).

24. Joan Beck, *Surrogate-Mother Ruling is a Step in the Right Direction,* CHIC. TRIB., Oct 25, 1990, (Perspective Section), at 27.

25. *See infra* parts IV.A-B (discussing those risks under Ohio law). *See also* Andrea E. Stumpf, Note, *Redefining Mother: A Legal Matrix for New Reproductive Techniques,* 96 YALE L.J. 187, 204 n.66 and accompanying text (1986) (discussing the risks adults incur and must accept when collaborating on reproduction).

26. A plethora of published material addresses the normative moral, ethical and legal issues involved in collaborative-reproduction contracts. *See, e.g.,* Richard Berquist, *The Vatican Instruction and Surrogate Motherhood, in* BEYOND BABY M, *supra* note 9, at 221 (analyzing the different levels of ethical considerations of surrogacy); Baruch Brody, *Current Religious*

Belsito v. Clark[27] was an easy case, but easy cases sometimes make bad law.[28] Although the case was unique in Ohio's legal system, all parties involved agreed that Shelly Belsito was Nicholas' natural mother and Carol Clark, who gave birth to him, asserted no parental rights.[29] The *Belsito* court held that genetic contribution is the primary test for determining a child's natural and legal parentage.[30]

Part I of this Comment introduces the roots of parental rights and responsibilities.[31] Part II briefly describes modern reproductive techniques and their effect on parental rights.[32] Part III explores the Ohio statutory definition of motherhood and analyzes the impact of *Belsito* on parentage determinations.[33]

Perspectives on the New Reproductive Techniques, in BEYOND BABY M, *supra* note 9, at 45 (discussing religious-based concerns about alternative reproduction); Barbara Katz Rothman, *Surrogacy: A Question of Values, in* BEYOND BABY M, *supra* note 9, at 235 (rejecting surrogacy because it reduces women to containers); Carol Tauer, *Essential Ethical Considerations for Public Policy on Assisted Reproduction, in* BEYOND BABY M *supra* note 9, at 65 (discussing the ethical implications of "contract mothering"); Mark Strasser, *Parental Rights Terminations: On Surrogate Reasons and Surrogacy Policies,* 60 TENN. L. REV. 135 (1992) (advocating recognition of surrogacy contracts with appropriate safeguards); Donald De Marco, *The Conflict Between Reason and Will in the Legislation of Surrogate Motherhood,* 32 AM. J. JURIS. 23 (1987) (arguing that surrogacy is born of will, not reason and should be outlawed); and Katherine B. Lieber, Note, *Selling the Womb: Can the Feminist Critique of Surrogacy be Answered?,* 68 IND. L. J. 205 (1992) (discussing the feminist critique of surrogacy). However, those issues are beyond the scope of this comment.

27. 644 N.E.2d 760 (Ohio C.P. 1994).

28. *See* Ankenbrandt v. Richards, 112 S. Ct. 2206, 2222 (1992) (Stevens, J., concurring) (cautioning that a court's duty to refrain from making bad law extends to easy cases); Burnham v. Superior Court of California, County of Marin, 495 U.S. 604, 640 (1990) (Stevens, J., concurring) (urging that the "adage about hard cases making bad law . . . be revised to cover easy cases"); Heckler v. Chaney, 470 U.S. 821, 840 (1985) (Marshall, J., concurring) (suggesting that "the rush to reach a clearly ordained result" may cause a court faced with an easy case to "offer up principles, doctrines, and statements that calmer reflection, and a fuller understanding of their implications in concrete settings, would eschew." In other words, easy cases make it "all too easy" for a court to make an undisciplined decision.); O'Bannon v. Town Court Nursing Ctr., 447 U.S. 773, 804 (1980) (Blackmun, J., concurring) (recognizing that "the intuitively sensed obviousness of a case induces a rush to judgment, in which a convenient rationale is too readily embraced without full consideration of its internal coherence or future ramifications").

The *Belsito* case suffered from "intuitively sensed obviousness." "Saying who the parents were was easy. That was common sense." Richard McBane, AKRON BEACON J., Oct. 16, 1994, at A1, A16, (quoting Judge Bill Spicer, Summit County Probate Court). Yet the judge recognized the precedential importance of his decision. *Id.* ("I've learned that you have to look at the rule you're setting out to see if it is a good rule for a variety of cases."). *See infra* part III.C.1-2.

29. *See Belsito*, 644 N.E.2d 760.

30. *Id.* at 767.

31. *See infra.*

32. *See infra.*

33. *See infra.*

It also analyzes the other cases defining motherhood and the proposed legislative responses.[34] Part IV anticipates the legal repercussions of Ohio's new definition of maternity on each party's rights and responsibilities.[35] Finally, the Comment concludes by advocating a new parentage paradigm that recognizes the important contributions of each party in collaborative reproduction.

I. THE BIRDS AND THE BEES: COITAL REPRODUCTION AND ESTABLISHING THE "NATURAL PARENT"[36]-CHILD RELATIONSHIP

The law recognizes both the biological and social aspects of family.[37]

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34. *See infra.*

35. *See infra.*

36. Our legal heritage does not include an express definition for "natural parents." The common law merely assigned parental rights and duties and recognized persons to whom those functions were assigned as "parents." *Cf.* 644 N.E.2d 760, 762-63 (Ohio C.P. 1994). "'Natural parent' refers to the child and parent being of the same blood or related by blood." *Id.* at 762. However, "parent" as commonly used, "comprehends much more than the mere fact of who was responsible for [a] child's conception and birth and is commonly understood to describe and refer to person or persons who share mutual love and affection with a child and who supply child support and maintenance, instruction, discipline and guidance." BLACK'S LAW DICTIONARY 1114 (6th ed. 1990). Also, statutes define "parent" to include:

> (1) either the natural father or natural mother of a child born of their valid marriage to each other, if no subsequent judicial decree has divested one or both of them of their statutory coguardianship as created by their marriage; (2) either the adoptive father or the adoptive mother of a child jointly adopted by them, if no subsequent judicial decree has divested one or both of them of their statutory coguardianship as created by the adoption; (3) the natural mother of an illegitimate child, if her position as sole guardian of such a child has not been divested by a subsequent judicial decree; (4) a child's putative blood parent who has expressly acknowledged paternity and contributed meaningfully to the child's support; (5) any individual or agency whose status as guardian of the person of the child has been established by judicial decree.

BLACK'S LAW DICTIONARY 1114 (6th ed. 1990).

The law may discriminate between parents, even when both are "natural parents." Sherrie L. Russell-Brown, *Parental Rights and Gestational Surrogacy: An Argument Against the Genetic Standard,* 23 COLUM. HUM. RTS. L. REV. 525, 538 (1992) (noting that the law has been more concerned with promoting marriage than recognizing biological ties because marriage determined a "certain person, to whom the care, the protection, the maintenance, and the education of the child should belong").

37. Genetic relationships have never been the sole criteria for assigning parental rights and duties. *See* Katheryn D. Katz, *Ghost Mothers: Human Egg Donation and The Legacy of the Past,* 57 ALB. L. REV. 733, 753 (1994) (stating that "Anglo-American law . . . has a long history of ignoring biology when determining parental, particularly paternal, rights and responsibilities"). A man may be declared a child's "natural" father even though no genetic link exists between the two and an unwed father's genetic connection to the child may be totally ignored for policy reasons. *See* Michael H. v. Gerald D., 491 U.S. 110 (1989) (rejecting a paramour's claim to fatherhood, despite his genetic link to and early relationship with the child, when the child's mother was married at the time of the child's conception and birth and continued in her marital relationship). *But cf. Belsito,* 644 N.E.2d at 763 (observing that

But when a child is the product of coitus, his legal parents are less likely to be determined by that biological act than by their social relationships.[38] In law, as in biology, it was generally easier for the mother to demonstrate parenthood than for the father.[39] In fact, the mother's status was the traditional focus of a child's legal status.[40]

The woman could claim her title to motherhood simply by giving birth.[41] The man's claim to fatherhood was based on his marriage to the mother or on his establishing a genetic connection to, and a relationship with, the child or its mother.[42] Each parent's status is evidenced on the child's birth certificate.[43] All of the parental rights and responsibilities attach to those whose names appear on this vital record.[44]

"[h]istorically and at common law, blood relation was the primary means of establishing the legal status of a natural parent"). Apparently, biology and marriage are merely convenient tools the law and society use to ensure that some specific person takes care of each child. Russell-Brown, *supra* note 36.

The roots of parenthood then properly lie in the child's needs. The State, as *parens patriae*, prefers that those needs be met by individuals rather than by society collectively. *Id.* Thus, we assign each child a set of parents. Ideally, society prefers that those parents be married to each other, but modern laws recognize that a child's parents' marital status is not fatal to the parent-child relationship. *See* OHIO REV. CODE ANN. § 3111.01(B) (Anderson Supp. 1994) ("The parent and child relationship extends equally to all children and all parents, regardless of marital status of the parents.").

38. For example, under the Uniform Parentage Act as adopted in Ohio, if a man is married to a child's mother when the child is born or if the child is born within 300 days after the marriage ends by separation or otherwise, then that man is *presumed* the child's father. OHIO REV. CODE ANN. § 3111.03(A)(1) (Anderson Supp. 1994). Thus, fatherhood is based on a *presumption* of a biological relationship when a social and legal relationship exists between the parents rather than on an actual biological relationship. This web of presumptions gives a child every opportunity to be "legitimate" at birth. *See infra* note 40 for a discussion of the legitimacy issue.

39. *See* Russell-Brown, *supra* note 36, at 531.

40. Even the word "marriage" is synonymous with "matrimony" which comes from the Latin word *"matrimonium,"* meaning mother. The AMERICAN HERITAGE DICTIONARY 772 (2nd ed. 1982). As long as the mother is married when the child is born, he is "legitimate." *See In re* Mancini, 440 N.E.2d 1232, 1236 (Ohio Ct. App. 1981) (restating the definition of "illegitimate child" as one whose mother is unmarried at the time of birth). The archaic term "legitimate" evinces the irony of trying to fit modern practices into centuries-old legal customs. It is hard to imagine that a twentieth century child could be "illegal" simply because his mother is unmarried.

41. OHIO REV. CODE ANN. § 3111.02(A) (Anderson Supp. 1994). This statute is rooted in the common law maxim: *mater est quam gestatio demonstrat* or "she is the mother whom the bearing [of the child] designates." Russell-Brown, *supra* note 36, at 530 n.13.

42. Russell-Brown, *supra* note 36, at 531.

43. OHIO REV. CODE ANN. § 3705.09 (Baldwin 1995).

44. *See* OHIO REV. CODE ANN. § 3103.031 (Anderson Supp. 1994) (assigning to a child's biological, adopted, acknowledged or adjudicated parents the duty of support while the child is a minor or is a full-time high school student).

In Ohio, hospital administrators are most often charged with completing the information contained in a birth record.[45] Every birth must be registered.[46] The State Director of Health determines what information is to be included on the birth certificate and may promulgate regulations to insure the accuracy of the information.[47] The official form, consisting of approximately thirty items, asks simply for the "mother" of the child, without further instruction on how to determine who that person is.[48] Ohio law only recognizes one mother and one father for each child.[49]

II. THE BIRDS AND THE BEES REVISITED: NON-COITAL REPRODUCTION AND LEGAL PARENTING

Nicholas is not a product of coitus.[50] His parents did not attain their

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45. OHIO REV. CODE ANN. §3705.09(B) (Baldwin 1995). That section establishes the procedures for registering births and specifically states:

> (B) When a birth occurs in or en route to an institution, the person in charge of the institution or his designated representative shall obtain the personal data, prepare the certificate, secure the signatures required, and file the certificate. . .
> (C) When a birth occurs outside an institution, the birth certificate shall be prepared and filed by one of the following in the indicated order of priority:
> (1) The physician in attendance at or immediately after the birth;
> (2) Any other person in attendance at or immediately after the birth;
> (3) The father;
> (4) The mother;
> (5) The person in charge of the premises where the birth occurred.
> (D) Either of the parents of the child or other informant shall attest to the accuracy of the personal data entered on the birth certificate. . . .

Id.

Because most births occur in a hospital, the person who usually completes the birth record is the hospital administrator. Telephone Interview with John Conner, Registrar for the State of Ohio (Jan. 11, 1995).

46. OHIO REV. CODE ANN. §3705.09(A) (Baldwin 1995). That section states:

> (A) A birth certificate for each live birth in this state shall be filed in the registration district in which it occurs within ten days after such birth and shall be registered if it has been completed and filed in accordance with this section.

Id.

47. OHIO REV. CODE ANN. § 3705.14 (Baldwin 1995). *See* OHIO ADMIN. CODE §§ 3701-5-01 to -30 (Baldwin 1994). The official form for establishing a birth record is amended approximately every ten years. Telephone Interview with Linda Barden, Summit County, Ohio Registrar (Jan. 11, 1995). The current form was last amended in 1990. *Id.*

48. Telephone Interview with Linda Barden, *supra* note 47. Barden explained that deputy registrars understood that the woman giving birth was the mother. *Id.*

49. *Belsito v. Clark*, 644 N.E.2d 760, 763 (Ohio C.P. 1994) (finding that "society and the law recognize only one natural mother and father" (citing Michael H. v. Gerald D., 491 U.S. 110 (1989)).

50. *See id.* at 761.

status naturally. Like other children conceived through collaborative reproduction, the facts of Nicholas' natural parentage do not easily conform to laws based on coital reproduction.

Despite his unorthodox beginnings, Nicholas's parents asked the court to declare them his "natural parents."[51] In the process, the court had to establish a more exact definition of "mother."[52] The court had little precedent on which to base its determination.[53]

Like Nicholas's parents, many couples are not able to achieve parenthood through coital reproduction.[54] In fact, some prefer not to do so.[55] Some of these couples turn to the medical community and technology to help them become parents.[56]

Reproductive technology has shattered the old paradigm of parentage. It is now possible for a child to have five different parents.[57] A new legal paradigm is needed to reflect scientific advancements. The logical first step in developing this new paradigm is to adopt terminology that more accurately reflects the current reality. Innovative language will help organize the possibilities modern science offers and clarify the medical, social and legal paths society chooses to follow in response.

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51. *Id.* at 762.

52. *See* Charlene Nevada, *What is a Mother? Court Will Decide; Summit Parents-to-be Want a New Definition,* AKRON BEACON J., Sept. 15, 1994, at A1.

53. Specifically, the *Belsito* court had to determine the definition of mother when the functions of gestation and genetics do not coincide in one woman. Under an Ohio statute, a mother is defined as either the woman who gives birth to a child or one who is proven genetically related to the child. OHIO REV. CODE ANN. § 3111.02 (Anderson Supp. 1994). Prior to *Belsito*, there were no Ohio cases determining which woman has the superior claim when two women can demonstrate motherhood. California and Michigan courts have been faced with this issue. *See infra* notes 141-45 and 167-73 and accompanying text.

54. An estimated 2-3 million American couples are infertile. Gary B. Ellis, *Infertility and the Role of the Federal Government, in* BEYOND BABY M, *supra* note 9, at 111. Infertile couples are those who fail to conceive a pregnancy within 24 months of unprotected intercourse. *Id.* Only 10% of couples attempting pregnancy fall into this category. *Id.*

55. *See* John Dwight Ingram, *Surrogate Gestator: A New and Honorable Profession,* 76 MARQ. L. REV. 675, 679 (1993) (explaining that some women find it more convenient to have a gestational surrogate bear their children for career, lifestyle or leisure considerations).

56. Infertility treatment is a growing industry. *Compare* John A. Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction,* 59 S. CAL. L. REV. 939, 946 n.19 and accompanying text (1986) (noting that two million dollars was spent on infertility treatments in 1983) *with* Andrews, *supra* note 21, at 626 (remarking that infertility costs more than a billion dollars a year).

57. The potential parents include: the sperm and egg sources (genetic parents), the woman who carries the pregnancy and gives birth (gestator or gestational mother), and the people who will raise the child ("functional parents", *see infra* note 58). John Lawrence Hill, *What Does it Mean to Be a "Parent"? The Claims of Biology as the Basis for Parental Rights,* 66 N.Y.U. L. REV. 353, 355 (1991).

This Comment classifies assisted noncoital reproduction into categories, depending on how the procreative functions are splintered among the persons involved in these collaborative efforts. The main categories are determined by whether the gestator is genetically related to the resulting child. Intentions regarding functional parenting[58] provide the subcategories.

A. Paragenetic Pregnancy: When Gestation and Genetics Are Married

Paragenetic pregnancy occurs when one woman contributes all of the biological components to producing a child.[59] Such a woman is the child's paragenetic mother. In a medically assisted paragenetic pregnancy, fertilization usually takes place in viva[60] by introducing the male's sperm into the female's body via artificial insemination.[61] However, in vitro fertilization[62] may also be used. The goal of a paragenetic pregnancy is to produce a child genetically related to one of the functional parents.[63]

When the functional father is infertile, the couple may use donated sperm to achieve pregnancy.[64] In Ohio, if the functional father is married to the paragenetic mother and he consents to the artificial insemination, he is the legal "natural" father of the resulting child.[65]

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58. As used in this Comment, "functional parenting" refers to the process of raising a child after birth.

59. The term "paragenetic pregnancy" is not a product of the scientific community. I coined it to describe pregnancies in which one woman supplies both the egg and gestation resulting in a child. *Cf. infra* note 74. In Ohio, the resulting child's paternity initially rests on whether the female is married, to whom she is married and whether her husband has consented to the artificial insemination procedure. *See* OHIO REV. CODE ANN. §§ 3111.01 - 3111.38 (Anderson 1989 & Supp. 1994).

60. This type of fertilization occurs inside of the female's body as opposed to outside her body (in vitro). Joanna K. Budde, *Surrogate Parenting: Future Legislation to Eliminate Present Inconsistencies,* 26 DUQ. L. REV. 633, 634 n.10 and accompanying text (1988).

61. *Id.*

62. In vitro fertilization (IVF) occurs when a woman's egg is fertilized by a male's sperm in a culture dish outside the woman's body. ROBERT EDWARDS, LIFE BEFORE BIRTH: REFLECTIONS ON THE EMBRYO DEBATE 2 (1989) (Edwards is a pioneer in genetics and IVF and was on the medical team that helped create the first successful IVF pregnancy in 1978). The resulting embryo is then returned to the womb where it has a ten to fifteen per cent chance of implanting itself on the uterine wall. *Id.* at 37. For a more detailed discussion of the procedure, *see id. See also* Robertson, *supra* note 56, at 939-51.

63. In conceiving Nicholas, the Belsitos' goal was to produce a child genetically related to *both* functional parents. *See* Testimony of Shelly Belsito, Sept. 27, 1994, Hearing Tape Transcript at tape 2, *Belsito v. Clark,* 644 N.E.2d 760 (Ohio C.P. 1994) (on file with the *Akron Law Review).*

64. *See* Machelle M. Seibel, *A New Era in Reproductive Technology: In Vitro Fertilization, Gamete Intrafallopian Transfer, and Donated Gametes and Embryos,* 318 NEW ENG. J. MED. 828 (1988) (describing in detail the process of preparing sperm for IVF).

65. *See* OHIO REV. CODE ANN. § 3111.37 (Anderson 1989) (establishing that the consenting

When the functional mother is infertile,[66] the couple may enlist a surrogate mother to help them produce a child.[67] Although the resulting child will still be genetically related to the functional father,[68] the functional mother contributes neither gestationally nor genetically to the child's biological roots.[69] The surrogate is the child's paragenetic mother.[70] Paragenetic "surrogate" pregnancies are often called "partial surrogacy" because the surrogate is the genetic mother but will not be the functional mother.[71] Under Ohio law, partial surrogacy is legal.[72] Some commentators argue that surrogacy is nothing more than a private adoption and should conform to state adoption statutes.[73]

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husband of a woman artificially inseminated with donor sperm is "treated in law and regarded as the natural father" of the resulting child. The presumption of paternity under § 3111.03 becomes *conclusive* and cannot be overcome through proof of genetic links to the child.).

66. As used in this context, "infertile" means unable or unwilling to carry a pregnancy.

67. A surrogate mother is "[a] woman [who] agrees to be artificially inseminated with the semen of another woman's husband; she conceives a child, carry it to term, and after its birth surrender it to the natural father and his wife." *In re* Baby M, 537 A.2d 1227, 1234 (N.J. 1988).

68. Even in this case, where the father is unquestionably genetically related to the resulting child, he risks losing his parental rights. He is subject to the same presumptions of paternity that exist for coital reproduction in §3111.03 and is subject to the requirements of §3111.37. Finally, a court may subrogate his parental interests to those of the surrogate. *See* Natalie Loder Clark, *New Wine in Old Skins: Using Paternity-Suit Settlements to Facilitate Surrogate Motherhood,* 25 J. FAM. L. 483, 489-90 (1986-87) (discussing the father's potential to become the custodial parent of the resulting child in partial surrogate arrangements).

69. One court that rejected the common argument that surrogacy is the same as sperm donation noted that there is a "very significant difference" between the two methods. *In re* Adoption of Paul, 550 N.Y.S.2d 815, 818 (N.Y. Fam. Ct. 1990) ("a sperm is merely a gamete, potentially capable, if successfully joined with an egg, of creating an embryo which must then survive gestation to birth, while the 'surrogate' mother is supplying a life-in-being, having provided, not only the egg, but protection and nourishment during gestation and having delivered a human child capable of independent survival"). *See infra* note 131 for a discussion of the *Belsito* court's treatment of gestational surrogacy.

70. In this case, the term "surrogate" is misleading. The surrogate is not standing in place of the child's mother because she *is* the child's biological mother. *See* Barbara L. Atwell, *Surrogacy and Adoption: A Case of Incompatibility,* 20 COLUM. HUM. RTS. L. REV. 1, 1 n.3 (1988) (arguing that a surrogate mother is actually a surrogate wife, substituting for the "wife by bearing a child for the biological father"); Nicole Miller Healy, *Beyond Surrogacy: Gestational Parenting Agreements Under California Law,* 1 UCLA WOMEN'S L.J. 89, 90 n.5 (1991) (arguing that the fetus does not view its gestational mother as a "surrogate for anything").

71. Ingram, *supra* note 55, at 678.

72. *See* Valerie Wilt, Comment, *Surrogate Contract and Its Enforceability Under Ohio Law,* 12 U. DAYTON L. REV. 575 (1987) (arguing that Ohio law implicitly allows surrogate contracts and that such contracts are not against public policy).

73. Atwell, *supra* note 70, at 15 (arguing that the ultimate goal of surrogate parenting agreements is to "make the contracting couple the legal parents of the child through adoption").

B. Disjunctive Pregnancy:[74] *When Gestation and Genetics Are Divorced*

A disjunctive pregnancy occurs when the female biological components are divided between two or more women. Because the gestational and genetic components of procreation are splintered,[75] the genetic father and mother make equal biological contributions to the resulting child.[76] The uniquely feminine contributions of gestation and birth are delegated to another woman, who may or may not be a biological ancestor to the child.[77] As a result of a disjunctive pregnancy, a child has both a genetic and a gestational mother.[78]

Gestational motherhood appears to be the purest form of parenthood.[79] Yet patriarchal society has denigrated the role of gestation to a service women perform for men; gestating the male seed.[80] This view may not serve the interests of children.[81]

Disjunctive pregnancy usually only occurs when the functional mother

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74. Again, "disjunctive pregnancy" is not a scientific term. I coined it to describe a pregnancy in which the female biological contributions are divided among two or more women. The woman who contributes the egg and genes is the disjunctive genetic mother. The woman who contributes gestation and birth is the disjunctive gestational mother. *Cf. supra* note 59.

75. *See* Healy, *supra* note 70, at text accompanying nn.4-5 (distinguishing gestational surrogacy from traditional surrogacy because the former "separates the genetic and gestational features of mothering").

76. *See* Rothman, *supra* note 9 (asserting that women's rights to their children are now based on their seeds, as are men's rights to children).

77. Healy, *supra* note 70, at text accompanying n.5.

78. *Id.* at 90. Thus, disjunctive pregnancies merely split the biological components of motherhood. The process does not eliminate either component. Thanks to disjunctive pregnancies, motherhood now has two distinct biological components. Fatherhood still only has one.

79. "Parent" is derived from the Latin *perere,* meaning to give birth. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1641 (1981). The origins of the definition suggest that the gestational phase of procreation is primary and the genetic contribution secondary.

80. This denigration can be traced as far back as Augustine, who viewed women as the "passive receptacle[s] of the male seed." Lucinda J. Peach, *From Spiritual Descriptions to Legal Prescriptions: Religious Imagery of Woman as "Fetal Container" in the Law,* 10 J.L. & RELIGION 73, 77 n.27 (1993-94). Even Artistotle emphasized the male genetic contribution to reproduction over the female, finding the male seed "more divine than the base matter contributed" by women. Barbara Bennett Woodhouse, *"Who Owns the Child?" Meyer and Pierce and the Child as Property,* 33 WM. & MARY L. REV. 995, 1043 (1992). Noted antisurrogacy feminist Gena Corea feels that the new reproductive techniques are "transforming the experience of motherhood and placing it under the control of men. Woman's claim to maternity is being loosened; man's claim to paternity strengthened." GENA COREA, THE MOTHER MACHINE 289 (1985).

81. A child's first human relationship is with the woman who gestates him. Healy, *supra* note 70. Denying a disjunctive gestational mother legal rights to that child denies the child the benefit of consistency. *See infra* part IV.C and notes 153-65 and accompanying text (discussing the ways in which children are harmed by denying recognition to a disjunctive gestational mother).

is infertile.[82] The type of infertility controls the course of treatment.[83] If the functional mother is unable to produce eggs, the couple may resort to egg donation.[84] If the functional mother is able to produce eggs but unable (or unwilling) to carry the pregnancy, another woman's womb may be used to gestate the resulting fetus.[85]

In extreme cases, disjunctive reproduction may be employed when the functional father is also infertile. If both of the prospective functional parents are infertile and the female cannot or will not gestate an embryo, the couple must resort to in vitro fertilization of donated sperm and egg, with the resulting embryo implanted into a gestational mother.[86] The success rates for in vitro fertlization are low,[87] yet the chances of a successful pregnancy are higher in disjunctive pregnancies than paragenetic pregnancies following IVF.[88]

Existing law[89] makes legal parentage more difficult to determine in a disjunctive pregnancy. Until *Belsito*, the woman who gestated and gave birth to the child was presumed the child's mother.[90] If married, her husband was also presumed to be the child's father.[91] Even if the gestational mother was

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82. Of course, a woman may not want to carry a pregnancy even though she is technically physically able to do so. Ingram, *supra* note 55, at 677.

83. *See* Robertson, *supra* note 56, at 947-51 (describing the diagnostic and treatment process).

84. *Id.* at 950.

85. This is purest form of surrogacy or "full surrogacy." Ingram, *supra* note 55, at 678. Even if the functional mother is able to carry a child, those women who receive hormone injections to produce eggs are less likely to successfully implant the embryo because of the hormonal alteration. Andrews, *supra* note 21, at 655-56. These women may resort to implantation of their embryo into another's womb to increase the odds of a successful pregnancy. Cost is a major consideration. *See id.* at 635 (noting that average costs of infertility diagnosis and IVF is $22,217 and for surrogacy the cost is at least $25,000).

The first live birth from a gestational host program occurred in Cleveland, Ohio in 1986 as a result of Dr. Leon Sheean's pioneering work. Testimony of Dr. Leon Sheean, Sept. 27, 1994, Hearing Tape Transcript at tape 1, Belsito v. Clark, 644 N.E.2d 760 (Ohio C.P. 1994) (on file with the *Akron Law Review*). Dr. Sheean also helped produce Nicholas Belsito. *See id.* at tape 1-2.

86. *See* Seibel, *supra* note 64 (describing this and other IVF procedures).

87. *Cf.* Testimony of Dr. Leon Sheean, Sept. 27, 1994 Hearing Tape Transcript at tape 2, *Belsito,* 644 N.E.2d 760 (Ohio C.P. 1994) (claiming a 25% success rate) *and* Andrews, *supra* note 21, at 655 (claiming an average 21% success rate) *with id.* (citing a mean rate of 75% for artificial insemination alone).

88. *See* Andrews, *supra* note 21, at 655-56 (stating that IVF success rates are higher when treatment does not include attempted implantation of an embryo into the woman who has been given hormones to stimulate egg retrieval).

89. *See* infra parts I and III.A.

90. *See* Telephone Interview with Linda Barden, *supra* note 47 and accompanying text.

91. OHIO REV. CODE ANN. § 3111.03 (Anderson Supp. 1994).

not married to the genetic father, Ohio law allows him to establish his paternity.[92]

III. MOTHERHOOD DEFINED AND REDEFINED

A. *Ohio Statutory Definitions of Motherhood*

Ohio's statutes, like the common law, do not explicitly define who is a "natural mother."[93] Ohio's version of the Uniform Parentage Act[94] allows a woman to establish that she is a child's natural mother by one of two methods.[95] She can either prove that she gave birth to the child or that she is the genetic mother of the child.[96] Any interested party may ask the court to estab-

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92. *See infra* note 96 (outlining OHIO REV. CODE ANN. §§ 3111.01-3111.29 (Anderson 1989 & Supp. 1994)).

93. Section 3111.01 does define the "parent and child relationship." It is "the legal relationship that exists between a child and the child's *natural* or adoptive parents" and anyone upon whom the Revised Code "confer[s] or impose[s] rights, privileges, duties and obligations." OHIO REV. CODE ANN. § 3111.01(A) (Anderson Supp. 1994) (emphasis added). The relationship "extends equally to all children and all parents, regardless of the marital status of the parents." OHIO REV. CODE ANN. § 3111.01(B) (Anderson Supp. 1994).

BLACK'S LAW DICTIONARY defines a "mother" as "[a] woman who has borne a child. A female parent. The term includes maternity during prebirth period." BLACK'S LAW DICTIONARY 1013 (6th ed. 1990).

One commentator argues that defining a concept is a circular process because "we implicitly appeal to some preanalytic concept of parenthood, as if presupposing the definition." Hill, *supra* note 57, at 360. The problem with defining a parent as "a biological parent" does not comport with the traditional *actual* use of the word. *Id.* at 360-61. "To stipulate a meaning for [motherhood] which is fundamentally distinct from the traditional way in which the term is used is to open the door to a changed, and perhaps diminished, social significance for [motherhood] as an institution." *Id.* at 361.

94. OHIO REV. CODE ANN. §§ 3111.01-3111.38 (Anderson Supp. 1994); Uniform Parentage Act, 9B U.L.A. 287 (1973).

95. OHIO REV. CODE ANN. § 3111.02 (Anderson Supp. 1994). That section also provides for an adoptive parent to establish the parent-child relationship. *Id.* Although the legislature amended this section effective Dec. 19, 1994, it did not change the provisions for determining the mother-child relationship. *See id.*

96. Specifically, that statute allows a woman to prove her parentage by using §§ 3111.01-3111.19 or §§ 3111.20-3111.29. *See* OHIO REV. CODE ANN. § 3111.02 (Anderson Supp. 1994). Those sections provide the structure for determining parentage. *Id.* Section 3111.01 defines the parent child relationship, which may be established pursuant to the § 3111.02; § 3111.03 creates presumptions for paternity; § 3111.04 allows the child, mother, putative father or child support enforcement agency to bring a parentage action; § 3111.05 requires that parentage actions be brought before a child turns twenty-four; § 3111.06 grants jurisdiction over parentage actions to the juvenile court; § 3111.07 requires that the mother, her husband, the putative father and the child be parties to the action and requires separate representation for the child if the court determines that his or her interests conflict with the mother; § 3111.08 subjects parentage actions to the rules of civil procedure and allows for default

lish the maternal relationship.[97] It is more difficult for women involved in disjunctives pregnancies to establish maternity than it is for men who are involved in collaborative reproduction to establish paternity because the only specific guidelines for establishing parenthood were designed to establish paternity, not maternity.[98] No provision is made for measuring gestational

judgments of parentage; § 3111.09 allows a court to order genetic testing sua sponte or upon motion of a party and permits the court to consider other genetic evidence; § 3111.10 establishes evidentiary standards for proving parentage, including coitus, statistical probabilities, weight of genetic testing, other medical evidence and all other relevant evidence; § 3111.11 requires a pretrial if parentage is not admitted in the answer; § 3111.12 declares the mother and father competent to testify, authorizes jury demands and requires a juvenile court to make a parentage determination within 120 days of filing; §3111.13 authorizes a parentage judgment and allows the judge to order preparation of a new birth record; §3111.14 permits a court to apportion payment of testing and costs; §3111.15 authorizes enforcement of the obligation of support, including reasonable expenses of pregnancy, confinement, and education, upon a parentage determination; §3111.16 grants the court continuing jurisdiction to modify its parentage and support orders; §3111.17 allows any interested party to bring a maternity action and makes the provisions of §3111.01 to §3111.19 applicable to maternity actions to the extent practicable; §3111.18 authorizes a court to order a new birth certificate upon a parentage determination; §3111.19 permits the parties to enter into a settlement agreement as to support without determining parentage. Sections 3111.20-3111.29 permit administrative determinations of parentage and support. Section 3111.20 provides definitions relating to support, establishes a parental duty of support upon a presumption of parentage, extends the duty of support beyond the child's minority while the child is attending high school, and establishes administrative procedures for support payments; § 3111.21 permits the parties by voluntary agreement to be bound by genetic testing, establishes the level of certainty required for parentage determinations, and establishes administrative appeal procedures; §3111.22 requires a party to request an administrative determination of parentage before filing a parentage action under §§3111.01 to 3111.19 except when the putative father is deceased; §3111.23 allows a child support enforcement agency to issue administrative orders for withholding child support; §3111.24 authorizes an employer to deduct its costs to comply with a withholding order from the parent's pay in addition to the child support; §3111.241 permits the child support enforcement agency to order a parent to obtain health insurance coverage for the child; §3111.242 allows the child support enforcement agency to seek a contempt order from the juvenile court for noncompliance with the administrative orders; §3111.25 provides sanctions to be imposed on an employer who fails to comply with a support withholding order; §3111.26 requires the child support enforcement agency to notify the natural mother, each presumed father and each putative natural father with notice of a parentage determination request; §3111.27 allows the child support enforcement agency to periodically review support orders and establishes a procedure for doing so; §3111.28 allows the child support enforcement agency to seek a court order if an employer fails to comply with a withholding requirement; and §3111.29 prohibits any person from physically preventing, or threatening violence to prevent a person from pursuing a parentage determination.

97. OHIO REV. CODE ANN. § 3111.17 (Anderson 1989).

98. *Compare id.* (ostensibly placing women on the same level with men in establishing parenthood through genetic testing as provided in §§3111.01-3111.19) *with* OHIO REVISED CODE ANN. § 2105.18 (Anderson 1994) (allowing a father to acknowledge paternity but making no such allowance for a mother) *and* OHIO REV. CODE ANN. § 3111.31 (Anderson 1989) (specifically exempting surrogate inseminations from the statutes determining legal parentage in artificial insemination by donors). Thus, genetic mothers suffer from statutory gender discrimination. Yet genetic mothers fare better than gestational mothers, whose only

contributions, only genetic links (on a male-based model).[99]

Historically, the woman who gave birth to the child was listed as the natural mother on the child's original birth certificate.[100] While no rules or regulations explicitly require this,[101] there are several logical reasons to do so. First, the statutory definition of "live birth," an event that triggers completion of a birth record, suggests that the person who bore the child is its mother.[102] Second, Ohio statutes are to be interpreted "according to the rules of grammar and common usage."[103] According to common usage, a parent does not become a parent until the live birth of the child has occurred.[104] Thus, a genetic "parent" of a fetus is not yet a parent in the eyes of the law. Third, a birth certificate is merely an archival record which reflects facts as they exist at the moment of birth.[105] At the moment of birth, the woman giving birth is the child's mother because there has been no other physical evidence or contrary determination of parentage.[106]

B. Current Survey of Other State Statutes

A few states have adopted statutes that address the issue of motherhood in collaborative reproduction arrangements. Arkansas makes the biological

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claim to motherhood—gestation—may be overcome by the genetic mother's proof of a genetic link to the child. There are no Ohio statutory procedures for measuring gestational contributions.

99. *See* OHIO REV. CODE ANN. §§ 3111.01-3111.38 (Anderson 1989 & Supp. 1994).

100. Even if a parent is not listed on the original birth certificate, the certificate can be amended after parentage is established OHIO REV. CODE ANN. § 3705.09 (Baldwin 1995).

101. Telephone Interview with Rachel Belenker, Assistant General Counsel to Ohio Department of Health (Jan. 11, 1995). The General Counsel advises the State and Deputy Registrars on the law. The form upon which births are reported contains no instructions for determining the child's mother. It merely states "mother." Telephone Interview with Linda Barden, *supra* note 47. This form is updated every ten years and was last updated in 1990. *Id.*

102. OHIO REV. CODE ANN. § 3705.01(A) (Baldwin 1995). That section defines "live birth" as "the complete expulsion or extraction *from its mother* of a product of human conception. . . ." *Id.* (emphasis added).

103. OHIO REV. CODE ANN. § 1.42 (Anderson 1989). In addition, §§ 3111.02-111.04 and §§ 3111.09-.10 are *"in pari materia* and must be construed together." Hulett v. Hulett, 544 N.E.2d 257 (Ohio 1989).

104. State v. Gray, 584 N.E.2d 710, 711 (Ohio 1992) (finding that a pregnant woman could not be convicted of child endangerment for actions taken before the child's birth). The Court noted that "[t]he plain interpretation of the word [parent] is mother or father of a child who has been born alive. The word parent comes from the Latin *parere,* meaning to give birth." *Id.*

105. Telephone Interview with John Conner, Registrar for the State of Ohio (Jan. 11, 1995) (explaining that the Bureau of Vital Statistics is an archival and registry agency and is not equipped to make legal determinations).

106. *Cf.* OHIO REV. CODE ANN. §§ 3111.01-3111.19 and §§ 3111.20-3111.29 (Anderson

father the focus of parentage determinations.[107] The Arkansas statute presumes that the biological father is the legal father of the child.[108] If he is married, the woman intended to be the mother is the child's legal mother (regardless of biology).[109] If the biological father is an anonymous sperm donor, he is not presumed to be the natural father.[110] This scheme is an exception from Arkansas' other statutory parentage presumptions.[111]

In New Hampshire and North Dakota, statutes presume that the woman who gives birth to a child is its legal mother regardless of genetics.[112] If she is married, her husband is presumed to be the child's father unless that presumption is rebutted.[113]

In Virginia, the intended parents are legally recognized as such if their surrogate contract was judicially pre-approved, except that a paragenetic surrogate has a right to terminate the agreement and retain parental rights.[114] If the parties do not have their contract pre-approved, the woman who gives birth to the child is the child's mother.[115] If the intended mother and father are not genetically related to the child, the paragenetic surrogate must consent to a relinquishment of her rights before the intended parents can become the child's legal parents.[116]

C. Judicial Gloss When Statutory Definitions Fail

1. "Blood is Thicker Than Water" — Simple Genetic Standard

The preceding sampling of state parentage statutes illustrates that most existing statutes do not clearly define legal rights in disjunctive pregnancies. The courts have had to face these issues in only a handful of cases.[117] In all

1989 & Supp. 1994)(allowing for genetic testing to establish parentage *after* a child's birth).

107. ARK. CODE ANN. §9-10-201 (Michie 1993).

108. *Id.*

109. *Id.*

110. *Id.*

111. *See* Alice Hofheimer, Note, *Gestational Surrogacy: Unsettling State Parentage Law and Surrogacy Policy,* 19 N.Y.U. REV. L. & SOC. CHANGE 571, at Appendix (1992) (discussing Arkansas statute).

112. *See* N.H. REV. STAT. ANN. § 168-B:1 to 32 (1994) and N.D. CENT. CODE § 14-18-01 to -07 (1991). *See* Lieber, *supra* note 26, at 222-24 (extensively analyzing the New Hampshire statute).

113. *See* Hofheimer, supra note 111, at Appendix (discussing both statutes).

114. VA. CODE ANN. §§ 20-156 to -165 (Michie Supp. 1994). *See* Lieber, *supra* note 26, at 218-22 (thoroughly analyzing this statute).

115. Lieber, *supra* note 26, at 221.

116. *See* VA. CODE ANN. §§ 20-156 to -165 (Michie Supp. 1994).

117. The first of these cases is Smith v. Jones, No. 85-532014-D2 (Mich Cir. Ct. Wayne

of these cases, courts have relied on genetics to guide them in determining who is the legal mother in disjunctive reproduction.[118] At first glance, Ohio and Michigan seem to rely solely on genetics for this determination,[119] while California and New York require genetics in conjunction with intent to raise the child.[120]

Most recently, an Ohio court was faced with the difficult task of determining who is the natural mother of a child born of a disjunctive pregnancy in Belsito v. Clark.[121] *Belsito* was a declaratory action filed in the Summit County, Ohio Probate Court and the decision of that court has not been appealed.[122]

Tony and Shelly Belsito, a married couple, asked the court to declare them to be the natural parents of the child Shelly's sister, Carol Clark, was carrying and was about to deliver.[123] The Belsitos wanted to be recognized as

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County Mar. 14, 1986) (holding that the biological mother, at the time of conception, is the natural mother of a child in a disjunctive pregnancy and as such, her name will appear on the child's birth certificate). The most famous case is Johnson v. Calvert, 851 P.2d 776 (Cal. 1993), *cert. denied,* 114 S. Ct. 206 (1993), *and cert. dismissed,* 114 S. Ct. 374 (1993) (holding that gestation or genetics coupled with intent to raise the child determines the natural mother under California law) *Id.* at 782. The most recent case is Belsito v. Clark, 644 N.E.2d 760 (Ohio C.P. 1994) (holding that genetics is the primary test of parentage).

Only one case involving egg donation has been reported. McDonald v. McDonald, 608 N.Y.S.2d 477 (N.Y. App. Div. 1994)(determining in a divorce action that a woman who gestates a child who is the product of egg donation intending to raise the child as her own is the "natural mother" of the child for custody purposes).

118. *See Smith,* No. 85-532014-D2, slip. op. at 9 (holding "a biological mother has the right to her maternity determined as well as the biological father has his right to paternity. . . . the birthing mother . . . is acting as a human incubator"); *Belsito,* 644 N.E.2d at 762 ("because . . . [the] Belsito[s] provided the child with its genetics, they must be designated as the legal and natural parents"); *see also* Johnson v. Calvert, 851 P.2d 776, 781 (Cal. 1993) (finding that "blood testing may. . . be dispositive of the question of maternity").

119. *See Smith,* No. 85-532014-D2, slip op. at 11 (holding that "the donor of the ovum, the biological mother, is . . . the natural mother"). *See also Belsito,* 644 N.E.2d at 767 (holding that "when a child is delivered by a gestational surrogate . . . the natural parents of the child shall be identified by a determination as to which individuals have provided the genetic imprint for that child").

120. *See Johnson,* 851 P.2d at 782 (holding that when genetics and birth "do not coincide in one woman, she who intended to procreate the child . . . is the natural mother"). *See also McDonald,* 608 N.Y.S.2d at 480 (holding that in a true egg donation case, "the gestational mother, is the natural mother")(citing *Johnson).*

121. 644 N.E.2d 760 (Ohio C.P. 1994).

122. The precedential value of this case is questionable. The state registrar will not be advising local registrars to change their practices based on this decision. Telephone Interview with Belenker, *supra* note 101 (discounting the impact of the decision because it is limited to Summit County and because it ignores the clear language of the statute).

123. *See Belsito,* 644 N.E.2d at 762.

the child's natural parents and avoid adopting a child they knew was genetically their own.[124] It bothered them that their child would be born illegitimate under existing Ohio law.[125]

The Belsitos conceived their child through IVF at the University Hospitals of Cleveland, MacDonald Hospital for Women.[126] Tony and Shelly provided the gametes which were joined in a petri dish.[127] Because Shelly Belsito's uterus had been removed in August 1992, their embryo was then implanted into Carol Clark's womb for gestation.[128]

Shelly testified that she had contacted the medical records department of Akron City Hospital where the child would be born and was told that the woman who gave birth to the child would be listed as the child's natural mother on the birth certificate.[129] Although the Belsitos could have waited until after Nicholas was born and had his birth certificate amended, they instead sought to be declared Nicholas's natural parents before his birth.[130]

In his *Belsito* decision, Judge William F. Spicer declared a new standard for determining natural motherhood in Ohio.[131] Interpreting

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124. Plaintiff's Opening Statement, Sept. 27, 1994, Hearing Tape Transcript at tape 1, *Belsito,* 644 N.E.2d 760, Sept. 27, 1994, Hearing Tape Transcript at tape 1 (on file with the *Akron Law Review).* Under Ohio law, Shelly could demonstrate her "natural" motherhood under § 3111.02 after Nicholas's birth and would not have had to resort to adoption even without the *Belsito* ruling. Section 3111.17 allowed her to bring a maternity action postnatally and then have Nicholas's birth certificate amended under § 3705.09.

125. Plaintiff's Opening Statement, Sept. 27, 1994, Hearing Tape Transcript at tape 1, *Belsito,* 644 N.E.2d 760. Carol Clark is not married. Testimony of Carol Clark, tape 4.

126. Belsito v. Clark, 644 N.E.2d 760, 761 (Ohio C.P. 1994).

127. Dr. Leon Sheean testified that a color-coding system was used throughout the procedure to ensure the identity of the resulting embryo. Testimony of Dr. Leon Sheean, Sept. 27, 1994, Hearing Tape Transcript at tape 1, *Belsito,* 644 N.E.2d 760 (on file with the *Akron Law Review).* The color-coding procedure provided one hundred percent accuracy in determining the embryo's genetic origins. *Id.*

128. Testimony of Dr. Leon Sheean, Sept. 27, 1994, Hearing Tape Transcript at tape 2, *Belsito,* 644 N.E.2d 760 (on file with the *Akron Law Review).* Shelly retained her ovaries and was able to produce eggs. *Belsito v. Clark,* 644 N.E.2d 760, 761 (Ohio C.P. 1994). Carol Clark is Shelly Belsito's sister. Id.

129. Testimony of Shelly Belsito, Sept. 27, 1994, Hearing Tape Transcript at tape 3, *Belsito,* 644 N.E.2d 760 (on file with the *Akron Law Review).*

130. *See* OHIO REV. CODE ANN. §§ 3111.18, 3705.09 (Baldwin 1995). The Belsitos wanted Nicholas to be legitimate at birth. *See* Plaintiff's Opening Statement, Sept. 27, 1994, Hearing Tape Transcript at tape 1, *Belsito,* 644 N.E.2d 760 (on file with the *Akron Law Review).*

131. "[U]nder Ohio law, when a child is delivered by a gestational surrogate who has been impregnated through the process of in vitro fertilization, the natural parents of the child shall be identified by a determination as to which individuals have provided the genetic imprint for that child." *Belsito,* 644 N.E.2d at 767. In essence, Spicer treated Carol's gestational contribution the same as a semen donation would be treated under § 3111.37 by denying her legal parental rights based on her biological contribution to the child. *See* OHIO REV. CODE

section 3111.02,[132] Judge Spicer recognized that identifying a child's natural parentage is no longer the same as determining who his legal parents are.[133] Spicer also rejected the California approach[134] to defining motherhood based on the intent of the parties.[135] Spicer based his rejection on public policy and on the failure of intent-based approach to "recognize and emphasize the genetic provider's right to consent to procreation and to surrender potential parental rights."[136]

ANN. §3111.37 (Anderson 1989) (exempting semen donors from statutory presumptions of paternity and denying them paternal rights). Yet unlike a semen donor, a gestational donor is statutorily entitled to demonstrate her motherhood and § 3111.37 does not prevent her from exercising that right. *Compare* OHIO REV. CODE ANN. §3111.02 (Anderson Supp. 1994) (allowing a woman to demonstrate her motherhood by birth or other means) *with* OHIO REV. CODE ANN. § 3111.31 (Anderson 1989) (specifically stating that §3111.37 does not apply to surrogate motherhood).

Of course, the court recognized that its decision is not applicable to cases in which a gestational mother asserts her parental rights. *Belsito,* 644 N.E.2d at 767 n.3. Thus, the *Belsito* decision merely allows a gestational mother to voluntarily donate gestatation and choose not to exert her § 3111.02 rights.

132. OHIO REV. CODE ANN. §3111.02 (Anderson Supp. 1994). Amici curiae Wilson Huhn, Malina Coleman and Howard Denemark, law professors at the University of Akron School of Law, urged the court to read that Code section in conjunction with other relevant factors such as "the intent of the parties, the best interest of children conceived [in disjunctive reproduction] . . . and the biological reality of genetic parenthood." Brief Amicus Curiae at 1, Belsito v. Clark, 644 N.E.2d 760 (Ohio C.P. 1994) (No. 94-09-05).

133. Belsito v. Clark, 644 N.E.2d 760, 767 (Ohio C.P. 1994) (determining that the genetic parents are the natural parents of a child but are only the legal parents of a child if they have not waived their parental rights and intend to raise the child. The legal parents are "the individual or individuals who will raise the child.").

134. *See infra* note 172 and accompanying text.

135. The court did not find the *Johnson* decision persuasive. *Belsito,* 644 N.E.2d at 764.

136. *Id.* Specifically, Spicer's public policy concerns presuppose the genetic mother's superior rights but do not acknowledge the gestational mother's statutory rights. *See id.* at 765 (objecting to the *Johnson* intent test because it "allows the nongenetic carrier/surrogate to be designated as the natural mother" and because adoption laws protect "the interest of the mother"). Spicer likens a gestational surrogate to *an adoptive parent. Id.* Because an adoptive parent is a biological and legal stranger to the child before adoption, the judge's analogy implies that a gestational mother is *always* a biological and legal stranger to her child. *See id.* (cautioning that "[t]he possibility of recognition as a parent means that a potential right is implicit in any agreement or contract to act as gestational surrogate" and that "[a] surrogate who chooses not to be the natural parent forfeits her right to be considered the natural and legal parent"). This circular logic begs the question of *who* is a "natural" parent and is an example of the problem of circular definitions. *See* discussion *supra* note 93.

While this logic makes it easier to determine motherhood in disjunctive pregnancies, it completely disregards Ohio's statutory recognition of gestation as proof of motherhood. *See* OHIO REV. CODE ANN. §3111.02 (Anderson Supp. 1994). Under this statute, the gestational mother does not come into court as a legal stranger to the child she is carrying. The statute impliedly recognizes that gestational contributions are sufficient to entitle a woman to claim legal motherhood. Under Ohio's statutory scheme, the focus on genetic parenthood contained in §§ 3111.01-3111.09, which §§3111.02 and 3111.17 make applicable to both putative mothers

The *Belsito* court elevated genetics over gestation in determining natural motherhood when the two do not coincide in the same woman.[137] Yet in rejecting gestational contributions to the child as sufficient to establish a mother-child relationship, the court had no evidence before it of the key role gestation plays in determining a child's biology.[138]

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and fathers, does not allow genetics to *always* preclude nongenetic claims to parenthood. First, §3111.17 provides that the genetic testing provisions of §§ 3111.01 et seq. only apply to determining motherhood "[i]nsofar as practicable." OHIO REV. CODE ANN. § 3111.17 (Anderson 1989). Those provisions do not even conclusively establish genetics as the sole, or even the primary, focus of fatherhood. *Cf.* OHIO REV. CODE ANN. §3111.03 (Anderson Supp. 1994) (establishing presumptive paternity based on the father's marital relationship with the mother) *with* OHIO REV. CODE ANN. §3111.10 (Anderson 1989) (listing not only genetic test results as a basis for determining paternity, but also *"all other evidence* relevant to the issue"); OHIO REV. CODE ANN. §3111.08(B) (Anderson Supp. 1994) (requiring a default judgment against a putative father who fails to defend against a paternity action upon motion of opposing party) *and* OHIO REV. CODE ANN. §3111.09(A) (Anderson Supp. 1994) (requiring a determination of paternity *without genetic testing* when a putative father willfully fails to submit himself and/or the child (if in his custody) to genetic testing and allowing a determination of nonpaternity if the mother willfully refuses to submit herself or the child (if in her custody) to genetic testing).

The parentage paradigm contained in §§ 3111.01 et seq. merely uses genetics as one tool to determine parenthood. First, §3111.17 recognizes that biological motherhood and fatherhood different. It is not "practicable" to ignore the biological contributions of a gestational mother when she has a statutory right to demonstrate her status through birth. Second, §3111.03's presumptions are based on marital relationships rather than genetic relationships. These presumptions are very strong and must be overcome by clear and convincing evidence. *See* Hulett v. Hulett, 544 N.E.2d 257 (Ohio 1989). Third, evidence of a gestational relationship, with its attendant biological and social contributions to the child, is relevant to determining motherhood. Gestational contributions are extremely important to the child even if they are deemphasized by his genetic parents. *See* Oxman, *supra* note 2 (discussing the effects of maternal hormones on a fetus); Rothman, *supra* note 9 (discussing the physical and social bonding between fetus and gestator).

Perhaps the problem is that males currently cannot gestate children. If they could, I doubt prenatal nurturing would be discounted so quickly. I suspect that in such an egalitarian world, the biological contributions of pregnancy would be viewed as important as, if not more important than, genetic contributions alone.

Finally, the law is willing to completely disregard genetic reality when putative parents are uncooperative. The underlying policy for parentage statutes is to recognize as parents those persons who are concerned with the best interests of the child. *See* Eppley v. Bratton, No. 94 A 7, 1994 WL 668111 (Ohio Ct. App. Nov. 7, 1994). The long-standing presumption that the biological parents will act in the child's best interests gives way to social realities. *See id.*

137. Belsito v. Clark, 644 N.E.2d 760, 767 (Ohio C.P. 1994) (holding that although both genetics and birth may determine parentage, "[t]he birth test becomes subordinate and secondary to genetics").

138. *See* Oxman, *supra* note 2 (discussing the important role maternal hormones play in the development of the fetus during gestation and throughout life).

Although Judge Spicer did question the Belsitos' expert witness, Dr. Sheean, about the *genetic/blood* contributions of the gestational mother; he did not propound any questions regarding other biological contributions she may have made. Testimony of Dr. Leon Sheean,

Despite the court's focus on genetics, it recognized that genetics alone cannot determine *legal* parentage.[139] Although the court rejected intent-based parenthood, its parentage scheme allowing a genetic mother to "consent" to give up her parental rights (as in the case of egg donation) is nothing more than a veiled "intent" standard. If the genetic mother does not intend to create and raise a child, she will consent to waive her rights.

The *Belsito* parentage scheme also allows for prenatal parentage determinations contrary to the postnatal authority granted in Chapter 3111. Most importantly, the decision impliedly recognizes gestational donations as valid without any specific statutory approval.[140]

Michigan has also faced the issue of legal motherhood in a disjunctive pregnancy and chosen the genetic standard.[141] Ironically, Michigan's only disjunctive motherhood case began in Ohio.[142] In that case, the gestational mother was married.[143] The genetic parents, the gestational mother and her husband all agreed that the genetic parents were the legal parents of the child.[144]

Sept. 27, 1994, Hearing Tape Transcript at tape 2, *Belsito,* 644 N.E.2d 760 (on file with the Akron Law Review). Evidently, the court presumed that only genes contribute to the unique identity of a child. This approach is not surprising in a patriarchal society where the only biological parental contribution men can make is genetic.

139. *See Belsito,* 644 N.E.2d at 767 (noting that after determining the natural parents, "a second query must be made to determine the legal parents"). *Belsito* was not a true adversarial action because both defendants agreed with the plaintiffs' claims of parenthood. *Id.* at n.3 and accompanying text (acknowledging that Carol Clark had not asserted any parental rights). No one advocated the importance of gestational contributions in *Belsito. See id.* If Carol Clark had been inclined to assert parental rights to Nicholas, she could have argued that she was both genetically related to him as his maternal aunt and gestationally his mother. Judge Spicer admitted that his decision did not affect the law of parentage where the gestational mother asserts parental rights. *Id.* at n.3 and accompanying text. Wisely, Judge Spicer calls upon the legislature to clarify the law of parentage as it applies to surrogacy. *Id.* at n.3. A local newspaper joined him in this plea. *Spicer's Law,* AKRON BEACON J., Oct. 26, 1994, at A14.

140. Semen donation did not relieve the donor of parental responsibilities until Ohio adopted §3111.37. *See* Susan Garner Eisenman, *Fathers, Biological and Anonymous, and Other Legal Strangers: Determination of Parentage and Artificial Insemination by Donor Under Ohio Law,* 45 OHIO ST. L.J. 383, 386 (1984) (noting that as originally enacted, the Ohio parentage scheme did not include provision for artificial insemination by donor and thus the parentage of children born to semen donors was controlled by biology rather than intent).

141. *See* Smith v. Jones, No. 85-532014-DZ (Mich. Cir. Ct. Wayne County Mar. 14, 1986).

142. The IVF procedure took place in Cleveland, Ohio at Mt. Sinai Medical Center. *Id.* slip op. at 2.

143. *Id.* slip op at 2. The gestational mother's husband swore that he and his wife abstained from sexual intercourse around the time of this procedure. *Id.*

144. *Id.* slip op. at 3 (the genetic parents were referred to as the "biological parents" although technically, the gestational mother contributes biologically to the child as well. *See* Oxman, *supra* note 2 (discussing the effects of the gestational mother's hormones on the developing fetus).

The court concurred.[145]

2. Critique of the Simple Genetic Standard

Numerous commentators disdain the genetic standard for determining motherhood.[146] Some see it as "an extremely masculine way to view parenthood"[147] and one that "is the ultimate meaning of patriarchy for the mother: seeds are precious, mothers are fungible."[148] It presents a "distorted view of women's wombs as 'incubators' for sale."[149] The image of women as incubators not only dehumanizes all women, but perpetuates the most pernicious type of gender discrimination.[150]

Finally, the simple genetic standard is not so simple. Intrafamily surrogacy arrangements can muddle the genetic link to motherhood.[151] It is

145. *Smith*, No. 85-532014-DZ, slip op. at 11. While the court seemed to make its determination on genetics alone, *id.* (noting that the natural mother is determined at conception) and *id.* slip op. at 9 (also noting that the gestational mother was acting as a "human incubator"), it actually relied on more than the "physical aspect" and recognized the "intent of the parties" in making its determination. *Id.* slip op. at 9-10. The *Smith* court also waited until the child was born to make its final determination. *Id.* slip op. at 10.

146. *See, e.g.*, Oxman, *supra* note 2 (detailing the essential endocrine contributions of the gestational mother and advocating a best interests standard); Russell-Brown, *supra* note 36 (arguing that common law, modern statutory law and the U.S. Supreme Court recognize that parenthood is not based merely on a genetic link to a child and that therefore a gestational surrogate should be accorded parental rights); Hill, *supra* note 57 (advocating the use of intent over biology as a standard for determining parenthood); Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297 (1990) (advocating use of intent-based parenthood because it allows for more gender-neutral parentage determinations); Rothman, *supra note* 9 (objecting to the total disregard of the gestational mother's relationship with the developing fetus).

147. Katz, *supra* note 37, at 748 (quoting from BARBARA KATZ ROTHMAN, RECREATING MOTHERHOOD 45 (1989)). The simple genetic standard also denies recognition of the only uniquely feminine biological contribution to children — gestation and birth. A part of motherhood, implicitly recognized under Ohio's parentage statute, § 3111.02, is now eliminated as a *legal* claim to motherhood if a woman does not also contribute genetically to the child. The *Belsito* court has effectively replaced the word "or" in § 3111.02 with the word "unless." *See* OHIO REV. CODE ANN. § 3111.02 (Anderson Supp. 1994).

148. *Id.*

149. Healy, *supra* note 70, at 116. Healy also argues that this view elevates the value of women's "immeasurably precious" reproductive capacities above the interests of women themselves. *Id.* at 115.

150. *Cf.* Peach, *supra* note 80 (recognizing the importance of religious symbols in shaping women's legal rights and tracing women's struggle for equal rights and equitable treatment to their "religiously-grounded" symbolic role as "fetal containers").

151. For instance, Carol Clark *is* genetically related to Nicholas because she is his maternal aunt. *See* Belsito v. Clark, 644 N.E.2d 760, 761 (Ohio C.P. 1994). Therefore, she not only contributed to his gestation, but vicariously shares his genes. *See id.* Of course, Judge Spicer noted that those genes must be "of the correct degree," eluding to statutes of intestate

also too simple. It takes more than mere genes to make a baby.[152]

In Ohio, the fate of a child who was the subject of another surrogacy case bears witness to the drawbacks of using genetics alone to determine parentage. The tragic story of Tessa Annaleah Reams unfolds in three separate actions in Franklin County.[153] Tessa's intended parents, Richard and Beverly Reams, entered into an oral surrogacy contract with Norma Stotski.[154] Pursuant to the agreement, Stotski would be artificially inseminated with Richard's sperm,[155] Beverly would adopt the child,[156] and the Reams would raise her as their own.

Unfortunately, Richard's sperm failed to impregnate Norma and Norma inseminated herself[157] with the sperm of another man, not her husband.[158] As a result, Tessa was not genetically related to either of her intended parents.[159] Although Richard acknowledged paternity,[160] that determination was subsequently vacated.[161] The Reams filed petitions for adoption of

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distribution. *Id.* at 763.

Siblings also share genes and are "of the correct degree." If a daughter gestates her parents' genetic child, she has a stronger genetic link to her sibling/child than do either of the genetic parents. In an age when remarriage is common and assisted reproduction allows anyone with a functioning uterus to carry anyone's fetus, such a scenario may not be far-fetched. Finally, "twins or triplets long implanted in their mothers exchange parts as they grow" and "swap cells so that many become mixtures of the originals." EDWARDS, *supra* note 62, at 52. Would twins have greater claim to parental rights to each other than either their genetic or gestational parents? *See* Anne Goodwin, *Determination of Legal Parentage in Egg Donation, Embryo Transplantation, and Gestational Surrogacy Arrangements,* 26 FAM. LAW Q. 275 (1992) (discussing some of the problems intrafamily noncoital reproductive arrangements pose and advocating recognition of the gestational mother as the natural mother).

152. Regina Brett, *'Birth Aunt' Sacrificed as Mothers Do,* AKRON BEACON J., Oct.16, 1994, at B3 ("[m]aking a baby is more than following a recipe where the ingredients are a sperm, an egg and a petri dish. It still takes a human body to feed it, warm it, protect it . . . . [In *Belsito,*] Carol Clark was one of the ingredients, whether you call her a mother or not.").

153. *See In re* Adoption of Reams, 557 N.E.2d 159 (Ohio Ct. App. 1989); Reams v. Reams, Nos. 90AP-1137, 90AP-1275, 1991 WL 160052 (Ohio Ct. App. Aug. 15, 1991); and Seymour v. Stotski, 611 N.E.2d 454 (Ohio Ct. App. 1992).

154. *Seymour,* 611 N.E.2d at 454.

155. *See id.*

156. *See id.* at 458 (rejecting Beverly's argument that her agreement with Norma gave her the status of Tessa's mother which would give her maternal rights without adopting Tessa).

157. It is possible for a woman to perform artificial insemination without medical assistance. Eisenman, *supra* note 140, at 391.

158. Seymour v. Stutski, 611 N.E.2d 454, 454-55 (Ohio Ct. App. 1992). Leslie Minor is Tessa's biological father. *Id.* at 455.

159. *See id.* at 458 (Beverly did not dispute that she was not Tessa's biological mother); and *id.* at 455 (declaring Leslie Minor Tessa's biological father).

160. Reams v. Reams, Nos. 90-AP-1137, 90AP-1275, 1991 WL 160052, at *1 (Ohio Ct. App. Aug. 15, 1991).

161. *Seymour,* 611 N.E.2d at 455.

Tessa.[162] Richard, who was awarded custody of Tessa, died before any court determined her legal parentage.[163] Beverly was incarcerated, her petition to adopt Tessa dismissed, and her attempts to be recognized as Tessa's legal mother were thwarted.[164] As a result of these unfortunate events, Tessa, who potentially had five different parents, ended up without any legal parent.[165]

Surely Ohio's parentage laws were not intended to focus exclusively on genetic heritage to the detriment of innocent children conceived of noncoital reproduction. As Tessa's genetic heritage suggests, those who donate gametes do not always act or intend to act in the best interests of resulting children.

3. Genetics + Intent = The California Approach

If genetics alone cannot effectively determine a child's natural mother,[166] perhaps genetics coupled with some other factor could. The facts of *Johnson v. Calvert*[167] are similar to those in *Belsito*. In *Johnson*, a married couple engaged the services of Anna Johnson, a single woman, to gestate an embryo created by their gametes.[168] Unfortunately for the Calverts, Anna was unwilling to honor her commitment to turn the resulting child over to the Calverts at birth.[169] Anna asked the court to declare her the child's natural mother.[170]

In a decision which has reverberated throughout the country,[171] the Cali-

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162. *Id.* Apparently, the adoption action was filed after Beverly and Richard separated. *See id.*

163. *Reams v. Reams,* 1991 WL 160052, at *1. The court noted that legal parentage does not always go hand in hand with biological parentage. *Id.* (stating that "[l]egal parentage, not to be confused with biological parentage, must be established before the issue of custody can properly be decided").

164. *See* Seymour v. Stotski, 611 N.E.2d 454, 458 (Ohio Ct. App. 1992) (finding that Beverly had no standing to pursue a parentage action when she was not the biological mother and had never been adjudicated Tessa's legal mother).

165. *See supra* note 57. Tessa's potential parents included: Norma, her biological mother, Richard and Beverly, her intended parents, Norma's husband, and Leslie, her biological father.

166. *See supra* notes 132-46 and accompanying text.

167. 851 P.2d 776 (Cal. 1993), *cert. denied,* 114 S. Ct. 206 (1993), *and cert. dismissed,* 114 S. Ct. 374 (1993).

168. Belsito v. Clark, 644 N.E.2d 760, 764 (Ohio C.P. 1994). Like Shelly Belsito, Crispina Calvert was able to produce eggs although she had undergone a hysterectomy. *Johnson,* 851 P.2d at 778.

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

170. *Id.*

171. The *Johnson* decision is cited in *Belsito* and *McDonald* and has been the subject of many law review, newspaper and magazine articles. *See, e.g.,* Jeffrey M. Place, *Gestational Surrogacy and the Meaning of "Mother":* Johnson v. Calvert, 851 P.2d 776 (Cal. 1993), 17 HARV. J.L. & PUB. POL'Y 907 (1994) (approving the genetic standard for judicial

fornia Supreme Court ruled that natural motherhood in disjunctive pregnancy cases is to be determined by biology coupled with the genetic mother's intent to create and raise the child.[172] The majority also rejected the dissent's proposed "best interest of the child" standard because that "approach raises the repugnant specter of governmental interference in matters implicating our most fundamental notions of privacy, and confuses concepts of parentage and custody."[173]

4. Critique of the Genetics + Intent Standard

Does basing motherhood on intent of the genetic mother offer a better solution than genetics alone? The *Johnson* dissent objected to the majority's genetics plus intent standard because it drew on concepts borrowed from tort,[174] intellectual property[175] and contract to determine motherhood.[176] Judge

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determinations of parenthood); Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood,* 40 UCLA L. REV. 637 (1993) (disapproving the judicial genetic standard); Healy, *supra* note 70(advocating a doctrinal structure addressing the new shared biological parenthood); *Intent of Parties is Paramount in Surrogacy Case,* NAT'L L.J., June 14, 1993, at 41; Martin Kasindorf, *And Baby Makes Four;* Johnson v. Calvert *Illustrates Just About Everything That Can Go Wrong in Surrogate Births,* L.A. TIMES (Magazine), Jan. 20, 1991, at 10; and Joan Beck, *Surrogate-Mother Ruling is a Step In the Right Direction,* CHI. TRIB., Oct. 25, 1990 (Perspective Section) at 27.

172. Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993), *cert. denied,* 114 S. Ct. 206 (1993), *cert. dismissed,* 114 S. Ct. 374 (1993) (concluding that "although the Act recognizes both genetic consanguinity and giving birth as means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law").

173. *Id.* at 782, n.10. Judge Kennard, the sole dissenter in *Johnson,* asserted that "the woman who provided the fertilized ovum and the woman who gave birth to the child both have substantial claims to legal motherhood." *Id.* at 788 (Kennard, J., dissenting).

174. *Id.* at 795-96 (Kennard, J., dissenting) (objecting to the majority's use of a "but-for" test in determining motherhood and noting that both mothers have rights under a causation standard).

175. *Id.* at 796-97 (Kennard, J., dissenting) (arguing that children are not akin to intellectual property such that the "originator of the concept" should obtain rights to them). One commentator has noted the irony of an early literary property case which used an analogy of motherhood to demonstrate the logic of intellectual property rights. Stumpf, *supra* note 25, at 208 n.33 (citing a legend in which the King settled a copyright controversy by stating "to every cow her calf").

176. *See Johnson,* 851 P.2d at 796-97 (Kennard, J., dissenting) (objecting to the notion that parental rights could be bargained away and agreeing that the child's best interest is a factor in determining parenthood). In addition, Judge Kennard strongly objects to the majority's complete disregard of the gestational mother's contribution to the child. *Id.* at 797-98 (noting that "[a] pregnant woman intending to bring a child into the world is more than a mere container or breeding animal; she is a conscious agent of creation no less than the genetic mother, and her humanity is implicated on a deep level").

Kennard was sensitive to the precedential value of that court's decision in the absence of subsequent legislation.[177] She recognized that future gestational surrogacy cases would not be identical.[178] In New York, a custody dispute between a married couple who had become parents through egg donation quickly emphasized this point.[179]

5. Analysis of the Best Interests Standard

At least one Ohio court has recognized a fundamental statutory policy of "requiring a Trial Court to act in the 'best interests' of a child[] when the well being of a minor is at issue."[180] That court specifically approved the best interest test in balancing the presumptions under section 3111.03(B).[181] Based on the developed body of legislation and common law relating to children, the court could "fathom no other standard that would better reflect policy considerations or logic."[182]

When divorcing parents dispute custody of their child, the court determines the custodial parent based on the best interest of the child.[183] A custody

Perhaps the majority's use of contractual concepts is not surprising in the modern era of the family. One commentator notes that "[t]he legal system increasingly views family members as business associates and contract partners." Janet L. Dolgin, *The Family in Transition: From Griswold to Eisenstadt and Beyond*, 82 GEO. L.J. 1519, 1534 (1994). Ohio seems to support this view. *See* Clark v. Joseph, 642 N.E.2d 36 (Ohio Ct. App.1994)(faulting unwed mothers for not being "participant[s] in ... economic partnership[s]" in which they "contribute to the child's father's individual income-producing ability"). *Id.* at 241.

177. Johnson v. Calvert, 857 P.2d 776, 799 (Cal. 1993) ("[b]ecause the [Uniform Parentage Act] does not adequately address the situation of gestational surrogacy, this court is of necessity making a rule that, unless new legislation is enacted, will govern all future cases of gestational surrogacy in California")(Kennard, J., dissenting). The court failed to recognize its impact around the country. *See supra* note 171.

178. *Id.* A subsequent paragenetic California case highlighted one of the problems created by the *Johnson* decision. *See* Moschetta v. Moschetta, 30 Cal. Rptr.2d 893 (Ct. App. 1994)(ruling that a paragenetic mother was the legal mother of the child she bore). The court noted that the "practical effect" of their decision after *Johnson* was to treat infertile couples differently in parental disputes depending on what type of reproductive technology they chose or were forced to use. *Id.* at 903. Those couples who could afford to use a disjunctive arrangement would be assured of legal parentage while those who used a paragenetic arrangement would have no assurance that their intentions to be the child's parents would be honored. *Id.*

179. *See* McDonald v. McDonald, 608 N.Y.S.2d 477 (N.Y. App. Div. 1994)(finding that the wife was the natural mother of twins born as a result of egg donation). The McDonalds' custody dispute was featured on a television program about egg donation. *60 Minutes* (CBS television broadcast, Oct. 2, 1994)(transcript on file with the *Akron Law Review*).

180. Eppley v. Bratton, No. 94 CA 7, 1994 WL 668111, at *3 (Ohio Ct. App. Nov. 7, 1994).

181. *Id.*

182. *Id.* at *4.

183. *See* OHIO REV. CODE ANN. § 3109.04 (Anderson Supp. 1994) (detailing the factors

dispute is analogous to a determination of legal parentage in a disjunctive pregnancy because two people have arguably equal and competing parental claims based on section 3111.02.[184] In each case, "the allocation of parental rights and responsibilities necessarily impacts the welfare of a minor child. And in issues of child welfare, the standard that courts frequently apply is the best interests of the child."[185]

In *Belsito*, Professors Huhn, Coleman and Denemark urged the court to use the genetic/intent standard to determine Nicholas's parentage.[186] They also urged the court to reject the best interests of the child standard because it would not be in the best interests of *children* born to gestational surrogates.[187] They reasoned, as did the majority in *Johnson*, that the best interest standard applies to determinations of custody, not natural parentage and might lead to different results in each case.[188]

However, the *Belsito* court recognized the similarity between surrogate cases and adoptions.[189] In adoption cases, the state uses its parens patriae powers to select and approve of the adopting parents with "[t]he underlying public policy . . . [being] to provide for the best interest of the child: to ensure that the abandoned child is not given to persons who will abuse or neglect the child, but . . . be placed in a home with caring and competent parents."[190] The *Belsito* court also found that public policy should be the focus of parentage determinations.[191]

D. Proposed Statutory Response to New Reproductive Technologies

Courts must decide the cases before them and not future cases when

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considered in determining custody); *In re* Pryor, 620 N.E.2d 973 (Ohio Ct. App. 1993) (confirming that the best interest of the child standard is still the primary standard in custody cases).

184. OHIO REV. CODE ANN. § 3111.02 (Anderson Supp. 1994). Judge Kennard agreed with the majority in *Johnson* that the UPA provides an equal basis for genetic and gestational mothers to argue their motherhood. *Johnson v. Calvert,* 851 P.2d 776, 795 (Cal. 1993), *cert. denied,* 114 S. Ct. 206 (1993), *cert. dismissed,* 114 S. Ct. 374 (1993) (Kennard, J., dissenting). Yet the California act also provides for only one "natural mother," forcing a choice between the two. *Id.*

185. *Johnson,* 851 P.2d at 799; *Epply,* 1994 WL 668111, at *3-4.

186. Brief Amicus Curiae at 8, Belsito v. Clark, 644 N.E.2d 760 (Ohio C.P. 1994).

187. *Id.* (noting that the best interests of the child standard applies to custody determinations, not determinations of natural parentage). *Cf. supra* notes 180-82 and accompanying text.

188. Brief Amicus Curiae at 8, *Belsito,* 644 N.E.2d 760.

189. Belsito v. Clark, 644 N.E.2d 760, 765 (Ohio C.P. 1994).

190. *Id.*

191. *Id.* (citing Davis v. Davis, 842 S.W.2d 588, 591 (Tenn. 1992)).

resolving such difficult issues as natural parentage.[192] Legislatures are the appropriate forums to deal with these issues and to determine public policy.[193] One commentator has proposed a Uniform Surrogacy Act to deal with the complex issues surrounding assisted reproduction.[194] The National Conference of Commissioners on Uniform State Laws approved a model act in 1988.[195] Under the model act, gestation and birth provide the primary definition of motherhood.[196] The Drafting Committee tailored the model act to meet the unique needs of children born of assisted conception.[197]

Ohio's legislature would be wise to investigate these proposals to clarify the legal status of children and parents who are parties to collaborative reproduction.

IV. BACKLASH: RAMIFICATIONS OF OHIO'S NEW DEFINITION OF "MOTHER"

Clinically separating the gestational, genetic and functional aspects of motherhood creates chaos in the corresponding parental rights and responsibilities under Ohio law.[198] Summit County, and any other Ohio jurisdictions

192. Judge Spicer recognized this point and limited his decision in *Belsito* to the facts of that case. *See Belsito*, 644 N.E.2d at 767 (finding that he could not properly rule on determining the status of a gestational mother who asserts paternal rights). Thus, the *Belsito* decision is limited to cases involving a gestational donation and waiver of a gestational mother's right to motherhood under §3111.02.

193. For a discussion of legislative responses to surrogacy itself, see Lieber, *supra* note 26.

194. *See* Jamie Levitt, *Biology, Technology and Geneology: A Proposed Uniform Surrogacy Legislation*, 25 COLUM. J.L. & SOC. PROBS. 451 (1992). The language of the proposed act is found in the Appendix to Levitt's article and defines the birth mother as the child's legal mother unless the intended mother complies with the act's provisions and agrees irrevocably in writing to become the child's mother. *Id.* at Appendix § 4.

195. UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT, 9B U.L.A. Supp. 1994 Historical Note (1988). To date, only two states have adopted this act; North Dakota, N.D. CENT. CODE §§ 14-18-01 to -07 (1991); and Virginia, VA. CODE ANN. §§ 20-156 to -165 (Michie Supp. 1994). For a good discussion of the model act, see Mimi Yoon, *The Uniform Status of Children of Assisted Conception Act: Does it Protect the Best Interests of the Child in a Surrogate Arrangement?*, 16 AM. J.L. & MED. 525 (1990). *See also supra* part III.B.

196. UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT §2 states "a woman who gives birth to a child is the child's mother." UNIF. STATUS OF CHILDREN OF ASSISTED CONCEPTION ACT § 2, 9B U.L.A. (1988). However, if a state has adopted Alternative A of the act and the intended mother has carefully followed the statutes guidelines for contracting with a surrogate, the intended mother is the legal mother of the child. *Id.* at §5(a), Alternative A. Alternative B does not recognize surrogacy agreements and declares the surrogate birth mother the legal mother of the child. *Id.* at § 5, Alternative B.

197. *Id.* at Prefatory Note (1994 pocket part) (the act is narrowly designed "to limit its applicability to what is best for children").

198. *See* Hill, *supra* note 57, at 353 (commenting that "[m]odern technology has wreaked

that accept the Summit County precedent, will now be faced with new legal dilemmas. The genetic and gestational parents will now have conflicting rights and responsibilities.

A. Legal Status of the Genetic/Legal Parents

Once the genetic parents are declared to be the natural parents of the child, they receive a bundle of rights and duties with respect to the fetus/child and the gestational mother.[199] The parents are required to pay for the support of their unborn child.[200] As a third-party provider of that support, the gestational mother would be entitled to collect from the genetic parents for prenatal support.[201] However, according to *Belsito*, genetic parents may waive their parental rights before birth, making it difficult for the gestational mother to collect for prenatal support.[202] If prenatal testing discloses significant fetal abnormalities, the genetic parents may be more likely to waive their parental rights.

B. Legal Status of the Gestational Mother.

When the gestational mother is denied parental status, her bundle of responsibilities far outweighs her vested rights. She is a legal stranger to the

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havoc on conventional and legal notions of parenthood").

199. *E.g.*, OHIO REV. CODE ANN. § 2151.03 (Anderson 1989) (making the parents liable for the proper care of their children, including "proper or necessary subsistence, education . . . or other care necessary for . . . health, morals and well-being"); OHIO REV. CODE ANN. § 3103.03 (Anderson Supp. 1994) (imposing a duty of support for minor children on their biological or adoptive parents); Santosky v. Kramer, 455 U.S. 745, 753 (1982) (finding natural parents have a natural right to "care, custody and management of their children"); and Meyer v. Nebraska, 262 U.S. 390 (1923) (finding a constitutional right in parents to bring up children). The parental rights follow the parental responsibilities for the child's care and support. *See* Anne L. Goodwin, *Oh, Brave New World of Parenthood!*, 12 DEL. LAW. 25, 28 (Summer 1994). Ohio parents are equally responsible for support and guardianship of their children. OHIO REV. CODE ANN. § 2111.08 (Anderson 1994).

200. *See* OHIO REV. CODE ANN. §§ 2151.03, 3103.03 (Anderson 1989 & Supp. 1994).

201. *See* OHIO REV. CODE ANN. § 3103.03(D) (Anderson Supp. 1994)(allowing a third party to provide necessary support for a minor child in good faith and be reimbursed for those necessaries from the child's parents).

202. *See* Belsito v. Clark, 644 N.E.2d 760, 767 (Ohio C.P. 1994) (apparently allowing the genetic parents to consentually waive their parental rights before birth). The gestator would likely file a maternity/paternity action. Unfortunately, she would not be entitled to recover attorney fees she incurs in such an action even if she is successful. *See* Clark v. Joseph, 642 N.E.2d 36 (Ohio Ct. App. 1994) (finding that a "mother who has not been married to the father of her child has not been a participant in an economic partnership in which she has contributed to the child's father's individual income-producing ability" and thus has no right to be "treated fairly" and "become self-supporting or . . . be provided sufficient income to maintain life-styles as close as possible to those which were attained during their marriages"

fetus/child. As such, she risks tort liability to both the genetic parents[203] and the fetus,[204] criminal liability,[205] and is in danger of sacrificing her individual right of privacy for the fetus's well-being.[206] Fetal rights advocates maintain

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as do divorcing women who seek child support from the child's father) *Id.* at 41. Such disparate treatment between married and unmarried mothers is not a violation of the equal protection clauses of the Ohio and U.S. Constitutions. *See id.*

203. Ohio recognizes a parent's right to assert a derivative claim against a third-party tortfeasor who injuries the parent's minor child. *See* Gallimore v. Children's Hosp. Med. Ctr., 617 N.E.2d 1052, 1057 (Ohio 1993). The parents' damages may include loss of filial consortium. *Id.*

204. *See infra* notes 220-23 and accompanying text. Even paragenetic mothers risk tort liability to their fetuses. *See* Kirchner v. Crystal, 474 N.E.2d 275 (Ohio 1984) (abolishing the doctrine of parental immunity); Clark v. Snapper Power Equip., Inc., 488 N.E.2d 138 (Ohio 1986) (declaring that parental immunity is not a total bar to a child's suit against his/her parents); and Shearer v. Shearer, 480 N.E.2d 388 (Ohio 1985) (permitting a child to sue for parental negligence). While there are no Ohio cases in which a child sued his parents for prenatal injuries, Ohio does recognize a child's right to sue third parties who inflict injuries on him in utero after viability. *See* Williams v. Marion Rapid Transit Inc., 87 N.E.2d 334 (Ohio 1949) (determining that an unborn, viable child is a "person" within the meaning of OHIO CONST., Art. I, § 16). As a third party to the fetus, a gestational mother might be especially vulnerable to intrauterine tort liability.

Because Ohio allows a child to both sue for prenatal injuries and to sue his/her own parents, it is likely Ohio will follow Michigan's lead and recognize a child's cause of action against its own mother for prenatal injuries. *See* Grodin v. Grodin, 301 N.W.2d 869 (Mich. Ct. App. 1980)(allowing a father and son to maintain an action against the child's mother for injuries the child sustained as a result of his mother taking tetracycline during her pregnancy. The court determined that a child's mother would be subject to the same liability standards as third parties for prenatal injuries.).

Considering that the *Grodin* decision was criticized because it treated pregnant women as a legal strangers to their fetuses, it is almost certain that a gestational mother, already a legal stranger to her child, will be held liable for negligent prenatal injuries. *See* Stallman v. Youngquist, 531 N.E.2d 355, 358 (Ill.1988) ("[t]he *Grodin* court would have the law treat a pregnant woman as a stranger to her developing fetus for purposes of tort liability" and that "profound implications . . . would result from such a legal fiction").

Despite this distinction, at least one commentator opposes imposing tort liability on a gestational mother because it "would unduly burden a pregnant woman's rights of privacy, autonomy, and bodily integrity — elevating the interests of fetuses above the rights of women." Karen A. Bussel, *Adventures in Babysitting: Gestational Surrogate Mother Tort Liability,* 41 DUKE L.J. 661, 671 (1991). Bussel cautions that otherwise legal activity would become illegal for gestational surrogates. *Id.* at 688 ("[t]he specter of tort liability may restrict . . . gestational surrogate mothers . . . from making choices that we regularly allow others to make"). Of course, consistent with the general public's consensus, Bussel has no sympathy for gestational mother's who abuse illegal drugs while pregnant. *See id.* at 689 ("states already forbid people from using controlled substances, [so] no autonomy rights are implicated in permitting injured children to recover for injuries that result from their mothers' gestational use of illegal drugs").

205. *See infra* notes 225-30 and accompanying text.

206. *See infra* note 208. The genetic parents may be able to exercise at least as much power over the woman as the State. *See* Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 69 (1976) (linking a father's power to affect a woman's reproductive decisions with

that pregnant women have an affirmative duty to rescue their fetuses once they have decided to carry them to term.[207]

Prenatal medical treatment presents the greatest potential for conflict between the interests of the gestational mother, the fetus and the genetic parents. "[P]rimary care fetal medicine is a specialty in its dawning."[208] This new specialty creates a conflict between the rights and interests of both paragenetic and disjunctive gestational mothers and their fetuses.[209] These conflicts erect a special barrier between the gestational mother and her own doctor who may act on behalf of the fetus or the genetic parents.[210] The gestational mother may be forced to endure invasive and non-invasive medical treatments and tests against her wishes for the benefit of the fetus and/or its genetic parents.[211] Several paragenetic mothers have already been forced to undergo involuntary cesarean sections.[212] In addition to the physical and mental pain such proce-

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that of the state's). *But see* David C. Blickenstaff, Comment, *Defining the Boundaries of Personal Privacy: Is There a Paternal Interest in Compelling Therapeutic Fetal Surgery?*, 88 NW. U. L. REV. 1157 (1994) (arguing that a father may not force a pregnant woman to allow fetal surgery because it would impose an affirmative duty upon her for the fetus' well-being and is "the ultimate violation of her liberty"). *Id.* at 1197-99.

207. Janet Gallagher, *Prenatal Invasions & Interventions: What's Wrong with Fetal Rights*, 10 HARV. WOMEN'S L.J. 9, 34 (1987).

208. Carl P. Weiner, *Primary Care Fetal Medicine, in* THE BEGINNING OF HUMAN LIFE 252 (Fritz K. Beller et al. eds., 1994). In addition, fetal rights is a growing area of the law. Gallagher, *supra* note 207, at 37-41.

209. One such heartbreaking case is *In re* A.C., 573 A.2d 1235 (D.C. 1990). In that case, a terminally ill pregnant patient was forced to undergo a cesarean section to save the life of her fetus. Both mother and child died. The District of Columbia Court of Appeals ruled that the patient had the right to determine whether to consent to the procedure and that "the state's interest in preserving life must be truly compelling to justify overriding a competent person's right to refuse medical treatment." *Id.* at 1246.

210. *Id.* at 1263, n.13 ("the current ethical position of the medical community is that a physician treating a pregnant woman in effect has two patients, the mother and the fetus").

211. The actual benefit of such procedures could be questionable. *See* Weiner, *supra* note 208, at 245 (stating that "[t]here are a relatively small number of fetal structural malformations currently thought potentially amenable to antenatal therapy" and that only two of seven fetuses survived a particular open antenatal surgery) and *id.* at 251-52. *See also* Frank A. Chervenak & Laurence B. McCullough, *Court-Ordered Cesarean Delivery, in* THE BEGINNING OF HUMAN LIFE, *supra* note 208, at 257-72. In an open surgery, a portion of the fetus is exposed and operated upon. Weiner, *supra* note 208, at 251. This surgery poses a risk of death to the gestational mother. *See id.*

212. *See In re* A.C., 573 A.2d 1235 (D.C. 1990) (in which a court-ordered cesarean on a terminally ill pregnant woman failed to save the lives of either the fetus or the mother; both died within two days of the procedure which was performed solely in the interest of the fetus). *See also In re* Madyun, No. 189-86 *cited in In re* A.C. app. at 1259 (D.C. Super. Ct. July 26, 1986) (ordering a woman to have a cesarean section because of the danger of fetal sepsis (infection)); Jefferson v. Griffin Spalding County Hosp. Auth., 274 S.E.2d 457 (Ga. 1981) (where a pregnant woman was ordered to undergo a cesarean section for her own benefit that of her fetus because both were in danger of dying due to the placental blockage of

dures may entail, there are substantial risks to the gestational mother's own health.[213]

The gestational mother may take solace in *Cox v. Court of Common Pleas of Franklin County*.[214] In that case, the Franklin County Common Pleas Court refused to allow a juvenile court to "compel a pregnant woman to take action for the alleged benefit of her unborn child."[215] However, if the gesta-

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the birth canal (placenta previa)). Judge Spicer has also ordered a pregnant woman to submit to a cesarean section against her wishes. McBane, *supra* note 3, at A16.

Pregnant women have also been ordered to submit to blood transfusions for the sake of their fetuses. *See* Raleigh Fitkin-Paul Morgan Mem. Hosp. v. Anderson, 201 A.2d 537 (N.J. 1964) (ordering a Jehovah's Witness to submit to a blood transfusion), *cert. denied,* 377 U.S. 985 (1964); *In re* Jamaica Hosp., 491 N.Y.S.2d 898 (Sup. Ct. 1985) (ordering a Jehovah's Witness to submit to a blood transfusion because the State's interest in the fetus, even before viability, outweighed the woman's interest); Crouse Irving Mem. Hosp., Inc. v. Paddock, 485 N.Y.S.2d 443 (Sup.Ct. 1985) (ordering blood transfusions in anticipation of a premature delivery). *But see*, Taft v. Taft, 446 N.E.2d 395 (Mass. 1983)(rescinding a lower court's order that the woman undergo a "purse string" operation for the benefit of her fetus).

Because of the time constraints inherent in these decisions,

> "it is difficult or impossible for the mother to communicate adequately with counsel, or for counsel to organize an effective factual and legal presentation in defense of her liberty and privacy interests and bodily integrity. Any intrusion implicating such basic values ought not to be lightly undertaken when the mother not only is precluded from conducting pre-trial discovery (to which she would be entitled as a matter of course in any controversy over even a modest amount of money) but also is in no position to prepare meaningfully for trial."

In re A.C., 573 A.2d at 1248. These problems are compounded by the questionable value of the medical assessments of the need for the procedures and their success. Kenneth Jost, *Mother Versus Child; Law and Medicare,* 75 A.B.A. J. 84, 86 (1989) (noting that the Ethics Committee of the American College of Obstetricians and Gynecologists is opposed to using court orders to force patients to submit to procedures because of the medical uncertainty of the diagnosis).

213. Intrusive procedures are the most dangerous to women. For example, "fetal surgery techniques are about as intrusive as Cesarean sections, and Cesareans are four times riskier for mothers than normal childbirths." Blickenstaff, *supra* note 206, at 1191. Amniocentesis, an invasive diagnostic technique during which the physician inserts a needle through the abdominal and uterine walls to obtain amniotic fluid for testing is also dangerous. Weiner, *supra* note 208, at 246. Despite the fact that it is "the most common invasive procedure performed in fetal medicine," *id.*, it does pose a material risk to the gestational mother of death from amniotic-fluid embolism. *See* Bedel v. Univ. Ob/Gyn Assocs, Inc., 603 N.E.2d 342 (Ohio Ct. App. 1991) (finding that there was a genuine issue in a medical malpractice suit as to whether the physician disclosed this material risk to the patient, whether the risk materialized and was the proximate cause of the patient's death).

214. 537 N.E.2d 721 (Ohio Ct. App. 1988).

215. *Id.* at 725. The appellate court determined that the juvenile court had no jurisdiction over the adult mother. *Id.* The court avoided the issue of whether the juvenile court had jurisdiction over the unborn child. *Id.* at 724 ("the questions as to whether the juvenile court can exercise jurisdiction over an unborn child [found in § 2151.23] and whether the statutory definition of 'child' includes 'an unborn child' need not be determined by this court". The

tional mother is a minor, a court could arguably determine that she is unruly or dependent for refusing to consent to prenatal care.[216] As such, she could fall within the jurisdiction of the court and be "detained" for the remainder of her pregnancy.

Elevating fetal interests over those of their paragenetic mothers is disturbing. However, paragenetic mothers' postnatal responsibilities may be lessened by protective prenatal treatment and this benefit might justify invasion of her personal rights.[217] But a forced invasion of a disjunctive gestational mother's bodily autonomy for the sake of a fetus to which she is a legal stranger smacks of slavery.[218] In addition, gestational mothers incur a greater risk of forced invasions than paragenetic mothers because of the lack of standards for ordering such invasions.[219]

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adult mother in this case was abusing illegal drugs.). Section 2151.23(A) gives the juvenile court exclusive jurisdiction over issues "[c]oncerning any child who . . . is alleged to be a juvenile traffic offender, or a delinquent, unruly, abused, neglected, or dependent" and "[t]o hear and determine all criminal cases charging adults with the violation of any section" of that chapter. OHIO REV. CODE ANN. § 2151.23(A) (Anderson 1994).

216. Such a determination would invoke the juvenile court's jurisdiction over the minor gestational mother's body under OHIO REV. CODE ANN. § 2151.23 (Anderson Supp. 1994).

217. Pregnant women are the only people who are compelled to subordinate their health interests to those of someone else. *See* Gallagher, *supra* note 207, at part II.C (discussing "judicial refusal to physically subordinate one individual to another").

Justice Blackmun's observation of motivations in the abortion debate applies equally well to forced invasions on a pregnant woman. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 112 S. Ct. 2791 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part and dissenting in part) (noting that "[t]he Chief Justice's view of the State's compelling interest in maternal health has less to do with health than it does with compelling women to be maternal"). Forced invasions force women to be maternal.

218. Gallagher, *supra* note 207, at part II.C, note 81 and accompanying text (arguing that "appropriation of a woman's body by forced medical treatment on behalf of a fetus has grave thirteenth amendment implications").

Treating gestational mothers as mere incubators threatens their very personhood. "[T]o use the force of the law to compel such a 'donation' would be to treat the 'donor' as a thing rather than a person. No clearer violation can be imagined of the principle that persons are to be treated as ends in themselves and never merely as means." Mary Anne Warren, *Women's Rights Versus the Protection of Fetuses, in* THE BEGINNING OF HUMAN LIFE, *supra* note 208, at 293-94.

219. Under the existing system, women in similar situations are not being treated equally because "physicians, hospitals and their lawyers have unfettered discretion regarding if and when they seek the use of State compulsion in the life of a pregnant woman in order to benefit her fetus." Lawrence J. Nelson, *The Mother and Fetus Union: What God has Put Together, Let No Law Put Asunder?, in* THE BEGINNING OF HUMAN LIFE, *supra* note 208, at 301-17. This discretion leads to discrimination. A national survey of court-ordered prenatal interventions showed that the poor, minorities and unmarried women were at greatest risk of force. *Id.* at 306. (finding that of the women forced to undergo procedures: "eighty-one percent of the women involved were black, Asian or Hispanic; 44% were unmarried; 24% did not speak English as their primary language; and 100% were treated in a teaching hospital clinic or were receiving public assistance"). In addition, the decision to compel is made hastily

A gestational mother also risks tort liability because her special relationship with the fetus probably gives rise to a duty of care.[220] She completely controls access to the child throughout the pregnancy and can influence its growth and development.[221] The gestational mother may also owe a duty of care to the genetic parents.[222] If the gestational mother's negligence kills the fetus, she may be liable for its wrongful death.[223] Whether or not the gestational mother is the source of the fetal injury, a question arises under whose insurance policy a claim for the injury could be made.[224]

Tort liability and physical invasion are not the only risks the disjunctive ;estational mother incurs. Her risk of criminal liability is greater because she ; not the "natural mother" of the child.[225] For instance, if she takes alcohol r drugs which harm the fetus, the parents may try to prosecute her for child ıdangerment. Although the Ohio Supreme Court has determined that a "*par-ıt* may not be prosecuted for child endagerment for substance abuse occurıg before the birth of the child,"[226] the Court assumed that the pregnant ›man was also the mother of the child.[227]

ıout full representation of the woman's interest. *Id.* (noting that judges are only hearing proponent's evidence and that the pregnant woman "is almost never represented by ›rmed legal counsel").

.20. *See* Berdyck v. Shinde, 613 N.E.2d 1014 (Ohio 1993) (finding that the law only imposes ıuty on one person for the benefit of another based on the relationship between them); ıgle v. White Castle Sys., Inc., 607 N.E.2d 45 (Ohio Ct. App. 1992) (holding that an .firmative duty to protect another could result from the existence of a special relationship).

221. Arguably, her duty of care to the child entitles her to the right to direct that care. *See* Blickenstaff, *supra* note 206, at 1186 (arguing that the father's duty of support entitles him to direct certain aspects of his child's life).

222. The genetic parents have a derivative cause of action against someone who negligently or intentionally causes harm to the child. *See supra* note 203.

223. *See* Werling v. Sandy, 476 N.E.2d 1053, 1056 (Ohio 1985) (holding that a "viable fetus which is negligently injured *en ventre sa mere,* and subsequently stillborn, may be the basis for a wrongful death action"). The fetus must be viable at the time of the injury, *id.* at 1054, and viability must be established for each pregnancy by expert medical opinion. Egan v. Smith, 622 N.E.2d 1191, 1193 (Ohio Ct. App. 1993).

224. In Ohio, an unborn viable fetus is a "person" under family compensation clauses in automobile liability policies. Peterson v. Nationwide Mutual Ins. Co., 197 N.E.2d 194 (Ohio 1964).

225. In *Johnson v. Calvert,* 851 P.2d 776 (Cal. 1993), the only contested gestational surrogacy case to date, the genetic parents claimed that the gestational mother had kidnapped their child. Rorie Sherman, *Surrogacy Again Rears Its Head: Are Contracts Enforceable?,* NAT'L L.J., Oct. 8, 1990, at 3, 1.

226. State v. Gray, 584 N.E.2d 710, syllabus (Ohio 1992).

227. *Id.* at 711 ("we conclude that R.C. 2919.22(A) does not create a statutory duty which is breached when a parent uses cocaine prior to the child's birth" and "a plain reading of the statute indicates that th[e] parent-child relationship must be in existence at the time of the creation of the substantial risk of harm"). Section 2919.22(A) prohibits any person acting in

Even if the gestational mother is not liable for child endangerment,[228] she may be liable for vehicular homicide if she is under the influence of alcohol or drugs, is in an automobile accident and the child is born alive but later dies.[229] A lower court has also held that a viable fetus is a "child" under the child abuse statute and harm to it may be considered abuse.[230]

The gestational mother's privacy rights are also in danger. Although commentators generally agree that the gestational mother is free to abort the fetus notwithstanding any clause to the contrary in her contract with the genetic parents,[231] the U.S. Supreme Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[232] narrowed every pregnant woman's right to an abortion. The *Casey* undue burden standard[233] might not protect a pregnant woman who wants to abort a fetus that is not her "property." If such a case made it to the Court, it is likely the Court would finally have to clarify the basis for a woman's right to an abortion.[234] The Court would either have to clearly define the fetus as a part of the gestational mother's body over which she has autonomous control; define the fetus as a part of the gestational

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a parental capacity for a minor child from creating "a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support." OHIO REV.CODE.ANN. §2919.22(A) (Anderson Supp. 1994).

228. The *Gray* court also noted that "the child did not become a 'child' within the contemplation of the statute until she was born." *Gray*, 584 N.E.2d at 711.

229. *See* State v. Dickinson, 275 N.E.2d 599 (Ohio 1971) (where the court interpreted the word "another" in § 4511.181 to mean to have been born alive). Section 4511.181 was repealed effective Jan. 1, 1974, but §§ 2903.06 and 2903.07 are "roughly analogous" to former § 4511.181. *See* OHIO REV. CODE ANN. § 2903.06 at Comment (Anderson 1993) The *Gray* court distinguished *Dickinson* because (1) no special relationship need exist in a homicide case, (2) the homicide statute requires proof of harm as an element of the crime and (3) the court was unwilling to impose criminal liability on the part of a pregnant woman because of the "unique relationship" she shared with the fetus. *Gray*, 584 N.E.2d at 712. For the *Gray* court, this unique relationship included the eventual parent-child relationship. *See supra* note 227.

230. *In re* Ruiz, 500 N.E.2d 935 (Ohio C.P. 1986). The *Ruiz* court was interpreting §2105.031. *Id.*

231. *See* James Bopp, Jr., *Surrogate Motherhood Agreements: The Risks to Innocent Human Life, in* BEYOND BABY M, *supra* note 9, at 208. The New Jersey trial court judge in the infamous *In re Baby M* agreed. *See In re* Baby M, 525 A.2d 1128 (N.J. Super. 1987). The New Jersey Supreme Court did not reach this issue on appeal. *In re Baby M*, 537 A.2d 1227 (N.J. 1988).

232. 112 S. Ct. 2791 (1992) (affirming a woman's right to an abortion without unduly burdensome state regulation).

233. *Id.* at 2821 (summarizing its holding that "[a]n undue burden exists . . . if [the] purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability").

234. *See id.* at 2818 (criticizing the trimester framework because it "misconceives the nature of the pregnant woman's interest" but failing to elaborate on the specific nature of a woman's interest in an abortion).

mother's body but not allow her autonomous control over it; or declare the fetus a separate entity with rights of its own. If the Court makes the latter two determinations, it would also have to decide what rights a fetus has and how those rights are balanced against the gestational mother's rights. A gestational mother carrying a fetus as a legal stranger may not find sympathy for her plight on the Court.[235]

Finally, the gestational mother's employment may also threatened as a result of her pregnancy.[236]

C. Legal Status of the Fetus/Child

Currently, fetuses stand in legal limbo. While *Roe v. Wade*[237] clearly excluded them from recognition as "person[s]" under the Fourteenth Amendment,[238] fetuses are enjoying increasing legal recognition.[239]

In the area of inheritance rights, children resulting from a disjunctive pregnancy are placed in a legal quandary after *Belsito*.[240] In Ohio, a child normally enjoys inheritance rights as a result of his or her genetic ancestry.[241] However, an "illegitimate" child may only inherit from its genetic father's estate if (1) the father has acknowledged paternity according to section 2105.18,[242] (2) a court has established the father's paternity under Chapter 3111, or (3) the child establishes paternity through genetic testing.[243] The *Belsito* court confused the inheritance rights of children born to disjunctive

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235. Disjunctive gestational mothers have been referred to as "reproductive prostitute[s]," Michele Galen, *Surrogate Law: Court Ruling Could Affect Surrogate Contracts,* NAT'L. L.J., Sept. 29, 1986, at 1, 8; a title which may not elicit support for her position.

236. *See* Frank v. Toledo Hospital, 617 N.E.2d 774 (Ohio Ct. App. 1992) (pregnant hospital employee lost her sex discrimination suit after she was fired because she was unable to receive a rubella vaccination). Although the *Frank* decision threatens the rights of all pregnant women, it particularly threatens a gestator. The gestator is either being paid for her services (indicating that she needs the money and can ill-afford to lose her job) or is voluntarily carrying the fetus (in which case she should not be forced to sacrifice her employment for the benefit of the genetic parents who retain all rights with respect to the fetus).

237. 410 U.S. 113 (1973).

238. *Id.* at 158.

239. *See* Gallagher, *supra* note 207, at 37-41.

240. *See* Belsito v. Clark, 644 N.E.2d 760, 768 (Ohio C. P. 1994) (declaring that Nicholas may inherit from and through his genetic parents but not his gestational mother).

241. *See* OHIO REV. CODE ANN. §2105.06 (Anderson 1994) (providing a descent and distribution scheme focusing on children and lineal descendents).

242. OHIO REV. CODE ANN. §2105.18 (Anderson 1994). This section does not provide for acknowledgment of maternity. *Id.*

243. *See* Alexander v. Alexander 537 N.E.2d 1310 (Ohio C.P. 1988). The court may order disinterment to accomplish the genetic testing post mortem. *Id.*

gestational mothers.[244] Such children may now be judicially denied their established statutory right to inherit from gestational mothers without any express or implied statutory authority for that denial.[245] In addition, a child's maternity is no longer demonstrated through birth.[246] These results do not seem to be in children's best interests.

CONCLUSION

Ohio needs to create a new parentage paradigm to meet the demographic and medical realities of late twentieth century. Collaboration is now possible in creating life. That collaboration must be acknowledged in our legal system. Historical concepts of exclusivity in parenthood are no longer valid in the face of disjunctive pregnancies, single-sex partnerships and other non-traditional families. A gestational mother earns her status as "mother" through her gestational contributions to the child and the potential physical, emotional and legal liability she incurs in gestating that child. Even if the law insists on adhering to its parental exclusivity principle, the gestational mother must be accorded rights consistent with her responsibilities and contributions. Gestating a child takes so much more commitment than does donating a germ cell. Yet after *Belsito*, Ohio law seems curiously backwards because it recognizes genetics as the greater contribution.

Gestation is the essence of motherhood. If it is not, there is no such thing as motherhood, only female fatherhood. The unique gestational contributions to the child's biology and sociology must be recognized for the best interests of children and society. And like men who may donate their reproductive capacities, women should be allowed to donate both features of their reproductive capacities to create cohesive, voluntary and binding family units.

Shelly Belsito wanted to mother her genetic son and Carol Clark was willing to donate her gestational motherhood. Thus, the *Belsito* decision

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244. The *Belsito* court ruled that Nicholas may only inherit by and through his genetic parents. *Belsito,* 644 N.E.2d at 768. Until the *Belsito* case, a child's right to inherit from and through its mother, whether married or not, was firmly established. *See* OHIO REV.CODE ANN. § 2105.17 (Anderson 1994) (allowing a child born to an unwed mother to inherit from and through her "as if born in lawful wedlock").

245. *See supra* notes 241-44 and accompanying text (setting forth the statutory authority for granting and denying paternal inheritance rights).

246. *See supra* notes 138-40 and accompanying text (discussing the *Belsito* court's rejection of a disjunctive gestational mother's right to demonstrate her maternity through birth, although gestational mothers who assert their rights are unaffected by the decision). As a result of the *Belsito* decision, a child's mother is determined at conception only when both disjunctive mothers agree because if they do not agree, both remain entitled to claim motherhood under §3111.02.

reaches the correct result but for the wrong reason. A court should not be forced to make a choice between maternal contributions without legislative guidance. I challenge the Ohio legislature to develop a parentage law that both recognizes and encourages responsible reproduction.

And thank you Nicholas, for awakening Ohio's legal community.

MICHELLE PIERCE-GEALY