

2001

## The G.I.F.T. of Two Biological and Legal Mothers

Ryiah Lilith

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/jgspl>



Part of the [Family Law Commons](#), and the [Sexuality and the Law Commons](#)

---

### Recommended Citation

Lilith Ryiah. "The G.I.F.T. of Two Biological and Legal Mothers." American University Journal of Gender Social Policy and Law 9, no. 1 (2001): 207-242.

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in Journal of Gender, Social Policy & the Law by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact [fbrown@wcl.american.edu](mailto:fbrown@wcl.american.edu).

# THE G.I.F.T. OF TWO BIOLOGICAL AND LEGAL MOTHERS

RYIAH LILITH\*

I.	INTRODUCTION .....	208
II.	THE LACK OF LEGAL PROTECTION FOR LESBIAN-HEADED FAMILIES .....	211
A.	<i>Children from Previous Marriages</i> .....	211
B.	<i>Foster Care</i> .....	212
C.	<i>Adoption</i> .....	213
III.	RECOGNIZING THE PARENTAL STATUS OF BOTH MOTHERS IN CASES OF LESBIAN COUPLES WHO CONCEIVE A CHILD THROUGH GIFT/ZIFT .....	215
A.	<i>Lower Courts' Recognition of Both the Genetic and Gestational Mothers as the Legal Parents of a Child Conceived by a Lesbian Couple through GIFT/ZIFT</i> .....	216
B.	<i>Determination of Parental Status in Gestational Surrogacy Cases Supports Legal Recognition of Both Mothers</i> .....	217
1.	Preconception Intent Test: The Parties who Intended to Raise the Child are the Legal Parents .....	218
2.	The Best Interests Test: Determination of Parental Rights Must Serve the Best Interests of the Child .....	221
3.	The Genetic Contribution Test: Recognizing the Genetic Parents as the Child's Legal Parents .....	225
C.	<i>U.S. Supreme Court Cases Establishing Fundamental Parental Rights</i> ..	227
1.	Fundamental Liberty Interest Inherent in Procreation and Parenting ..	227
2.	Due Process: <i>Bowers v. Hardwick</i> .....	228
3.	Equal Protection: <i>Romer v. Evans</i> .....	230
D.	<i>Statutory Support for Legal Recognition of Both Mothers</i> .....	232
1.	The Uniform Status of Children of Assisted Conception Act .....	232
2.	The Uniform Parentage Act .....	234
IV.	RECOMMENDATIONS .....	239
V.	CONCLUSION: THE GIFT OF TWO BIOLOGICAL MOTHERS.....	240

---

\*J.D. Candidate, American University Washington College of Law, 2001; B.S., Florida State University, 1997. I wish to thank Barbara Lavender, whose article in CIRCLES describing her lesbian GIFT case inspired this Comment and provided a starting point for my analysis.

## I. INTRODUCTION

In 1987, an estimated three million lesbians and gay men in the United States raised between eight and ten million children.<sup>1</sup> In 1998, approximately six to ten million lesbian and gay parents raised as many as fourteen million children.<sup>2</sup> The use of assisted reproductive technologies ("ARTs")<sup>3</sup> account for part of these increasing numbers of lesbian and gay parents.<sup>4</sup> However, while

1. See WILLIAM B. RUBENSTEIN, SEXUAL ORIENTATION & THE LAW 801 (2d ed. 1997), citing ABA Annual Meeting Provides Forum for Family Law Experts, 13 FAM. L. REP. (BNA) 1512, 1513 (1987).

2. See Lambda Legal Defense and Education Fund, *Lesbian & Gay Parenting: A Fact Sheet*, at <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=31> (last visited Oct. 9, 1999) (providing estimates of the number of lesbian and gay parents); see also Family Pride Coalition, *Frequently Asked Questions*, at <http://www.familypride.org/faq/index.html> (last visited Oct. 9, 1999) (listing the common percentages used to determine the number of lesbian and gay parents).

3. Human reproduction requires four biological components and processes: (1) ova, (2) sperm, (3) fertilization, and (4) gestation. ARTs essentially intervene in one or more of these four processes to facilitate reproduction. See BARRY R. FURROW ET AL., BIOETHICS: HEALTH CARE LAW AND ETHICS 95 (3d ed. 1997) (detailing the process of human reproduction and highlighting the points at which fertility problems commonly occur). ARTs include artificial insemination-homologous ("AIH") (artificially inseminating a woman with the sperm of a man who intends to help parent the child, usually the woman's husband or partner), artificial insemination-donor ("AID") (artificially inseminating a woman with the sperm of a man who will presumably have no relationship with the child), *in vitro* fertilization ("IVF") (removing a woman's ova and mixing them in a container with sperm, then returning the fertilized ova to the woman's uterus), gamete intrafallopian transfer ("GIFT") (removing the ova from one woman and injecting them along with sperm into the fallopian tubes of a second woman), zygote intrafallopian transfer ("ZIFT") (removing the ova from one woman and fertilizing them, then placing the zygotes in the uterus of a second woman), embryo transfer (inseminating one woman and then removing the embryo and placing it in the uterus of the woman who intends to gestate and raise the child), and ova transfer (removing the ova of one woman and inserting them in the fallopian tubes of a second woman). See *id.* at 105-06 (discussing various procedures that facilitate reproduction).

This Comment addresses only those ARTs which facilitate reproduction and does not consider genetic reproductive technologies, such as cloning. However, note that to a certain extent genetic reproductive technology revolves around reproduction using only female genetic material. See Kyle Velte, Comment, *Egging on Lesbian Maternity: The Legal Implications of Tri-Gametic In Vitro Fertilization*, 7 AM. U. J. GENDER, SOC. POL'Y & L. 431, 433 n.11 (1999) (describing several experimental and theoretical techniques for creating an embryo with gametes from three individuals—"an egg from each of two women and the sperm from a donor"); Steve Farrar, *Science Will Give Women Ability to "Father" a Baby*, LONDON TIMES, Jan. 10, 1999, available in 1999 WL 7900376 (reporting on experiments with parthenogenesis in mammals "to overcome the genetic barrier that prevent mammals, alone in the animal kingdom, from producing young from an unfertilized egg" and noting that parthenogenesis allows for genetic contributions from one or two females).

4. See Deborah Bradley, *A New Kind of Family: Some Gays, Lesbians Turn to Artificial Insemination*, DALLAS MORNING NEWS, July 16, 1995, available in 1995 WL 9048164 (noting the growing number of same-gender couples utilizing ARTs). In 1996, in the United States, 20,659 live births resulted from IVF, ZIFT, and GIFT. See Centers for Disease Control, *CDC's Reproductive Health Information Source*, at [http://www.cdc.gov/nccdphp/drh/art96/sec1\\_q1.htm](http://www.cdc.gov/nccdphp/drh/art96/sec1_q1.htm) (last visited Oct. 8, 1999) (providing an overview of the frequency and success rates of various

## 2001] THE G.I.F.T. OF TWO BIOLOGICAL AND LEGAL MOTHERS 209

ARTs can enable same-gender<sup>5</sup> couples to conceive children, after the child's birth, lesbian and gay parents often face significant hostility from the legal system if they attempt to have their parental rights<sup>6</sup> legally recognized.<sup>7</sup> In many cases, only the biological parent—e.g., the artificially inseminated lesbian who gave birth to the child—receives recognition as the legal parent of the child; the partner of the biological parent often has no legally recognized relationship with the child.<sup>8</sup>

This Comment considers the legal implications of two ARTs which can enable a lesbian couple<sup>9</sup> to conceive a child who is the biological progeny of both women. The first, gamete intrafallopian transfer ("GIFT"), involves removing the ova from the ovaries of one woman, the genetic mother, and then injecting the ova, along with semen containing fertile sperm,<sup>10</sup> into the uterus of the second woman, the

---

ARTs). However, this figure does not include the most common procedures—AID and AIH—performed on "hundreds of thousands of women" annually. See FURROW ET AL., *supra* note 3, at 98.

5. This Comment uses the term "gender" to refer to the dichotomies of female/male, woman/man, girl/boy, and feminine/masculine. Although inconsistent with the convention of referring to physiological differences (i.e. female/male) as "sex" and cultural distinctions (i.e. feminine/masculine, woman/man, girl/boy) as "gender," the exclusive use of "gender" underscores the "socially constructed, overlapping nature of all category distinctions, even the biological ones." See SUZANNE J. KESSLER, *LESSONS FROM THE INTERSEXED* 134 n.2 (1998).

6. This Comment uses the phrases "parental rights," "parent and child relationship," and "mother and child relationship" interchangeably to refer to "the legal relationship existing between a child and his [or her] natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations." See UNIF. PARENTAGE ACT § 1, 9B U.L.A. 287-345 (1987).

7. See generally Gay & Lesbian Advocates & Defenders, *Protecting Families: Standards for Child Custody in Same-Sex Relationships*, at <http://www.glad.org/Publications/CivilRightProject/protectingfamilies.pdf> (last visited July 20, 1999) (emphasizing the legal system's general hostility to same-gender family issues).

8. See, e.g., *Nancy S. v. Michele G.*, 228 Cal. App. 3d 831, 833-34 (Ct. App. 1991) (determining that the biological mother "is the only parent of the two minor children that [were] conceived by artificial insemination during her relationship with [the nonbiological mother] . . . and that any further contact between [the nonbiological mother] and the children shall only be by [the biological mother's] consent"); see also discussion *infra* Part II (discussing the issues raised by the failure of courts to give legal protection to families headed by lesbian couples).

9. This Comment uses the term "lesbian couple" to refer to a female same-gender couple, while recognizing that one or both of the women in a lesbian couple could identify as bisexual rather than lesbian.

10. This likely would be sperm from an anonymous donor in order to avoid any paternity issues. See NATIONAL CENTER FOR LESBIAN RIGHTS, *LESBIANS CHOOSING MOTHERHOOD: LEGAL IMPLICATIONS OF DONOR INSEMINATION AND CO-PARENTING* 1-7 (1991), reprinted in RUBENSTEIN, *supra* note 1, at 883-88 (noting that "[o]ne of the primary legal concerns among lesbians using donor insemination is whether the sperm donor will be recognized as the father of the child" and advising that "using an unknown donor is still the safest legal protection available, especially in states where no statutory or case law protection exists"); see also *Thomas S. v. Robin Y.*, 618 N.Y.S.2d 356, 378 (App. Div. 1994) (granting paternity to a known sperm donor despite an agreement between the mother and the donor that he would not seek parental rights); *Craig W. Christensen, Legal Ordering of Family Values: The Case of Gay and Lesbian Families*, 18 CARDOZO

gestational mother.<sup>11</sup> The second, zygote intrafallopian transfer (“ZIFT”), involves removing the ova from the ovaries of one woman, the genetic mother, mixing the ova with fertile sperm<sup>12</sup> in a container, and then implanting the fertilized ova, or zygotes, in the uterus of the second woman, the gestational mother.<sup>13</sup> This Comment argues that, in such cases where a lesbian couple conceives a child through GIFT/ZIFT, both women—the genetic mother and the gestational mother—should be recognized as the child’s legal parents.<sup>14</sup>

Part II of this Comment contrasts the rapid increase in the number of lesbian and gay families with the lack of legal recognition for many of those families in which only one parent is biologically related to the child.<sup>15</sup> Part III presents the arguments supporting the recognition of both the genetic and the gestational mothers as the legal parents of a child conceived through GIFT/ZIFT and cites precedent from GIFT/ZIFT<sup>16</sup> and gestational surrogacy cases,<sup>17</sup> Supreme Court decisions concerning the fundamental liberty interest inherent in procreation and parenting,<sup>18</sup> and the Uniform Parentage Act.<sup>19</sup> Part IV recommends that the legal system afford the same parental rights to lesbian couples as it affords mixed-gender couples; at the very least, when both mothers have a biological tie to their child, both should be recognized as legal parents.<sup>20</sup> Part V concludes that even in an ideal future where lesbian couples will have a variety of options for creating legally recognized families, GIFT/ZIFT

---

L. REV. 1299, 1356 (1997) (observing that in the vast majority of cases where “a donor has asserted parental claims against an unmarried woman, the donor has prevailed”).

11. See FURROW ET AL., *supra* note 3, at 105 (describing GIFT procedure).

12. See *supra* note 10 (highlighting the importance of using an anonymous sperm donor to avoid potential paternity issues).

13. See FURROW ET AL., *supra* note 3, at 105 (describing ZIFT procedure).

14. See *infra* Part III (presenting the arguments for legal recognition of both mothers).

15. See *infra* Part II (outlining the relative lack of legal protection for lesbians who become mothers through previous marriages to men, foster care, or adoption).

16. See *infra* Part III.A (discussing lower state court cases which recognized both mothers’ parental rights).

17. See *infra* Part III.B (analyzing gestational surrogacy cases, including the famous “Baby M.” case).

18. See *infra* Part III.C (highlighting the cases that established fundamental parental rights, such as *Skinner v. Oklahoma*, 316 U.S. 535 (1942), and *Meyer v. Nebraska*, 262 U.S. 390 (1923)).

19. See *infra* Part III.D (discussing the Uniform Status of Children of Assisted Conception Act and the Uniform Parentage Act).

20. See *infra* Part IV (concluding that until the legal system routinely recognizes the parental rights of non-biological lesbian and gay parents, lesbian couples who conceive children through GIFT/ZIFT can best expect legal recognition of both women’s parental status).

## 2001] THE G.I.F.T. OF TWO BIOLOGICAL AND LEGAL MOTHERS 211

procedures will remain an attractive alternative because they offer something that adoption and others ARTs cannot provide—a child biologically connected to both mothers.<sup>21</sup>

## II. THE LACK OF LEGAL PROTECTION FOR LESBIAN-HEADED FAMILIES

Lesbians can become parents in a variety of ways, either as individuals or as a couple: some have biological children from previous marriages to men;<sup>22</sup> some raise foster children; and some adopt children.<sup>23</sup> The law, however, does not always recognize these varied forms of motherhood.<sup>24</sup> As a result, some lesbian couples utilize ARTs as a way to conceive biological children, with the understanding that biological connections are more readily recognized by the law.<sup>25</sup> However, due to the fact that most ARTs cannot create a child biologically related to two women, the non-biological mother will still have no legally recognized parental rights.<sup>26</sup> Only GIFT/ZIFT procedures can enable a lesbian couple to conceive a child with two biological—and therefore two legal<sup>27</sup>—mothers.

### A. *Children from Previous Marriages*

In the 1970s, most lesbians became mothers while they were married to men.<sup>28</sup> When the lesbian mother later forms a new family

21. See *infra* Part V (contemplating the importance of biological ties between parents and children).

22. See Family Pride Coalition, *supra* note 2, at 1 (estimating that “25 to 42 percent of all lesbians have been married” and that “50 to 75 percent of all lesbians who have been married have one or more biological children.” In contrast, “about 20 percent of gay males have been married” and “20 to 50 percent of all gay men who have been married have one or more biological children.”).

23. See Lambda Legal Defense and Education Fund, *supra* note 2, at 1 (“[T]he last decade has seen a sharp rise among gay people planning and forming families through adoption, foster care, donor insemination, and other reproductive technologies.”).

24. See Nancy Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 483 (1990) (“Biology, marriage to a woman who bears a child, and legal adoption are the only bases currently available for attaining the legal status of parent.”); see also *infra* Part II.B (discussing foster care); Part II.C (discussing adoption).

25. See Velte, *supra* note 3, at 432 (noting that ARTs enable “lesbian couples to create families that are based on biology and genetics, rather than the more legally precarious family structures that are [otherwise] available”).

26. But see Peggy Lowe, *Lesbian Couple Ruled Parents*, DENV. POST, Oct. 26, 1999, at B20 (“A Boulder judge has awarded full parental rights to two lesbian partners even though one of the women has no biological ties to the other’s unborn child.”).

27. See *infra* Part III (presenting arguments for the legal recognition of both biological mothers).

28. See RUBENSTEIN, *supra* note 1, at 801 (“The law first encountered lesbian, gay, and bisexual parents in the context of the dissolution of heterosexual marriages.”); Polikoff, *supra*

with a female partner, the resulting family structure resembles that of a stepfamily,<sup>29</sup> in that the existence of a legally recognized father, even if noncustodial, will likely keep the nonbiological “stepmother” from having any legally recognized relationship with the child.<sup>30</sup> In addition, the father may challenge the custody arrangements because of the mother’s sexual orientation.<sup>31</sup> Further, even if the biological father has no legally recognized parental rights<sup>32</sup> which would bar the stepmother’s adoption of the child, legislation in many jurisdictions makes it difficult or impossible for lesbians to adopt.<sup>33</sup>

### B. Foster Care

If a state suspects that a parent or parents have mistreated their child, the state can remove the child from the parental home and send the child to live with a foster family while it decides whether the child’s best interests will be furthered by returning home.<sup>34</sup> A child’s stay in foster care might last only a few days or, if the state decides to initiate termination of parental rights proceedings against the natural parent or parents, it might last for an extended period of time.<sup>35</sup> However, “[f]oster care does not establish a legally recognized parent-child relationship regardless of the length of the placement.

note 24, at 464. Polikoff explains that:

Mostly these are women who were unaware of their Lesbian tendencies until after they married and had children. Or they are women who suppressed their Lesbian feelings, convinced, as most heterosexuals are, that these feelings represented a natural phase in their lives and would disappear after they experienced marriage and motherhood. There are some women, too, who consciously rejected the gay life in favor of the more socially accepted and respected heterosexual relationships.

*Id.* (quoting PHYLLIS LYON & DEL MARTIN, *LESBIAN/WOMAN* 141 (1972)).

29. See generally SUSAN HOFFMAN, *LESBIAN STEP FAMILIES: AN ETHNOGRAPHY OF LOVE* (1997) (examining the experiences of five lesbian stepfamilies as part of a Social Work dissertation).

30. Some state legislatures have granted courts broad power to allow adoptions by stepparents even when the noncustodial parent objects. See, e.g., VA. CODE ANN. § 63.1-219.10 - 63.1-219.11 (Michie 1999) (requiring both parents’ consent to the adoption unless there has been a termination of parental rights. But, this statute also provides that “[i]f after hearing evidence the court finds that the valid consent of any person . . . whose consent is hereinabove required is withheld contrary to the best interests of the child . . . the court may grant the [adoption] petition without such consent.”). However, most courts seem reluctant to exercise such authority. See generally *Malpass v. Morgan*, 192 S.E.2d 794 (Va. 1972) (reversing a trial court decision to grant an adoption to a stepfather over the objections of the biological father).

31. See *infra* note 105 and accompanying text (discussing various courts’ treatment of parental sexual orientation in custody disputes and citing several cases where courts considered the homosexuality or bisexuality of a parent sufficient to bar an award of custody).

32. For example, if he voluntarily relinquished parental rights as part of a termination of parental rights proceeding.

33. See *infra* Part II.C (discussing the lack of legal protection granted to lesbian couples who have adopted and, in some jurisdictions, the inability of lesbian couples to adopt).

34. See RUBENSTEIN, *supra* note 1, at 874 (discussing foster care generally).

35. See *id.*

## 2001] THE G.I.F.T. OF TWO BIOLOGICAL AND LEGAL MOTHERS 213

The foster parent is only a temporary guardian of the child.”<sup>36</sup> The child is legally a ward of the state, and the state can remove the child from the foster home and return her to her natural parents or transfer her to another foster home at its discretion.<sup>37</sup>

Whether lesbians can be foster parents depends upon the jurisdiction. For example, in some municipalities—such as New York City, San Francisco, Los Angeles, and Trenton, New Jersey—social workers try to match lesbian and gay children with lesbian and gay foster parents, while in some states—such as North Dakota and Massachusetts—it is difficult for lesbians to become foster parents.<sup>38</sup>

### C. Adoption

Adoption creates a legal parental relationship between the adoptive parent or parents and the child.<sup>39</sup> Adoption terminates the rights and responsibilities of the biological parent or parents and transfers them to the adoptive parent or parents.<sup>40</sup> As with foster care, the ability of lesbians to adopt varies widely among jurisdictions.<sup>41</sup> Only one jurisdiction<sup>42</sup>—Florida—has a statutory ban on lesbian and gay adoption,<sup>43</sup> but challenges to lesbian and gay adoption have also been raised in other states.<sup>44</sup> Conversely, New

36. *Id.*

37. *See id.* at 875; *Smith v. Organization of Foster Families for Equal. & Reform*, 431 U.S. 816 (1977) (holding that foster parents’ due process rights were not violated by the state’s removal of foster children that had been in their care for over a year); *see also Martin v. Pittsylvania County Dep’t of Soc. Servs.*, 348 S.E.2d 13, 22-23 (1986) (discussing the distinction between regular foster care, permanent foster care, and termination of parental rights). *But cf. ME. REV. STAT. ANN. tit. 22, § 4064* (West 1999) (defining “long-term foster care” as “a foster family placement for a child in the custody of the department in which the department retains custody of the child while delegating to the foster parents the duty and authority to make certain decisions”); *VA. CODE ANN. § 63.1-206.1* (Michie 1999) (recognizing “permanent foster placement” as a status between regular foster care and adoption).

38. *See Lambda Legal Defense and Education Fund, supra* note 2, at 3 (discussing foster parenting generally and noting that in North Dakota only married couples can become foster parents).

39. *See RUBENSTEIN, supra* note 1, at 846.

40. *See id.*

41. *See infra* notes 42-45 and accompanying text (listing extreme variation in state adoption statutes).

42. *See THE LEGAL FOUNDATION OF THE LESBIAN & GAY LAW ASSOCIATION OF GREATER NEW YORK, LESBIAN/GAY LAW NOTES 91* (June 1999) (summarizing legislation affecting lesbian and gay individuals and reporting that before July 2, 1999, New Hampshire also prohibited lesbian and gay individuals and couples from becoming adoptive or foster parents).

43. *See FLA. STAT. ANN. § 63.042(3)* (West 1999) (“No person eligible to adopt under this statute may adopt if that person is a homosexual.”); *Cox v. Florida Dep’t of Health Servs.*, 656 So.2d 902, 903 (Fla. 1995) (confirming the constitutionality of Florida’s ban on lesbian and gay adoption).

44. *See RUBENSTEIN, supra* note 1, at 865 n.3 (explaining that “courts outside of Florida are free from *statutory* restraints barring adoptions by lesbians, gay men, and bisexuals but are



York's adoption laws guarantee lesbians and gay men the same eligibility to become adoptive parents as heterosexual applicants.<sup>45</sup> Although the majority of states that have considered this issue no longer officially deem lesbian and gay individuals and couples unfit to raise a child, bills barring adoptions by lesbian and gay individuals and couples continue to be introduced in state legislatures each year.<sup>46</sup>

While traditional adoption both terminates the parental rights of the antecedent parents and establishes the parental rights of the adoptive parents, second-parent adoption maintains the parental rights of one antecedent parent while establishing the parental rights of a (second) adoptive parent.<sup>47</sup> For example, a non-biological mother could second-parent adopt the biological child of her partner, or a lesbian couple could adopt a child in stages—first one mother adopts the child individually and then the second mother petitions for a second-parent adoption.<sup>48</sup> Second-parent adoption, in the twenty-one jurisdictions which permit it,<sup>49</sup> is one way for lesbian couples to skirt legislative prohibitions on simultaneous joint adoption by unmarried couples.<sup>50</sup> According to the Lambda Legal

---

nonetheless often asked to prohibit such adoptions in practice”).

45. See N.Y. DOM. REL. § 110 (McKinney 1999) (allowing unmarried adults to adopt); In the Matter of Jacob, 600 N.E.2d 397, 401 (N.Y. 1995) (interpreting the state's adoption statute as “encouraging the adoption of as many children as possible regardless of the sexual orientation . . . of the individuals seeking to adopt them”).

46. See NATIONAL GAY AND LESBIAN TASK FORCE, 1998 CAPITAL GAINS AND LOSSES: A STATE BY STATE REVIEW OF GAY, LESBIAN, BISEXUAL, TRANSGENDER, AND HIV/AIDS-RELATED LEGISLATION IN 1998 10 (1998) (reporting that six states introduced bills to prohibit adoption by lesbian and gay individuals and/or couples in 1998).

47. See RUBENSTEIN, *supra* note 1, at 866 (noting that many step-children are adopted through second-parent adoptions in mixed-gender couples).

48. See *In re M.M.D., B.H.M.*, 662 A.2d 837 (D.C. App. 1995) (allowing second-parent adoption in stages by a gay male couple); Elizabeth Zuckerman, Comment, *Second-Parent Adoption for Lesbian-Parented Families: Legal Recognition of the Other Mother*, 19 U.C. DAVIS L. REV. 729, 731 n.8 (1986) (citing cases and situations in which courts have granted second-parent adoptions).

49. See Lambda Legal Defense and Education Fund, *supra* note 2, at 4 (listing the jurisdictions in which courts have granted second-parent adoptions: Alabama, Alaska, California, District of Columbia, Illinois, Indiana, Iowa, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Texas, Vermont, and Washington). However, Pennsylvania recently reversed its trend of allowing second-parent adoptions. See *In re Adoption of C.C.G. & Z.C.G.*, No. 1192 WDA 1999, 2000 WL 1672904 (Pa. Super. Ct. Nov. 8, 2000), consolidated with *In re Adoption of R.B.F. & R.C.F.*, No. 67 MDA 1999, 2000 WL 1673393 (Pa. Super. Nov. 8, 2000). The Pennsylvania superior court held that since Pennsylvania does not recognize same-sex marriages, “this Court cannot liken same-sex partners to stepparents, thereby holding same-sex partners exempt from the provision terminating the natural parents’ rights.” *Id.* at \*3.

50. But see *Matter of Dana*, 209 A.D.2d 8, 9 (N.Y. App. Div. 1995) (“The question to be resolved . . . is whether the adoption statute of this State permits the adoption of a child by the female life partner of the child’s natural mother. In our view, this question must be answered

## 2001] THE G.I.F.T. OF TWO BIOLOGICAL AND LEGAL MOTHERS 215

Defense and Education Fund, “second-parent adoption is currently the only way for [same-gender] couples to both become legal parents of their children.”<sup>51</sup>

### III. RECOGNIZING THE PARENTAL STATUS OF BOTH MOTHERS IN CASES OF LESBIAN COUPLES WHO CONCEIVE A CHILD THROUGH GIFT/ZIFT

No established body of law exists regarding parental rights associated with lesbian couples who conceive a child through GIFT/ZIFT. However, this section discusses four areas of law that support the legal recognition of both mothers. First, at least two lower state courts have presided over lesbian GIFT/ZIFT cases and recognized both mothers’ parental status.<sup>52</sup> Second, gestational surrogacy cases in which a dispute arises between the gestational and the genetic mothers reveal the factors courts should consider in determining parental status—most notably, genetic relationship and intent to raise the child.<sup>53</sup> Third, U.S. Supreme Court decisions respecting the fundamental liberty interests of procreation and intimate association suggest confirmation of both mothers’ parental status.<sup>54</sup> Fourth, the Uniform Parentage Act provides statutory support for the legal recognition of both mothers.<sup>55</sup>

---

in the negative.”), *overruled by* In the Matter of Jacob, 660 N.E.2d 397 (N.Y. 1995); In Interest of Angel Lace M., 516 N.W.2d 678 (Wis. 1994) (prohibiting second-parent adoption by a lesbian couple).

51. Lambda Legal Defense and Education Fund, *supra* note 2, at 4.

52. See In the Matter of the Adoption Petition of C.C., Case N. A 19833, slip op. (Cal. Super. Ct. Sept. 12, 1997) (holding that in the case of lesbian couples, a child conceived through GIFT/ZIFT has two legal mothers); In the Matter of Z.L.C. & B.L., Civil Action No. 97-DR, slip op. (Col. Dist. Ct. 1997) (recognizing the legal status of both the genetic and gestational mothers who conceived a child through GIFT/ZIFT).

53. See Johnson v. Calvert, 851 P.2d 776, 782 (Cal. 1993) (holding that the preconception intentions of the parties determine parental rights); Belsito v. Clark, 644 N.E.2d 760, 762 (Ohio Ct. Com. Pl. 1994) (holding that “the natural parents of a child shall be identified by determination as to which individuals have provided the genetic imprint for that child”).

54. See, e.g., Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (expanding the concepts of constitutional protection of families to include procreation as “fundamental to the very existence and survival of the race”); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (upholding the “liberty of parents and guardians to direct the upbringing and education of children under their control”); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (finding a fundamental liberty interest protected by the Fourteenth Amendment which encompasses the right to “establish a home and bring up children”).

55. See UNIF. PARENTAGE ACT, 9B U.L.A. 287-345 (1987) (establishing the requirements for legal recognition of the parent and child relationship).

A. *Lower Courts' Recognition of Both the Genetic and Gestational Mothers as the Legal Parents of a Child Conceived by a Lesbian Couple through GIFT/ZIFT*

According to one court, “[s]urrogacy technology did not exist and a separate birth and genetic mother were factually impossible when the statute, case law, and common law were formulated. It must therefore be assumed that the framers of those laws did not intend for the law to result in two mothers.”<sup>56</sup> Other courts, however, have rejected this argument and found that, in the case of lesbian couples, a child conceived through GIFT/ZIFT has two legal mothers.<sup>57</sup>

In *the Matter of the Adoption Petition of C.C.*,<sup>58</sup> a California case, involved a lesbian couple who conceived a child through ZIFT. The California Family Code recognized the gestational mother as the child’s legal parent.<sup>59</sup> To ensure that their child had two legal parents, the genetic mother petitioned the court to adopt the child.<sup>60</sup> However, the court refused to grant the relief requested, ruling that it could not grant an adoption because “[t]he entire purpose of our adoption laws is to create a parent-child relationship between two persons who did not previously enjoy that relationship.”<sup>61</sup> Further, “[a] natural parent whose parental status has never been judicially terminated, is not capable of adopting his or her own natural child.”<sup>62</sup> The court declared that, as the genetic mother of the child, the petitioner already possessed parentage and an adoption would therefore be “an idle act.”<sup>63</sup> Instead, the court issued an order for a new birth certificate, amended to reflect the parentage of both mothers.<sup>64</sup>

In a Colorado case involving a lesbian couple who conceived a child through GIFT, both the genetic and the gestational mothers petitioned to have their status as the natural mothers legally

56. *Belsito v. Clark*, 644 N.E.2d 760, 763 (Ohio Ct. Com. Pl. 1994) (acknowledging only the genetic mother as the legal mother of a child conceived through ZIFT).

57. See *infra* notes 58-67 and accompanying text.

58. No. A 19833, slip op. (Cal. Super. Ct. Sept. 12, 1997).

59. CAL. FAM. CODE § 8512 (West 1997) (“‘Birth parent’ means the biological parent or, in the case of a person previously adopted, the adoptive parent.”).

60. See *Adoption of C.C.*, at 1 (“This is a petition for adoption of a minor child.”).

61. *Id.* at 2.

62. *Id.*

63. *Id.*

64. See *id.* at 4 (“On the highly exceptional, if not unique, facts of this case, the Court is prepared to make its decree recognizing the Petitioner as the natural parent . . . and making appropriate orders with respect to her birth certificate, on which Petitioner apparently was not named.”).

## 2001] THE G.I.F.T. OF TWO BIOLOGICAL AND LEGAL MOTHERS 217

recognized.<sup>65</sup> In this case the judge required the mothers to testify under oath as to their intentions to jointly raise the child and required an affidavit from the doctor who performed the procedure.<sup>66</sup> After considering this evidence, the judge issued a "Decree Affirming Parental Status," which verified that both the gestational and the genetic mothers were the child's natural mothers, and ordered the state to "issue a new birth certificate for the minor child" that listed both women as the child's mothers.<sup>67</sup>

These lower state court cases provide persuasive precedent for the legal recognition of both the genetic and the gestational mothers in cases where a lesbian couple conceives a child through GIFT/ZIFT. However, they do not carry the same authority as rulings from higher state courts. Several state appellate and supreme courts have considered the competing claims of gestational and genetic mothers in surrogacy cases, which presented similar medical procedures in a different legal context, and indicated that in certain circumstances courts should grant legal recognition to both mothers.<sup>68</sup>

*B. Determination of Parental Status in Gestational Surrogacy Cases  
Supports Legal Recognition of Both Mothers*

Gestational surrogacy<sup>69</sup> cases usually involve disputes between the surrogate mother who gave birth to a child and the child's genetic mother and father. In such surrogacy cases, the parties have often signed a contract designating the genetic mother as the child's legal

---

65. See Kit McChesney & Barbara Lavender, *Gifted Conception*, CIRCLES 18 (Mar./Apr. 1998) (describing the Colorado case of a lesbian couple who conceived a child through GIFT).

66. See *id.* at 20 (quoting the attorney for the mothers as recalling that the judge wanted the mothers "to say this, under oath, in person, on the record, in the courtroom, so that no one could come back later and challenge his ruling on the grounds that he had not verified this in person").

67. *Id.*

68. See *infra* notes 83-90 and accompanying text (citing one gestational surrogacy case whose language supports recognition of two mothers in lesbian GIFT/ZIFT cases).

69. "Gestational surrogacy" refers to procedures where the woman who gestates the child did not supply the ova, which another woman (the genetic mother) provided. Gestational surrogacy includes GIFT/ZIFT procedures. See FURROW ET AL., *supra* note 3, at 115. Another type of surrogacy, "traditional surrogacy," involves the artificial insemination of a woman with the sperm of the intended father. *Id.* In traditional surrogacy, one woman provides both the genetic and gestational components. See *id.* (discussing different types of surrogacy and noting that "[s]urrogacy may be the least technological of reproductive technologies. It is also the oldest; Genesis tells of Abraham's servant Hagar bearing a child to be raised by the genetic father, Abraham, and his wife Sarah. Genesis 16:1-16."). The famous "Baby M." case involved a traditional surrogacy arrangement. See *In the Matter of Baby M.*, 537 A.2d 1227, 1234 (N.J. 1988) ("For a fee of \$10,000, a woman agrees to be artificially inseminated with the semen of another woman's husband; she is to conceive a child, carry it to term, and after its birth surrender it to the natural father and his wife.").

mother, which the surrogate mother then attempts to breach.<sup>70</sup> Unlike lesbian GIFT/ZIFT cases, gestational surrogacy cases require a choice between two oppositional claimants.<sup>71</sup>

Courts have constructed and applied three tests for determining which parents will receive legal recognition in surrogacy disputes: (1) preconception intent to raise the child;<sup>72</sup> (2) best interests of the child;<sup>73</sup> and (3) genetic relationship to the child.<sup>74</sup> Rather than comparing the relative merits and disadvantages of each test,<sup>75</sup> this Comment argues that under all three of these tests, a court should grant legal recognition to both mothers in lesbian GIFT/ZIFT cases.

# 1. Preconception Intent Test: The Parties who Intended to Raise the Child are the Legal Parents

*Johnson v. Calvert*<sup>76</sup> first raised the issue of what determined legal motherhood at birth. In that case, the genetic parents sued the gestational surrogate mother after she threatened to refuse to surrender the child and sought a declaration from the court indicating their status as the legal parents of the child.<sup>77</sup> While the

70. See, e.g., *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) (involving a custody dispute between the gestational surrogate mother and the genetic mother and father); *In the Matter of Baby M.*, 537 A.2d 1227 (N.J. 1988) (concerning a custody dispute between the surrogate mother (both genetic and gestational) and the father of the child along with his wife).

71. This Comment assumes that a lesbian couple who conceives a child through GIFT/ZIFT intends to raise the child jointly.

72. See *Johnson*, 851 P.2d at 782 (holding that the preconception intentions of the parties determine parental rights); see also discussion *infra* Part III.B.1 (reviewing the development of preconception intention by the California supreme court and its use to support the parental rights of lesbian couples).

73. See *Johnson*, 851 P.2d at 799 (Kennard, J., dissenting) (arguing for a best interests of the child test); *Belsito v. Clark*, 644 N.E.2d 760, 764 (Ohio Ct. Com. Pl. 1994) (rejecting preconception intent test); see also discussion *infra* Part III.B.2 (arguing that a "best interests of the child" test ultimately supports the recognition of both mothers' rights in lesbian GIFT/ZIFT cases).

74. See *Belsito*, 644 N.E.2d at 767 (holding that "the natural parents of a child shall be identified by a determination as to which individuals have provided the genetic imprint for that child"); see also discussion *infra* Part III.B.3 (reviewing two genetic contribution tests used to determine parental rights).

75. See Malina Coleman, *Gestation, Intent, and the Seed: Defining Motherhood in the Era of Assisted Human Reproduction*, 17 CARDOZO L. REV. 497, 505 (1996) (analyzing intent test); Jonathan B. Pitt, *Fragmenting Procreation*, 108 YALE L.J. 1893 (1999) (criticizing the intent and genetic tests); Michelle Pierce-Gealy, Comment, "Are You My Mother?": *Ohio's Crazy-Making Baby-Making Produces a New Definition of Mother*, 28 AKRON L. REV. 535, 550-61 (1995) (offering an overview and critique of approaches utilized by courts to assign parental rights in gestational surrogacy cases).

76. 851 P.2d 776 (Cal. 1993).

77. See *Johnson*, 851 P.2d at 778 ("After the surrogate made a demand suggesting she might refuse to surrender the child, the couple sued for a declaration that they were the legal parents of the unborn child, and the surrogate then filed her own action to be declared mother. The cases were consolidated.").

## 2001] THE G.I.F.T. OF TWO BIOLOGICAL AND LEGAL MOTHERS 219

trial and appellate courts found in favor of the genetic parents based on their equation of genetic contribution with natural and legal parentage,<sup>78</sup> the California Supreme Court ruled in favor of the genetic parents for a different reason. It held that the preconception intentions of the parties determined parental status.<sup>79</sup>

The court considered the applicable provisions of the Uniform Parentage Act,<sup>80</sup> as codified in the California Civil Code,<sup>81</sup> which provided that either genetic contribution or giving birth to a child resulted in legal paternity.<sup>82</sup> According to the statute, both the genetic mother and the gestational surrogate mother showed evidence of a mother and child relationship, but the court stated that it would only recognize one mother.<sup>83</sup> Because no “clear legislative preference”<sup>84</sup> existed in the Civil Code for either the genetic mother or the gestational surrogate mother, the court looked to the preconception intention of the parties, as manifested in the surrogacy contract, to determine which woman’s parental status would receive recognition:

Mark and Crispina are a couple who desired to have a child of their own genes but are physically unable to do so without the help of reproductive technology. They affirmatively intended the birth of the child, and took the steps necessary to effect in vitro fertilization. But for their acted-on intentions, the child would not exist. Anna agreed to facilitate the procreation of Mark’s and Crispina’s child. The parties’ aim was to bring Mark’s and Crispina’s child into the world, not for Mark and Crispina to donate a zygote to Anna. Crispina from the outset intended to be the child’s mother. Although the gestative function Anna performed was necessary to bring about the child’s birth, it is safe to say that Anna would not have been given the opportunity to gestate or deliver the child had she, prior to implantation of the zygote, manifested her own intent to be the child’s mother. No reason appears why Anna’s later change of heart should vitiate the

---

78. See *Anna J. v. Mark C.*, 286 Cal. Rptr. 369, 373 (Ct. App. 1991) (discussing the trial court’s decision); *id.* at 380-82 (affirming the trial court’s decision that the genetic parents were the “biological and natural” parents).

79. See *Johnson*, 851 P.2d at 782 (noting that since evidence supported both women’s claims, an inquiry into the parties’ intentions was necessary).

80. 9B U.L.A. 287-345 (1987); see *infra* Part III.D.2 (discussing the Uniform Parentage Act).

81. CAL. CIV. CODE § 7000 et seq. (West 1993).

82. See CAL. CIV. CODE §§ 7003(1), 7004(A), 7015 (West 1993) (listing various ways of adducing evidence of mother and child relationship).

83. See *Johnson*, 851 P.2d at 781 (finding only one natural mother “despite advances in reproductive technology rendering a different outcome biologically possible”).

84. *Id.*

determination that Crispina is the child's natural mother.<sup>85</sup>

In *Johnson*, the court could only recognize one mother's parental rights because each wanted to be the sole mother of the child.<sup>86</sup> The court stated that "California law recognizes that a child has only one mother," but cited no judicial authority for the statement, and relied only upon the facts of the case.<sup>87</sup> The court remarked that the genetic parents had provided the child with "a stable, intact, and nurturing home," while the gestational mother had little contact with the child.<sup>88</sup> The court also found that if the law recognized the gestational surrogate mother's parental rights, it would "diminish" the genetic mother's role.<sup>89</sup> Under those circumstances, the court could "see no compelling reason to recognize such a situation [of two mothers] here."<sup>90</sup> By focusing on the specifics of this case, however, the *Johnson* court left open the possibility that in different circumstances, the Civil Code could authorize recognition of two legal mothers. Indeed, in *Adoption of C.C.*,<sup>91</sup> discussed previously, the court applied this language from *Johnson* in order to recognize both the gestational and the genetic mothers as legal parents:

[T]he factual situation here is quite different than that found in *Johnson v. Calvert*. Both [the gestational and the genetic mother] completely agree that they always intended and do now intend that both of them would be [the child's] parents, in law and in fact . . . . Recognizing both as natural parents will not at all disrupt or diminish the parental role of either; and such recognition will not defeat or frustrate the agreement they had and do now maintain, but will rather further the realization of the agreed-upon purposes and objectives they each hold.<sup>92</sup>

Further, the *Johnson* preconception intent test<sup>93</sup> supports the legal recognition of both mothers in a lesbian couple. The *Johnson* court determined that when two women can predicate their claims to maternity on a biological connection to the child, the legal mother is the one who intended to "bring about the birth of [the] child that

---

85. *Id.* at 782.

86. *Id.* at 778.

87. *Id.* at 781.

88. *Id.* at 781 n.8.

89. *Id.*

90. *Id.* The court declined "to accept the contention of amicus curiae of the American Civil Liberties Union (ACLU) that [it] should find that the child has two mothers." *Id.*

91. No. A 19833, slip op. (Cal. Super. Ct. Sept. 12, 1997).

92. *Id.* at 3-4.

93. See *Johnson*, 851 P.2d at 782 (explaining the preconception intent test).

## 2001] THE G.I.F.T. OF TWO BIOLOGICAL AND LEGAL MOTHERS 221

she intended to raise as her own.”<sup>94</sup> In the case of a lesbian couple, both mothers would have intended to bring about the birth of their child and raise him or her jointly.<sup>95</sup>

## 2. The Best Interests Test: Determination of Parental Rights Must Serve the Best Interests of the Child

Although courts have applied the *Johnson* intent test in other gestational surrogacy cases,<sup>96</sup> some commentators have criticized it<sup>97</sup> and at least one court has rejected it.<sup>98</sup> The dissent in *Johnson* rejected the majority’s focus on preconception intentions and suggested instead a focus on the best interests of the child:

[T]he majority has articulated a rationale for using the concept of intent that is grounded in principles of tort, intellectual property and commercial contract law. But . . . we are not deciding a case involving the commission of a tort, the ownership of intellectual property, or the delivery of goods under a commercial contract; we are deciding the fate of a child . . . . [T]his court should look . . . to family law, as the governing paradigm and source of a rule of decision. . . . [The] “best interests” standard serves to assure that in the judicial resolution of disputes affecting a child’s well-being, protection of the minor child is the foremost consideration. Consequently, I would apply “the best interests of the child” standard to determine who can best assume the social and legal responsibilities of motherhood for a child born of a gestational surrogacy arrangement.<sup>99</sup>

Modern statutes generally apply the best interests of the child standard in child custody adjudications. Some states provide scant guidance to the courts and simply refer to the best interests standard generally,<sup>100</sup> while other states have enumerated lists of relevant

94. *Id.*

95. *See supra* note 70 (assuming that both women intended to raise the child jointly).

96. *See, e.g.,* McDonald v. McDonald, 608 N.Y.S.2d 477, 479 (N.Y. App. Div. 1994) (applying the preconception intent test to recognize the gestational mother and her husband’s parental rights instead of the genetic mother who donated her ovum to the couple and did not intend to have any further involvement).

97. *See, e.g.,* Janet L. Dolgin, *The “Intent” of Reproduction: Reproductive Technologies and the Parent-Child Bond*, 26 CONN. L. REV. 1261, 1295 (1994) (“Judicial reliance on intent in cases such as *Johnson* will prove impractical or will be expressly transformed into a more straightforward reliance on ordinary contract principles.”).

98. *See* Belsito v. Clark, 644 N.E.2d 760, 764 (Ohio Ct. Com. Pl. 1994) (rejecting the *Johnson* preconception intent test based on difficulty in application, poor public policy, and “failure to recognize and emphasize the genetic provider’s right to consent to procreation and to surrender potential parental rights”).

99. *Johnson*, 851 P.2d at 799 (Kennard, J., dissenting).

100. *See, e.g.,* ALASKA STAT. § 09.55.205 (Michie 1999) (“[I]n awarding custody the court is to be guided by the following considerations: (1) by what appears to be for the best interests of



factors for courts to consider in making determinations.<sup>101</sup> The majority of cases considering the best interest standard have involved mixed-gender parents;<sup>102</sup> however, the court's duty is not to consider the traditional or nontraditional nature of the household, but to further the child's best interests.<sup>103</sup>

Courts could use the best interests of the child standard to undermine the argument for granting legal recognition to both mothers, believing that because of the very nature of lesbianism and the likely adverse reaction of the community, allowing a child to grow up in a household headed by two lesbian parents contravenes the child's best interests.<sup>104</sup> However, while courts formerly considered the homosexuality or bisexuality of a parent sufficient to bar an award of custody,<sup>105</sup> a majority of U.S. jurisdictions have adopted a

---

the child and if the child is of a sufficient age and intelligence to form a preference, the court may consider that preference in determining the question."); ARK. CODE. ANN. § 9-13-101 (Michie 1999) (requiring the child custody award to be "made without regard to the sex of the parent, but solely in accordance with the welfare and best interests of the children").

101. See, e.g., CAL. FAM. CODE § 3011 (West 1999). The California Code states that:

In making a determination of the best interests of the child . . . the court shall, among any other factors it finds relevant, consider all of the following:

- (a.) The health, safety, and welfare of the child.
- (b.) Any history of abuse by one parent or any other person seeking custody . . .
- (c.) The nature and amount of contact with both parents . . .
- (d.) The habitual or continual illegal use of controlled substances or . . . abuse of alcohol by either parent.

*Id.*

102. See RUBENSTEIN, *supra* note 1, at 808 (arising from divorce proceeding when one parent is gay or bisexual).

103. See Polikoff, *supra* note 24, at 543 ("[T]he court's role is neither to embrace the creation of a nontraditional family nor to punish the parents for failing to adhere to the one-mother/one-father form. ").

104. See Conkel v. Conkel, 509 N.E.2d 983, 984 (Ohio Ct. App. 1987) (reporting the arguments raised by the child's mother based on the father's bisexuality). The mother argued that:

she is fearful for the physical and mental well-being of the children because visitation with their father may trigger homosexual tendencies in them; (2) during visitation with their father they may contract AIDS; (3) homosexuality is a basis to change custody; (4) an extended visitation would force the children to "confront the homosexual problem" and "suffer the slings and arrows of a disapproving society;" and (5) an adverse impact need not be shown.

*Id.* The court rejected the mother's arguments. *Id.*

105. See, e.g., S. v. S., 608 S.W.2d 64, 66 (Ky. Ct. App. 1980) (denying lesbian mother custody because "there is social stigma attached to homosexuality"); S.E.G. v. R.A.G., 735 S.W.2d 164, 166 (Mo. Ct. App. 1987) ("[Homosexual] conduct can never be kept private enough to be a neutral factor in the development of a child's values and character."); Jacobson v. Jacobson, 314 N.W.2d 78, 81 (N.D. 1981) (reasoning that because of societal mores against homosexuality, serving the children's best interests meant denying custody to their lesbian mother); Roe v. Roe, 324 S.E.2d 691, 694 (Va. 1985) ("[T]he father's continuous exposure to the child of his immoral and illicit relationship renders him an unfit and improper custodian as a matter of law . . . [T]he best interests of the child will only be served by protecting her from the burdens imposed by such behavior. ").

## 2001] THE G.I.F.T. OF TWO BIOLOGICAL AND LEGAL MOTHERS 223

“nexus” test, which attempts to promote the best interests of the child by considering only those factors that have an identifiable connection with the welfare of the child.<sup>106</sup> Under the nexus test, courts will not consider moral beliefs, stereotypes, and social biases that do not have a substantial connection to the best interests of the child.<sup>107</sup>

The best interests of the child standard raises different issues in the context of a marital dissolution where one parent has a homosexual or bisexual orientation than in the context of a lesbian couple who conceives a child through GIFT/ZIFT. In the former, the court must determine whether a child’s best interests will be served by living in a lesbian- or gay-headed household versus a heterosexual-headed household, while in the latter, the child will live in a lesbian household regardless of the court’s decision.<sup>108</sup> Thus, the only best interests issue in lesbian GIFT/ZIFT cases is whether the court will grant legal recognition to both mothers.<sup>109</sup>

While a court could not stop a lesbian couple from conceiving a child through GIFT/ZIFT, it could refuse to legally recognize the resulting family by characterizing such a family structure as irredeemably contrary to the best interests of the child.<sup>110</sup> However, the recognition of both the genetic and the gestational mothers’ parental rights would confer numerous legal protections on the child, thus serving the child’s best interests. For example, the child would likely have a right to continued contact with both mothers if the couple separated in the future, whereas if the court did not

106. See Lambda Legal Defense and Education Fund, *Lesbian and Gay Parenting: A Fact Sheet* (Sept. 28, 1997), at <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=31> (last visited July 15, 1999) (reporting that thirty jurisdictions have adopted a nexus test: Alabama, Alaska, Arizona, California, Connecticut, Delaware, District of Columbia, Florida, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, New Jersey, New Mexico, New York, North Dakota, Ohio, Oregon, South Carolina, Pennsylvania, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming); see also RUBENSTEIN, *supra* note 1, at 810-11 (summarizing the nexus test as “a parent’s sexuality may only be taken into account when it has some relationship to her parenting abilities,” but noting that “the nexus test by no means produces determinant results in favor of gay or bisexual parents . . . . Courts have articulated a nexus test in cases that both protect and discriminate against these parents.”).

107. See generally *In re Marriage of Birdsall*, 243 Cal. Rptr. 287 (Ct. App. 1988); *D.H. v. J.H.*, 418 N.E.2d 286 (Ind. Ct. App. 1981); *Bezio v. Patenaude*, 410 N.E.2d 1207 (Mass. 1980).

108. See Polikoff, *supra* note 24, at 543-44 (explaining this distinction in the context of mixed-gender marital dissolution versus “lesbian-mother family dissolution” cases). Polikoff states that:

In the context of a lesbian-mother family dissolution, the child will continue to live with a lesbian regardless of who has custody and regardless of whether the legally unrecognized mother has visitation rights. The only issue in these cases is whether the court will recognize that the child has two lesbian mothers.

*Id.*

109. See *id.* at 543-44.

110. See *infra* notes 112-15 and accompanying text.

recognize both mothers' parental status and the couple later separated, the legally recognized mother could interrupt or sever the child's relationship with the nonlegal mother.<sup>111</sup> Such interruption or severance of the parent-child relationship would not serve the child's best interest.<sup>112</sup> Also, recognizing both mothers requires both to assume financial responsibility for their child.<sup>113</sup> Otherwise, the non-legal mother's voluntary assumption of shared financial responsibility for the child could be deemed gratuitous and, as such, she could refuse to support the child in the future.<sup>114</sup> Further, in case of one mother's death or incapacity, a second legal parent serves the child's best interests by keeping him or her with a known parent rather than having to adjust to the care of a third party.<sup>115</sup> Although the legal

111. In the past five years, a few courts have ruled that the non-legal mother is nevertheless a "de facto parent," entitled to visitation after the couple separates. *See, e.g., E.N.O. v. L.M.N.*, 711 N.E.2d 886, 889 (Mass. 1999) (ruling that a lesbian who helped raise her partner's biological child had been a de facto parent, entitling her to visitation rights after the couple split up); *V.C. v. M.J.B.*, 748 A.2d 539, 549-50 (N.J. 2000) (finding that the female partner of the biological mother had assumed a parental role in helping to raise the child and had established a "psychological parenthood" which entitled her to petition for custody and visitation); *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000) (holding that the non-biological mother was "entitled to prove that she qualified as a de facto or 'psychological' parent"); *In re H.S.H.-K.*, 533 N.W.2d 419, 421 (Wis. 1995) (recognizing the visitation rights of a non-biological lesbian co-parent who had a "parent-like relationship" with the child). *But see* *Alison D. v. Virginia M.*, 572 N.E.2d 27, 29 (N.Y. 1991) (holding that even though the parties shared child care and support duties toward a child conceived by artificial insemination pursuant to their agreement, the non-biological mother was not a legal or "de facto" parent). In addition, the most recent case noted that de facto parents could be "subject to child-support obligations." *See Rubano*, 759 A.2d at 976 ("[T]he fact that Rubano is not a biological parent does not necessarily relieve her of a potential legal obligation to support the child."). However, no court has awarded a de facto parent custody. *See Nancy S. v. Michele G.*, 279 Cal. Rptr. 212, 212 (Ct. App. 1991) ("It does not, however, follow that as a 'de facto' parent appellant has the same rights as a parent to seek custody and visitation over the objection of the children's natural mother . . . custody can be awarded to a de facto parent *only* if it is established by clear and convincing evidence that parental custody is detrimental to the children.") (emphasis added). *See generally* Barbara J. Cox, *Love Makes a Family—Nothing More, Nothing Less: How the Judicial System Has Refused to Protect Nonlegal Parents in Alternative Families*, 8 J.L. & POL. 5 (1991) (discussing the de facto parent legal theory and cases that utilized it).

112. *See E.N.O. v. L.M.N.*, 711 N.E.2d at 891 ("It is to be expected that children of nontraditional families, like other children, form relationships with both parents . . . [t]hus, the best interest calculus must include an examination of the child's relationship with both his legal and de facto parent.").

113. *See generally* *Carole K. v. Arnold K.*, 380 N.Y.S.2d 593 (N.Y. Fam. Ct. 1976) (holding that all parents have a legal duty to support their children even after the dissolution of the parents' relationship); *In re Aguilar*, 145 Cal. Rptr. 197 (Ct. App. 1978) (imposing criminal liability upon parents for willful failure to support minor children).

114. *See generally* HOWARD CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 264 (2d ed. 1987) (noting that while stepparents can voluntarily assume the duty of support, they can usually terminate this duty at will).

115. *See In re Pearlman*, No. 87-24,926 DA (Fla. Cir. Ct., Mar. 31, 1989), *reprinted in part*, 15 FAM. L. REP. (BNA) 1355 (May 30, 1989), *cited in* Polikoff, *supra* note 24, at 529-30 (awarding custody of a deceased woman's child to her nonbiological partner and overturning the adoption of the child by her maternal grandparents because of the child's attachment to the nonbiological mother, the child's strong preference for living with the nonbiological mother,

## 2001] THE G.I.F.T. OF TWO BIOLOGICAL AND LEGAL MOTHERS 225

mother could nominate the other mother as guardian of the child, a relative of the legal mother could contest the appointment.<sup>116</sup> Likewise, recognition of both mothers' parental rights would enable the child to inherit from both by intestate succession.<sup>117</sup> Without legal recognition, while the non-legal mother could provide for her child through a will, one of her relatives could challenge the will and have it subsequently invalidated; if the non-legal mother died without a current will, the child could not be her heir at law.<sup>118</sup>

Thus, a court that applies the best interests test to determine "who can best assume the social and legal responsibilities of motherhood for a child born of a gestational surrogacy arrangement"<sup>119</sup> should conclude that recognition of both mothers' parental rights will promote and protect the best interest of their biological child by securing numerous financial and emotional protections.

### 3. The Genetic Contribution Test: Recognizing the Genetic Parents as the Child's Legal Parents

Several states focus on genetics when determining parental rights in cases involving both a genetic and a gestational mother.<sup>120</sup> The states differ, however, in choosing to focus on either the genetic mother or the genetic father as the determinative individual.<sup>121</sup> For example, Arkansas places the genetic father at the center of the inquiry: he possesses parental rights, and, if he is married, so does the woman who intends to raise the child, regardless of her biological

---

and the child's anxiety caused by living with her grandparents).

116. See RUBENSTEIN, *supra* note 1, at 874 n.2, citing *In re Estate of Susan Hamilton*, No. 24950, slip op. (Vt. P. Ct. 1989) (upholding "the designation of a biological mother's lover as guardian in the face of a challenge brought by the child's grandparents").

117. Intestate succession refers to "the method used to distribute property owned by a person who died without a valid will—also termed 'hereditary succession.'" BLACK'S LAW DICTIONARY 335 (pocket ed. 1996).

118. The child could not be an heir, either because he or she would have no legal relationship to the non-legal mother or because the courts would consider the child illegitimate. See generally *Lalli v. Lalli*, 439 U.S. 259 (1978) (upholding a New York law that precluded illegitimate children from inheriting from their fathers through intestate succession unless a court order issued during the father's lifetime had established paternity); *Labine v. Vincent*, 401 U.S. 532 (1971) (upholding a Louisiana law that precludes an illegitimate child from taking a father's property through intestate succession unless the father legitimates the child).

119. *Johnson v. Calvert*, 851 P.2d 776, 799 (Cal. 1993) (Kennard, J., dissenting).

120. See, e.g., ARK. CODE ANN. § 9-10-201(b)(1-2) (Michie 1999) (using genetics to ascertain parentage); *Belsito v. Clark*, 644 N.E.2d 760, 762 (Ohio Ct. Com. Pl. 1994) (holding that "natural parents of a child shall be identified by determination as to which individuals have provided the genetic imprint for that child").

121. See *infra* notes 122-23 and accompanying text.

link to the child.<sup>122</sup> However, an Ohio case, *Belsito v. Clark*,<sup>123</sup> focused on the genetic mother.<sup>124</sup>

*Belsito* involved the same gestational surrogacy fact pattern as *Johnson*.<sup>125</sup> However, the *Belsito* court rejected both the preconception intent test utilized by the *Johnson* majority<sup>126</sup> and the best interests of the child test advocated by the dissent,<sup>127</sup> in lieu of a test based on genetic contribution to the child.<sup>128</sup> The *Belsito* genetic contribution test asks two questions: (1) which individuals provided the gametes for the child; and (2) did the genetic parents waive their parental rights and consent to allowing others to raise the child.<sup>129</sup> Under *Belsito*, "[i]f the genetic parents have not waived their rights and have decided to raise the child, then they must be recognized as the natural and legal parents."<sup>130</sup>

122. See ARK. CODE ANN. § 9-10-201(b)(1-2) (Michie 1999) (stating that in surrogacy cases "the child shall be that of: the biological father and the woman intended to be the mother if the biological father is married"). This statute seems like the exact opposite of the New Hampshire statute, which focuses on the gestational mother by recognizing her parental status. See N.H. REV. STAT. ANN. § 168-B:2-3 (1999). If she is married, there is a rebuttable presumption recognizing the parental rights of her husband. See generally 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 the Arkansas and New Hampshire statutes).

123. 644 N.E.2d 760 (Ohio Ct. Com. Pl. 1994).

124. Technically the *Belsito* court recognized the genetic parents' parental status; however, since the issue of paternity was uncontested, the court focused on assigning parental rights between a genetic and a gestational mother. See *Belsito*, 644 N.E.2d at 760-61.

125. Both cases involved a married couple, the genetic parents, and a surrogate gestational mother. However, in *Belsito* the surrogate gestational mother agreed with the genetic parents' claims of parenthood. See *Belsito*, 644 N.E.2d at 762 (explaining that the genetic parents commenced the action because Ohio laws regarding birth certificates state: "the woman who gave birth . . . will be listed as the child's mother . . . [and] because the surrogate and the genetic father are not married, the child will be considered illegitimate, and will be listed on his birth records as 'Baby Boy Clark' [surrogate mother's surname] and not as 'Baby Boy Belsito'").

126. See *supra* Part III.B.1 (discussing preconception intention test).

127. See *supra* Part III.B.2 (discussing best interests of the child test).

128. See 644 N.E.2d at 766. According to the *Belsito* court:

The use of the intent test is truly a new and questionable framework upon which to base the determination of parentage . . . . [T]here is abundant precedent for using the genetics test for identifying a natural parent. For the best interests of the child and society, there are strong arguments to recognize the genetic parent as the natural parent . . . . Because [the genetic] test has served so well, it should remain the primary test for determining the natural parent, or parents, in . . . surrogacy cases.

*Id.*

129. See *Belsito*, 644 N.E.2d at 767. The *Belsito* court explained that:

The test to identify the natural parents should be, "Who are the genetic parents?" . . . However, a genetic test cannot be the only basis for determining who will assume the status of legal parent . . . . [A] second query must be made to determine the legal parents, the individual or individuals who will raise the child. That question must be determined by the consent of the genetic parents.

*Id.*

130. *Id.*

## 2001] THE G.I.F.T. OF TWO BIOLOGICAL AND LEGAL MOTHERS 227

Like the preconception intent and best interests of the child tests, the genetic contribution test supports the recognition of the parental rights of both the genetic and gestational mothers in cases where a lesbian couple conceived a child through GIFT/ZIFT.<sup>131</sup> Initially, the *Belsito* test would acknowledge the genetic mother's parental status,<sup>132</sup> since she would not have waived her parental rights. However, since the sperm donor would have waived his parental rights at the time of donation,<sup>133</sup> there would be no legally recognized second genetic parent, and the genetic mother could presumably consent to share the "rights and duties of parentage"<sup>134</sup> with the gestational mother.<sup>135</sup> Thus, courts should recognize both women's parental rights under the genetic contribution test.

### C. U.S. Supreme Court Cases Establishing Fundamental Parental Rights

#### 1. Fundamental Liberty Interest Inherent in Procreation and Parenting

Although the U.S. Constitution does not contain an explicit confirmation of the right to procreation, a series of Supreme Court cases have recognized fundamental rights associated with parenting.<sup>136</sup> Moreover, the Court has not limited the concept of

131. See *infra* notes 132-35 and accompanying text.

132. Some commentators applauded the *Belsito* premise of genetic contribution as the defining feature of parenthood, since this is the biological feature of parenthood that men and women share. See, e.g., Katha Pollitt, *Checkbook Maternity: When is a Mother not a Mother?*, THE NATION, Dec. 31, 1990, at 843. Others, however, viewed this preference for genetics as based on a male reproductive paradigm, which ignores the fact that women alone contribute another essential element of reproduction—gestation. See, e.g., Coleman, *supra* note 75, at 518 ("Women do not gain their rights to their children in this society as mothers, but as father equivalents, as equivalent sources of seed.") (quoting BARBARA K. ROTHMAN, RECREATING MOTHERHOOD: IDEOLOGY AND TECHNOLOGY IN A PATRIARCHAL SOCIETY 36-37 (1989)); Nicole Miller Healy, *Beyond Surrogacy: Gestational Parenting Agreements Under California Law*, 1 UCLA WOMEN'S L.J. 89, 116 (1991) (stating that the genetic contribution test presents a "distorted view of women's wombs as 'incubators' for sale").

133. See *supra* note 10 (explaining this Comment's premise of anonymous sperm donation).

134. See *Belsito*, 644 N.E.2d at 767.

135. The gestational mother did not assert her parental rights in *Belsito*, causing the court to admit that its decision did not affect the law of parentage where the gestational surrogate does assert her parental rights. See *Belsito*, 644 N.E.2d at 767 n.3 ("Because that issue is not before the court, the law of nongenetic-providing surrogacy remains, in part, uncertain."). However, gestational surrogacy is distinct from lesbian GIFT/ZIFT: (1) unlike gestational surrogacy, in lesbian GIFT/ZIFT cases the genetic and gestational mothers would intend to raise the child jointly; and (2) lesbian GIFT/ZIFT involves only two potential parents, unlike gestational surrogacy cases, which typically involve at least three (i.e., the mixed-gender couple and the woman who either donates her ova or gestates the couple's child).

136. See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (expanding the concepts of constitutional protection of families to include procreation as "fundamental to the very existence and survival of the race"); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (upholding the "liberty of parents and guardians to direct the upbringing and education of

parental rights to traditional, nuclear families,<sup>137</sup> but has held that a person with a biological connection and a history of involvement with a child has a constitutionally protected parental right.<sup>138</sup> Hence, the unorthodox nature of a lesbian couple conceiving a child through GIFT/ZIFT does not negate the mothers' protected interest.<sup>139</sup> Indeed, according to Justice Brennan, the parent and child relationship "was among the first that the Court acknowledged in its cases defining the 'liberty' interest protected by the Constitution."<sup>140</sup> The Court also has recognized the specific rights of the gestational mother to become pregnant<sup>141</sup> and the genetic mother to produce biological offspring.<sup>142</sup> Both the genetic and gestational mothers' fundamental rights as natural parents entitle them to the protections of due process and equal protection.

## 2. Due Process: *Bowers v. Hardwick*<sup>143</sup>

The Court locates the right to privacy, which includes the rights of procreation and parenting, in the liberty provision of the Due Process clause of the Fifth Amendment.<sup>144</sup> However, in *Bowers v. Hardwick*,<sup>145</sup> the Court refused to extend the fundamental right of privacy to protect the right of consenting adults to engage in same-gender sodomy.<sup>146</sup> Some courts have since cited the existence of a state sodomy law, combined with the Supreme Court's ruling in

---

children under their control"); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (finding a fundamental liberty interest protected by the Fourteenth Amendment which encompasses the right to "establish a home and bring up children").

137. See *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (expanding the concept of familial rights to include extended families).

138. See *Stanley v. Illinois*, 405 U.S. 645, 650 (1972) ("[T]he privacy interests . . . of a man in the children he has sired and raised, undeniably warrants deference and absent a powerful countervailing interest, protection.").

139. See *Michael H. v. Gerald D.*, 491 U.S. 110, 133 (1989) (Stevens, J., concurring) (noting that the fundamental liberty interests of procreation and intimate association may arise in "unconventional . . . settings").

140. *Id.* at 141-42 (Brennan, J., dissenting).

141. See *Carey v. Population Servs. Int'l.*, 431 U.S. 678, 685 (1977) (holding that the decision to bear a child is fundamental to individual autonomy).

142. See *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.") (emphasis in original).

143. 478 U.S. 186 (1986).

144. U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property without due process of law.").

145. 478 U.S. 186 (1986).

146. The defendant in *Bowers* was charged with violating Georgia's criminal sodomy law by engaging in oral sex with another man in his bedroom. *Id.* at 186.

## 2001] THE G.I.F.T. OF TWO BIOLOGICAL AND LEGAL MOTHERS 229

*Bowers*, as a compelling reason to deny parental rights to lesbians and gay men.<sup>147</sup> However, *Bowers* does not, in fact, pose a formidable challenge to the argument for legal recognition of both the genetic and the gestational mothers of a child conceived through GIFT/ZIFT.

First, many state appellate and supreme courts have ruled that state sodomy laws violate the privacy rights guaranteed by the state constitution,<sup>148</sup> and a majority of jurisdictions currently do not have sodomy laws.<sup>149</sup> Second, the Court in *Bowers* reasoned that none of the cases addressing familial and parental privacy rights “bear any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy . . . . No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated.”<sup>150</sup> However, lesbian GIFT/ZIFT cases do implicate family and procreative issues, such that they are distinguishable factually from *Bowers*. Finally, even if *Bowers* precludes legal recognition of both mothers on due process grounds, the Court in *Bowers* did not rule on the issue of equal protection, an area which has expanded the constitutional protection afforded to lesbians and gay men.<sup>151</sup> According to the Seventh Circuit, “*Bowers* will soon be eclipsed in the area of equal protection by the Supreme Court’s holding in *Romer*.”<sup>152</sup>

---

147. See generally *Thigpen v. Carpenter*, 730 S.W.2d 510 (Ark. Ct. App. 1987) (relying on *Bowers* to reject a mother’s argument that denial of custody was a violation of her due process rights); *Bottoms v. Bottoms*, 457 S.E.2d 102 (Va. 1995) (relying on a state sodomy statute to deny custody to a lesbian mother).

148. See, e.g., *Commonwealth v. Wasson*, 842 S.W.2d 487, 492 (Ky. 1992) (finding that the state sodomy law “violates rights of equal protection as guaranteed by our Kentucky constitution”); *New York v. Onofre*, 415 N.E.2d 936 (N.Y. 1980) (striking down a state sodomy law as violative of federal and state constitutions). But see *Missouri v. Walsh*, 713 S.W.2d 508 (Mo. 1986) (upholding the constitutionality of the state’s sodomy law and rejecting a challenge based on the federal and state constitutions).

149. Thirty-two states and the District of Columbia have no sodomy laws. Five states (Arkansas, Kansas, Oklahoma, Missouri, and Texas) maintain same-gender sodomy laws and thirteen states (Alabama, Arizona, Florida, Idaho, Louisiana, Massachusetts, Minnesota, Michigan, Mississippi, North Carolina, South Carolina, Utah, and Virginia) maintain mixed- and same-gender sodomy laws. See The National Gay and Lesbian Task Force, *The Right to Privacy in the U.S. March 1999*, at <http://www.nglft.org/downloads/sodomy399.gif> (last visited Oct. 21, 1999).

150. 478 U.S. 186, 190-91 (1986).

151. See *infra* Part III.C.3 (discussing equal protection arguments).

152. *Nabozny v. Podlesny*, 92 F.3d 446, 458 n.12 (7th Cir. 1996) (holding that lesbian and gay students have a constitutional right to equal protection from harm in public schools); see also *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) (asserting that the majority opinion overrules the *Bowers* decision).



230 JOURNAL OF GENDER, SOCIAL POLICY &amp; THE LAW [Vol. 9:1]

3. Equal Protection: *Romer v. Evans*

*Romer v. Evans*<sup>153</sup> should remind courts that states cannot rely on homophobic prejudice as a justification for government action. In *Romer*, the Supreme Court held that Amendment 2 to Colorado's Constitution was unconstitutional under the Equal Protection Clause.<sup>154</sup> Amendment 2 stated:

No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This section of the Constitution shall be in all respects self-executing.<sup>155</sup>

The Court held that Amendment 2 failed even the most deferential rational basis review.<sup>156</sup> First, the Court found that the amendment's "peculiar property of imposing a broad and undifferentiated disability on a single named group is an exceptional and . . . invalid form of legislation."<sup>157</sup> Second, Amendment 2's "sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests."<sup>158</sup>

---

153. 517 U.S. 620 (1996).

154. *Romer*, 517 U.S. at 623. The Fifth Amendment's Due Process Clause provides that "no person shall . . . be deprived of life, liberty, or property, without due process of the law." U.S. CONST. amend V. Although this clause does not have an explicit equal protection component, it forbids the federal government from discriminating in a manner "so unjustifiable as to be violative of due process." See *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (declaring school segregation in the District of Columbia to be unconstitutional under the Fifth Amendment). The Court explained that the Due Process Clause of the Fifth Amendment contains an equal protection guarantee. *Id.* Equal protection analysis under the Fifth Amendment mirrors that under the Equal Protection Clause of the Fourteenth Amendment. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 217 (1995) (explaining that "[t]his Court's approach to Fifth Amendment equal protection claim has always been precisely the same as to equal protection claims under the Fourteenth Amendment") (alteration in original) (quoting *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975)). The Fourteenth Amendment's Equal Protection Clause states that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend XIV.

155. *Romer*, 517 U.S. at 624 (citing COLO. CONST. amend. 2).

156. *Id.* at 631 ("[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end. Amendment 2 fails, indeed defies, even this conventional inquiry.").

157. *Id.*

158. *Id.*

## 2001] THE G.I.F.T. OF TWO BIOLOGICAL AND LEGAL MOTHERS 231

The Constitution protects the parental rights of a person with a biological connection and a history of involvement with a child<sup>159</sup> and, as such, when two people have a biological connection and a history of involvement with a child the law will recognize both people as the child's parents. If this constitutional protection is not extended to lesbian couples, where both women have a biological connection to the child, this discrepancy is subject to invalidation under *Romer*.<sup>160</sup>

First, such a policy of denying legal recognition to both women would constitute an unconstitutionally broad disability on a single group.<sup>161</sup> The Court characterized Amendment 2 as "at once too narrow and too broad [because i]t identifies persons by a single trait and then denies them protection across the board."<sup>162</sup> Similarly, failing to recognize parental rights of both biological mothers denies this fundamental right only to couples who possess the single trait of being lesbian couples—as opposed to mixed-gender couples who utilize ARTs to conceive a child but still receive legal recognition of their parental rights.<sup>163</sup> Likewise, the Court viewed Amendment 2's disabling effect on lesbian and gay individuals' legal status as having "broad" and "far-reaching" implications.<sup>164</sup> The denial of parental rights carries a similar degree of broad and far-reaching implications.<sup>165</sup>

Second, the refusal to legally recognize both mothers would be invalid under *Romer* because it does not rationally further a legitimate government interest and may instead be motivated only by anti-lesbian animus.<sup>166</sup> The states' legitimate interest in determining parental status should dictate a decision that serves the best interests of the minor child, which, in cases involving lesbian couples who conceive through GIFT/ZIFT, means granting legal recognition to

159. See *supra* note 138 and accompanying text (citing *Stanley v. Illinois*, 405 U.S. 645 (1972)).

160. See *infra* notes 161-64 (explaining why not extending protection would be invalid under *Romer*).

161. See *Romer v. Evans*, 517 U.S. 620, 632 (1996) (finding Amendment 2 to be unconstitutional because it imposed a "broad . . . disability on a single named group").

162. *Romer*, 517 U.S. at 633.

163. See, e.g., UNIF. PARENTAGE ACT § 5(a) (1999), 9B U.L.A. 33 (Supp. 2000) (determining that the husband of a woman artificially inseminated under a physician's supervision "is treated in law as if he were the natural father of a child thereby conceived").

164. *Romer*, 517 U.S. at 627-28.

165. See generally *M.L.B. v. S.L.J.*, 519 U.S. 102 (1997) (characterizing termination of parental rights as unique in their severity of state action).

166. See *Romer*, 517 U.S. at 634-35 (stating that laws enacted for broad purposes must bear a rational relationship to a legitimate governmental purpose in order to outrun the injuries that the law causes).

232 JOURNAL OF GENDER, SOCIAL POLICY &amp; THE LAW [Vol. 9:1

both mothers.<sup>167</sup> Further, in *Romer* the Court stated that laws motivated by animosity towards “a politically unpopular group cannot constitute a legitimate government interest.”<sup>168</sup> Relying on *Romer*, many courts now presume “that constitutional claims on behalf of lesbians and gay men have legitimacy, and that the government bears the burden of justifying its anti-gay actions” on grounds other than homophobia.<sup>169</sup>

#### D. Statutory Support for Legal Recognition of Both Mothers

##### 1. The Uniform Status of Children of Assisted Conception Act

The Uniform Status of Children of Assisted Conception Act<sup>170</sup> (“USCACA”) defines the legal status of children conceived through assisted conception, broadly defined to include artificial insemination by donor (“AID”), *in vitro* fertilization (“IVF”), and surrogacy.<sup>171</sup> While the USCACA’s category of assisted conception would arguably encompass GIFT/ZIFT,<sup>172</sup> the definitions of “donor,” “surrogate,” and “intended parents” would preclude recognition of both mothers in lesbian GIFT/ZIFT cases.

Under the USCACA, the genetic mother would be legally recognized as a “donor,” defined as “an individual [other than a surrogate] who produces egg or sperm used for assisted conception . . . but does not include a woman who gives birth to a resulting child.”<sup>173</sup> However, the gestational mother would not be recognized as a “surrogate”—defined as “an adult woman who enters into an agreement to bear a child conceived through assisted

167. See *supra* Part III.B.3 (discussing best interests of the child standard and its application to children conceived through GIFT/ZIFT to lesbian couples).

168. *Romer*, 517 U.S. at 634 (quoting *Department of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

169. See Ruth E. Harlow, *How Far Can Romer Reach?*, at <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=15> (last visited Feb. 1, 1997) (noting that within a year of the *Romer* decision attorneys have used the decision to fight a variety of anti-gay discrimination cases).

170. 9B U.L.A. 199-214 (Supp. 2000). Two states have adopted the USCAC: North Dakota and Virginia. See *Table of Jurisdictions Wherein Act Has Been Adopted*, UNIF. STATUS CHILD. ASST. CONCEP. ACT, 9B U.L.A. 199 (Supp. 2000) (citing N.D. CENT. CODE §14-18-01 to -07; VA. CODE ANN. § 20-156 to -165).

171. See Comment, UNIF. STATUS CHILD. ASST. CONCEP. § 1, 9B U.L.A. 202 (Supp. 2000) (explaining the scope of the USCACA).

172. See UNIF. STATUS CHILD. ASST. CONCEP. § 1(1), 9B U.L.A. 202 (Supp. 2000) (“‘Assisted conception’ means a pregnancy resulting from (i) fertilizing an egg of a woman with sperm of a man by means other than sexual intercourse or (ii) implanting an embryo . . .”).

173. UNIF. STATUS CHILD. ASST. CONCEP. § 1(2), 9B U.L.A. 199 (Supp. 2000).

## 2001] THE G.I.F.T. OF TWO BIOLOGICAL AND LEGAL MOTHERS 233

conception for the intended parents”<sup>174</sup>—and the lesbian couple would not be recognized as “intended parents”—defined as “a man and a woman, married to each other, who enter into an agreement under this [Act] providing that they will be the parents of a child born to a surrogate . . . .”<sup>175</sup> As a result, the USCACA would classify lesbian GIFT/ZIFT as assisted conception, but would not utilize a surrogacy analysis to determine parental rights.<sup>176</sup>

The USCACA clearly delineates parental rights associated with assisted conception without surrogacy: “a woman who gives birth to a child is the child’s mother”<sup>177</sup> and “a donor is not a parent of a child conceived through assisted conception.”<sup>178</sup> Thus, under the USCACA, only the gestational mother would receive legal recognition of her parental rights. This result, however, contradicts the motivation behind the USCACA “to provide a child with two parents.”<sup>179</sup> Moreover, North Dakota, one of the two jurisdiction adopting the USCACA, omits several sections,<sup>180</sup> one of particular relevance to lesbian GIFT/ZIFT cases: North Dakota does not include the section that deems the gestational mother the child’s legal mother,<sup>181</sup> but does include the section that denies parental recognition to the genetic mother.<sup>182</sup> As a result, the USCACA as adopted in North Dakota would recognize neither the genetic nor

174. UNIF. STATUS CHILD. ASST. CONCEP. § 1(4), 9B U.L.A. 199 (Supp. 2000).

175. UNIF. STATUS CHILD. ASST. CONCEP. § 1(3), 9B U.L.A. 199 (Supp. 2000). See Ann MacLean Massie, *Restricting Surrogacy to Married Couples: A Constitutional Problem? The Married-Parent Requirement in the Uniform Status of Children of Assisted Conception Act*, 18 HASTINGS CONST. L.Q. 487, 528-29 (1991) (arguing that defining intended parents to exclude non-married couples is constitutional).

176. The majority of the USCACA deals with surrogacy. See UNIF. STATUS CHILD. ASST. CONCEP. ALTERNATIVE A §§ 5-9, ALTERNATIVE B § 5, 9B U.L.A. 205-13 (Supp. 2000). The USCACA sets forth two alternate provisions, Alternatives A and B. Alternative A comprises sections 5 through 9 of the USCACA and Alternative B section 5 proclaims all surrogacy agreements to be null and void. *Id.*

177. UNIF. STATUS CHILD. ASST. CONCEP. § 2, 9B U.L.A. 203 (Supp. 2000). See UNIF. STATUS CHILD. ASST. CONCEP. § 3, 9B U.L.A. 203-04 (Supp. 2000) (“The husband of a woman who bears a child through assisted conception is the father of the child.”).

178. UNIF. STATUS CHILD. ASST. CONCEP. § 4(a), 9B U.L.A. 204 (Supp. 2000).

179. See Prefatory Note, UNIF. STATUS CHILD. ASST. CONCEP., 9B U.L.A. 199 (Supp. 2000) (reporting that “there was great urgency on the part of the Drafting Committee to provide a child with two parents, and this established a presumption of paternity in the husband of a married woman who bears a child through assisted conception”).

180. North Dakota adopted Alternative B, which in effect prohibits all surrogacy agreements. See Comment, UNIF. STATUS CHILD. ASST. CONCEP., 9B U.L.A. 212 (Supp. 2000) (“Alternative B adopted in: North Dakota.”).

181. See Action in Adopting Jurisdiction, UNIF. STATUS CHILD. ASST. CONCEP. § 2, 9B U.L.A. 203 (Supp. 2000) (“North Dakota omits this section.”).

182. See Variations from Official Text, UNIF. STATUS CHILD. ASST. CONCEP. § 4, 9B U.L.A. 205 (Supp. 2000) (noting that North Dakota retains subsection (a), which reads “a donor is not the parent of a child conceived through assisted conception”).

the gestational mother. This result completely subverts the intention behind the USCACA of protecting the best interests of the child.<sup>183</sup>

In fact, the Prefatory Notes to the USCACA contemplate the scenario in which a child of assisted conception might have “no one [legally] responsible for support, nurturing, health, well being” and proclaim that “the greatest priority . . . of the Drafting Committee was to provide an act which addressed these . . . deficiencies.”<sup>184</sup> In lieu of reaching this presumably unforeseen and unfortunate result, the courts would be wise to rely upon the UPA instead of the USCACA.<sup>185</sup>

## 2. The Uniform Parentage Act

The Uniform Parentage Act<sup>186</sup> (“UPA”) establishes the requirements for legal recognition of the parent and child relationship.<sup>187</sup> While only two states have adopted the USCACA,<sup>188</sup> eighteen states have adopted the UPA;<sup>189</sup> thus, lesbian parents are

183. See Prefatory Note, UNIF. STATUS CHILD. ASST. CONCEP., 9B U.L.A. 200 (Supp. 2000). The Prefatory Note states that:

It is extremely important for all to understand clearly the mandate which has guided the Drafting Committee in the preparation of this Act. The Committee was given the responsibility to draft . . . a child oriented act . . . that would inure to the benefit of those children born as a result of [assisted conception]. . . . This Act was designed primarily to effect the security and well being of those children born and living . . . as a result of assisted conception.

*Id.*

184. Prefatory Note, UNIF. STATUS CHILD. ASST. CONCEP., 9B U.L.A. 200 (Supp. 2000).

185. See N.D. CENT. CODE § 14-17-01 to -26 (1999) (adopting the UPA). *But see infra* note 189 (listing the eighteen states which have adopted the UPA and recognizing that Virginia is not among them).

186. 9B U.L.A. 287-345 (1987).

187. The Uniform Parentage Act was intended to address issues of legitimacy and not surrogacy. See Notes, UNIF. PARENTAGE ACT, 9B U.L.A. 287-90 (1987); *see also In re Marriage of Moschetta*, 25 Cal. App. 4th 1218 (1994) (concluding that the UPA does not have any reasonable application to surrogacy cases). However, a lesbian couple who conceived a child through GIFT/ZIFT would not implicate surrogacy issues and, therefore, this limitation does not prevent the application of the UPA to lesbian GIFT/ZIFT cases. *Cf. Nancy S. v. Michelle G.*, 228 Cal. App. 3d 831 (1991) (holding that non-biological mother who had not adopted the biological children of her female partner was not a parent within the meaning of the UPA).

188. See *supra* note 170 (listing the states that adopted the USCACA).

189. These eighteen states are: Alabama, California, Colorado, Delaware, Hawaii, Illinois, Kansas, Minnesota, Missouri, Montana, Nevada, New Jersey, New Mexico, North Dakota, Ohio, Rhode Island, Washington, and Wyoming. See *Table of Jurisdictions Wherein Act Has Been Adopted*, UNIF. PARENTAGE ACT, 9B U.L.A. 17 (1987) (citing ALA. CODE § 26-17-1 to 26-17-2; CAL. FAM. CODE ANN. §§ 7600 to 7730; COLO. REV. STAT. ANN. § 19-4-101 to 19-4-130; DEL. CODE ANN. tit. 13, §§ 801 to 819; HAW. REV. STAT. § 584-1 to 584-26; 750 ILL. COMP. STAT. 45/1 to 45/26; KAN. STAT. ANN. § 38-1110 to 38-1138; MINN. STAT. ANN. § 257.51 to 257.75; MO. ANN. STAT. § 210.817 to 210.852; MONT. CODE ANN. § 40-6-101 to 40-6-135; NEV. REV. STAT. ANN. § 126.011 to 126.371; N.J. STAT. ANN. § 9:17-38 to 9:17-59; N.M. STAT. ANN. § 40-11-1 to 40-11-23; N.D. CENT. CODE § 14-17-01 to 14-17-26; OHIO REV. CODE ANN. § 3111.01 to 3111.19; R.I. GEN. LAWS § 15-8-1 to 15-8-27; WASH. REV. CODE ANN. § 26.26.010 to 26.26.905; and WYO. STAT. § 14-2-101 to 14-2-120).

## 2001] THE G.I.F.T. OF TWO BIOLOGICAL AND LEGAL MOTHERS 235

more likely to seek recognition under the UPA than the USCACA.

Section 3(1) of the UPA provides that “[t]he parent and child relationship” may be established between a child and the natural mother “by proof of her having given birth to the child.”<sup>190</sup> The UPA thus presumptively designates the gestational mother as the child’s legal mother, but requires additional proof to establish that the genetic mother also has a legally recognized parental relationship.<sup>191</sup> While section 3 does not specify any other acceptable means of proving maternity,<sup>192</sup> the comment to section 21 explains that because of the relatively low number of maternity disputes the UPA’s drafters focused primarily on guidelines for establishing paternity,<sup>193</sup> and section 21 states that any relevant portions of the UPA can be applied to establish maternity.<sup>194</sup> States that have adopted the UPA have made this dual applicability even more explicit. For example, the Colorado statute modeled on the UPA states: “[i]n case of a maternity suit against a purported mother, where appropriate in the context, the word ‘father’ shall mean ‘mother.’”<sup>195</sup>

Section 4(a) of the UPA states the conditions under which the law presumes a man to be the natural father of a child.<sup>196</sup> First, subsection (4) provides that the presumption of parentage exists if, “while the child is under the age of majority, [a man] receives the child into his home and openly holds out the child as his natural child.”<sup>197</sup> Substituting the feminine for the masculine pronouns

190. UNIF. PARENTAGE ACT § 3 (1), 9B U.L.A. 297-98 (1987).

191. The UPA favors the gestational mother as the legal mother, in contrast to the genetic contribution test, which favors the genetic mother as the legal mother. *See supra* Part III.B.3 (discussing the genetic contribution test). A jurisdiction such as Ohio, which has adopted the UPA, *see* OHIO REV. CODE ANN. § 3111.01 to 3111.19, and uses the genetic contribution test, *see* *Belsito v. Clark*, 644 N.E.2d 760 (Ohio Ct. Com. Pl. 1994), provides possibly the strongest case law and statutory support for the legal recognition of both mothers.

192. Section 3, in its entirety, states only that:

The parent and child relationship between a child and (1) the natural mother may be established by proof of her having given birth to the child, or under this Act; (2) the natural father may be established under this Act; (3) an adoptive parent may be established by proof of adoption or under the [Revised Uniform Adoption Act].

UNIF. PARENTAGE ACT § 3, 9B U.L.A. 297-98 (1987).

193. The comment to § 21 explains: “[s]ince it is not believed that cases of this nature will arise frequently, Sections 4 to 20 are written principally in terms of the ascertainment of *paternity*.” Comment, UNIF. PARENTAGE ACT § 21, 9B U.L.A. 334 (1987).

194. *See* UNIF. PARENTAGE ACT § 21, 9B U.L.A. 334 (1987) (indicating that “[a]ny interested party may bring an action to determine the existence or nonexistence of a mother and child relationship. Insofar as practicable, the provisions of this Act applicable to the father and child relationship apply”).

195. COLO. REV. STAT. ANN. § 19-4-125 (West 1999).

196. UNIF. PARENTAGE ACT § 4, 9B U.L.A. 298-99 (1987).

197. UNIF. PARENTAGE ACT § 4(a)(4), 9B U.L.A. 299 (1987).

creates the presumption of maternity for a woman who receives a minor child into her home and openly holds the child out as her natural child.<sup>198</sup> In the case of a lesbian couple, the genetic mother presumably will have resided with the child since birth and openly acknowledged the child as her own.<sup>199</sup> Consequently, the genetic mother should be recognized as a presumed parent pursuant to subsection (4). Second, subsection (5) creates the presumption of paternity if a man files a written acknowledgment of his paternity, along with a written statement by the mother that she does not dispute his claim of paternity, with the court or registrar of vital statistics.<sup>200</sup> In the case of lesbian couples, the genetic mother could file a petition to establish maternity at the same time that the gestational mother files the notice of the birth, and, as part of such a joint filing, the gestational mother could assent to the genetic mother's status as parent.<sup>201</sup> Third, while subsection (1) presumes the paternity of the man married to the child's natural mother,<sup>202</sup> legal recognition of the relationship between the child and the genetic mother does not depend on the existence of a marriage between the two natural parents.<sup>203</sup>

In addition, section 12 of the UPA allows for the presumption of parentage from "blood test results . . . of the statistical probability of the alleged father's paternity"<sup>204</sup> or "medical or anthropological evidence relating to the alleged father's paternity of the child based

---

198. A literal substitution of the feminine for the masculine pronouns in § 4(a)(4) would read: "A [woman] is presumed to be the natural [mother] of a child if: while the child is under the age of minority, [she] receive the child into [her] home and openly holds out the child as [her] natural child."

199. See *supra* note 71 (stating this Comment's assumption that a lesbian couple who conceived a child through GIFT/ZIFT would intend to raise the child together).

200. See UNIF. PARENTAGE ACT § 4(a)(5), 9B U.L.A. 299 (1987). This section states that:

A man is presumed to be the natural father of a child if: he acknowledges his paternity of the child in a writing filed with the [appropriate court or Vital Statistics Bureau], which shall promptly inform the mother of the filing of the acknowledgment, and she does not dispute the acknowledgment within a reasonable time after being informed thereof, in a writing filed with the [appropriate court or Vital Statistics Bureau].

*Id.*

201. See McChesney & Lavender, *supra* note 65, at 19 (explaining that in the Colorado lesbian GIFT case, the mothers filed a "Petition for Determination of Parent and Child Relationship" which contained a stipulation that both parties agreed to their own and each other's maternity).

202. See *supra* note 200 and accompanying text.

203. See UNIF. PARENTAGE ACT § 2, 9B U.L.A. 296 (1987) ("The parent and child relationship extends equally to every child and to every parent, regardless of the marital status of the parents.").

204. UNIF. PARENTAGE ACT § 12(3), 9B U.L.A. 317 (1987).

## 2001] THE G.I.F.T. OF TWO BIOLOGICAL AND LEGAL MOTHERS 237

on tests performed by experts.”<sup>205</sup> Substituting the feminine for the masculine pronouns creates the presumption of maternity, as such genetic tests would confirm the genetic mother’s biological relationship to the child.

Finally, section 4(5)(b) provides that:

A presumption under this section may be rebutted in an appropriate action only by clear and convincing evidence. If two or more presumptions arise which conflict with each other, the presumption which on the facts is founded on the weightier considerations of policy and logic controls. The presumption is rebutted by a court decree establishing paternity of the child by another man.<sup>206</sup>

While section 21 of the UPA directs substitution of the feminine for the masculine “insofar as practicable,”<sup>207</sup> in the context of this means of rebutting the presumption of paternity, “mother” should not be substituted for “father.” While proof of the paternity of another man would negate the paternity of an alleged father, proof of the genetic mother’s maternity does not negate the gestational mother’s maternity, because whereas only one man can provide the necessary biological material to inseminate an egg, two different components of maternity exist—genetic and gestational.<sup>208</sup> By permitting two different mothers to serve those two functions, GIFT/ZIFT changes the traditional notion that a child can have only one mother:

The capability of separating the process of producing eggs from the act of gestation renders obsolete the use of the word biological to modify the word mother. [Newly developed artificial means of reproduction] now make it possible for two different women to make a biological contribution to the creation of a new life. It would be a prescriptive rather than a descriptive definition to maintain that the egg donor should properly be called the biological mother. The woman who contributes her womb during gestation . . . is also a biological mother.<sup>209</sup>

Since the UPA contains no language that imposes a limit of only one possible mother and child relationship, its recognition of only one father should not extend to recognize only one mother.<sup>210</sup>

205. UNIF. PARENTAGE ACT § 12(4), 9B U.L.A. 317 (1987).

206. UNIF. PARENTAGE ACT § 4(5)(b), 9B U.L.A. 299 (1987).

207. UNIF. PARENTAGE ACT § 21, 9B U.L.A. 334 (1987).

208. See *supra* notes 9-13 and accompanying text (differentiating between genetic and gestational maternity and explaining the GIFT/ZIFT procedure).

209. Ruth Macklin, *Artificial Means of Reproduction and Our Understanding of the Family*, HASTINGS CENTER REP., Jan.-Feb., p. 6 (1991).

210. See Jerald V. Hale, Note, *From Baby M. to Jaycee B.: Fathers, Mothers, and Children in the Brave New World*, 24 J. CONTEMP. L. 335, 345-46 (1998) (noting that while the UPA resolves all



The legislative intent behind the UPA also supports the legal recognition of both mothers.<sup>211</sup> The UPA codified the rulings of several Supreme Court decisions that mandated equal treatment of legitimate and illegitimate children<sup>212</sup> and allowed for the recognition of two legal parents for a child, both of whom owe the child certain rights, including support and inheritance.<sup>213</sup> The drafters of the UPA, as well as the various state legislatures that adopted the UPA probably did not anticipate cases of children conceived by lesbian couples through GIFT/ZIFT, both because society did not commonly recognize such alternative families and because medical science had not yet developed GIFT/ZIFT procedures.<sup>214</sup> However, the legislative intent of the UPA still applies to such cases, as statutes are not frozen in time but must necessarily be applied to situations and circumstances not within the drafters' original contemplation.<sup>215</sup> In fact, legislative enactments by their very nature must generalize and impose principles applicable to a variety of unenumerated and unforeseen situations.<sup>216</sup> Statutory construction requires recognition of modern realities, including diverse family structures such as same-gender parents and surrogate mothers, particularly when such

---

paternity disputes by recognition of only one father, "more than one mother can be legally recognized under the UPA").

211. See *infra* notes 212-19 and accompanying text (outlining the legislative intent behind the UPA).

212. See generally *Gomez v. Perez*, 409 U.S. 535 (1973) (deciding that illegitimate children are guaranteed a right of support from their fathers); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972) (holding that worker's compensation benefits related to the death of their father are due dependent, unacknowledged, illegitimate children). The UPA states that "[t]he parent and child relationship extends equally to every child and every parent, regardless of the marital status of the parents." UNIF. PARENTAGE ACT § 2 (1999), 9B U.L.A. 24 (Supp. 2000). See also Frederic B. Rodgers, *Equal Protection for Illegitimate Children: Uniform Parentage Act of 1977*, 6 COLO. LAW. 1298, 1298 (1977) (noting that under the UPA issues of legitimacy are irrelevant to the establishment of a parent and child relationship).

213. See *Hobus v. Hobus*, 540 N.W.2d 158, 160 (N.D. 1995) (explaining that under the UPA the parent of a child is obligated to care for, protect, support, educate, give moral guidance to, and provide a home for the child).

214. See *supra* Parts I-II (recounting the historical background of GIFT/ZIFT and the evolution of the legal treatment same-gender parents).

215. See *Church of the Lukumi Babalu, Inc. v. City of Hialeah*, 508 U.S. 520, 577 (1993) (Souter, J., concurring) (explaining that the drafters' intent behind a statute is only one "in the hierarchy of issues to be explored" in applying the statute). But see Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863 (1989) (arguing against evolving interpretations of the law and averring that "the main danger in . . . judicial interpretation of any law is that the judges will mistake their own predilections for law. . . . One might reduce this danger by insisting that the new values invoked to replace original meanings be clearly and objectively manifested in the laws.").

216. See *Nomination of David H. Souter to be Associate Justice of the Supreme Court of the United States: Hearing Before the Senate Comm. on the Judiciary*, 101st Cong. 54, 161 (1990) (statement of Judge David Souter) (emphasizing that the application of constitutional and statutory provisions is "enlightened by changing facts and circumstances in society").

## 2001] THE G.I.F.T. OF TWO BIOLOGICAL AND LEGAL MOTHERS 239

recognition is in the child's best interest:

The reality of a child's life does not depend upon legal rules. In assessing the rights of parents who do not fit the one-mother/one-father status, courts can either preserve the fiction of this status regardless of the child's reality, or they can recognize diversity and tailor rules accordingly. They cannot, however, make the family life of all children uniform.<sup>217</sup>

The intention behind passage of the UPA fits the situation of lesbian couples who conceive a child through GIFT/ZIFT.<sup>218</sup> The fact that the enactors of the UPA did not anticipate the medical or familial circumstances of children conceived through GIFT/ZIFT and born to lesbian couples should not interfere with application of the statute's protections to a situation that comes within its express terms and underlying purposes.<sup>219</sup> The courts should recognize both mothers of a child conceived through GIFT/ZIFT and grant such a child the same benefits afforded any other child who seeks legitimacy through the UPA.

#### IV. RECOMMENDATIONS

GIFT/ZIFT offers lesbian couples the opportunity to conceive a child who has a distinct biological connection to both women. Since in this respect a lesbian couple is similarly situated to a mixed-gender couple, who possess a fundamental liberty interest associated with procreation and parenting, the lesbian couple's parental rights should receive equal protection under the law.<sup>220</sup> Also, in states which have adopted the UPA, its express language should apply—because the UPA does not proscribe the existence of two mothers and no courts have interpreted it as doing so under similar circumstances—leading to the recognition of both the gestational and the genetic mothers' parental status.<sup>221</sup>

Until the legal system routinely recognizes the parental rights of non-biological lesbian parents, lesbian couples who conceive children

217. See Polikoff, *supra* note 24, at 473 (noting that the law proscribes rather than describes the reality of modern families).

218. See *generally supra* Part III.D.2 (explaining how the UPA recognizes both the gestational and genetic mothers of a child conceived through GIFT/ZIFT).

219. See UNIF. PARENTAGE ACT § 1, 9B U.L.A. 23 (Supp. 2000) (conveying the UPA's purpose as recognizing "the legal relationship existing between a child and his[or her] natural [biological] parents incident to which the law confers or imposes rights, privileges, duties, and obligations").

220. See *supra* Part III.C.3 (asserting the reasons why lesbian couples should receive equal protection).

221. See *supra* Part III.D.2 (illustrating the positive effects the UPA may have on lesbian couples seeking parental status).

240 JOURNAL OF GENDER, SOCIAL POLICY &amp; THE LAW [Vol. 9:1

through GIFT/ZIFT can best expect legal recognition of both women's parental status. Individuals,<sup>222</sup> organizations,<sup>223</sup> publications,<sup>224</sup> and websites<sup>225</sup> which aid lesbian couples in becoming parents should be made aware of the possibilities of GIFT/ZIFT so that they can pass this information along to lesbian couples, especially those who live in jurisdictions that limit or preclude them from other means of becoming mothers.<sup>226</sup> Although the number of lesbian couples who utilize GIFT/ZIFT procedures is at present probably rather small, this low incidence may be due, at least in part, to a general lack of awareness. If GIFT/ZIFT, specifically lesbian GIFT/ZIFT, continues to receive wider publicity and popular culture exposure,<sup>227</sup> the number of lesbians seeking these procedures will likely increase.

#### V. CONCLUSION: THE GIFT OF TWO BIOLOGICAL MOTHERS

While many feminist, lesbian, and gay legal scholars argue for a broader notion of family,<sup>228</sup> with legal recognition of multiple parents

222. See, e.g., *Surrogacy Attorney*, at <http://www.surrogacyattorney.com> (last visited Sept. 10, 2000) (advertising the services of a "surrogacy attorney" who works with "non-traditional families, including single parents and members of the gay and lesbian community").

223. See, e.g., *Growing Generations*, at <http://www.growinggenerations.com> (last visited Sept. 10, 2000) ("Growing Generations, LLC is the first and only gay and lesbian owned surrogacy firm exclusively serving the gay community worldwide."); *Surrogate Mothers, Inc.*, at <http://www.surrogatemothers.com> (last visited Sept. 10, 2000) ("SMI . . . is the only recognized surrogacy program in the world which also openly works with gay and lesbian couples/individuals."); *California Surrogacy Specialist International*, at <http://www.calisurrogacy.qpg.com> (last visited Jan. 18, 2000) (characterizing itself as "serving the gay community in creating families for our future").

224. See, e.g., *Gay Parent Magazine*, at <http://www.gayparentmag.com> (last modified Sept. 8, 2000) (offering "resource[s] for lesbians and gay men who are, or wish to be parents"); *Alternative Family Magazine*, at <http://www.altfammag.com> (last visited Sept. 10, 2000) (marketing itself as "America's premier magazine for GLBT parents and their children").

225. See, e.g., *Family Q: The Internet Resource for Lesbian Moms and Gay Dads*, at <http://www.studio8prod.com/familyq> (last visited Jan. 18, 2000) ("The purpose of this web site is to provide lesbians and gay men with access to information regarding building and maintaining a family despite the lack of social support for lesbian and gay parents, as well as a means for contacting others in the same or similar situation.").

226. See *supra* Part II.

227. For example, a recent episode of the popular television show, *Judging Amy*, involved a lesbian GIFT/ZIFT case. In that fictional case, the genetic mother sued the hospital because of its failure to include her name, along with the child's gestational mother's name, on the birth certificate. The hospital argued that to include both mothers' names would be tantamount to recognizing same-gender marriage. The fictional Judge Gray rejected the hospital's argument and, focusing on the biological connection both women had to the child and their preconception intention to raise the child together, found that the best interests of the child standard mandated the recognition of both mothers and ordered the hospital to amend the child's birth certificate. See *Judging Amy: The Treachery of Compromise* (CBS television broadcast, Feb. 27, 2001).

228. See, e.g., Polikoff, *supra* note 24, at 490-91 ("Courts or legislatures looking for guidance in developing a new definition of parenthood would best serve the interests of children by

## 2001] THE G.I.F.T. OF TWO BIOLOGICAL AND LEGAL MOTHERS 241

and caregivers,<sup>229</sup> others contend that feminists should not slight the strength of biological familial connections. According to one such feminist:

The biological links in a family create powerful bonds because they are particular, specific, unique, and most important, irreversible connections. While one can divorce a spouse, the genetic tie between parent and child or between siblings can never be undone. . . . Morally obligating ties of blood kinship produce responsibilities that no one contracts for or enters into with informed consent.<sup>230</sup>

Thus, even as lesbian couples' options for creating legally recognized families continue to increase,<sup>231</sup> GIFT/ZIFT procedures remain an attractive option because they offer something that adoption and others ARTs cannot provide—a child biologically connected to both mothers.

Nevertheless, some feminist anthropologists have expressed considerable concern about the effect on kinship relations of same-gender couples utilizing ARTs.<sup>232</sup> Kinship traditionally involves a convergence of genetic ties with the gestational and nurturing roles; by splitting these aspects, some feminists fear that ARTs threaten the essence of kinship.<sup>233</sup> But, many of these concerns specifically focus

---

focusing on two criteria: the legally unrelated adult's performance of parenting functions and the child's view of that adult as a parent.”).

229. See, e.g., Allison Harvey Young, *Reconceiving the Family: Challenging the Paradigm of the Exclusive Family*, 6 AM. U. J. GENDER & L. 505, 515 (1998) (“A more inclusive notion of family does not mean simply adding to the number of ‘parents’ which law and society recognize. The challenge is to approach the task with a greater degree of imagination, so that different types and degrees of contribution and potential contribution may be fostered.”).

230. Sidney Callahan, *Gays, Lesbians, and the Use of Alternate Reproductive Technologies*, in FEMINISM AND FAMILIES 188, 191 (Hilde Lindermann Nelson ed., 1997).

231. For example, Vermont's recently enacted Act Relating to Civil Unions “provide[s] eligible same-sex couples the opportunity to ‘obtain the same benefits and protections afforded by Vermont law to married opposite-sex couples’ as required by Chapter I, Article 7th of the Vermont Constitution.” H.847, No. 91 An Act Relating to Civil Unions, § 2(a) (Vt. 2000) (enacted), available at Acts of the 1999-2000 Vermont Legislature, <http://www.leg.state.vt.us/docs/2000/acts/act.091.htm> (last visited Oct. 26, 2000). Lesbian couples with a certified civil union receive equal treatment in terms of establishing parental relationships; they are to be treated the same as married couples under Vermont's adoption laws and “the rights of parties to a civil union, with respect to a child of whom either becomes the natural parent during the term of the civil union, shall be the same as those of a married couple.” H. 847, § 1204(e)(4) - (f) (Vt. 2000). In other words, for a lesbian couple with a certified civil union, both the biological and non-biological mothers would be considered legal parents at the child's birth, and, if the couple were to separate, issues of custody, visitation, and support would be governed by Vermont's divorce laws. See H. 847, § 1204(d) (Vt. 2000).

232. See Callahan, *supra* note 230, at 198 (“Intentionally using medical technology to break apart genetic, gestational, and social parenting by the use of [ARTs] breaks down the moral responsibility and personal integrity embodied individuals should exercise in their use of reproductive powers.”).

233. See, e.g., HELENA RAGONÉ, SURROGATE MOTHERHOOD: CONCEPTION IN THE HEART 109-

242 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 9:1

on surrogacy, which severs the gestational (or gestational and genetic) role from the nurturing role.<sup>234</sup> These concerns do not apply to lesbian couples who utilize GIFT/ZIFT, for although the genetic and gestational roles are split between two women, these roles converge with the nurturing role as both women raise the child jointly.<sup>235</sup>

In short, GIFT/ZIFT offers lesbian couples the opportunity to conceive a child who has a distinct biological connection to both women—an experience which until recently could only be shared by a fertile mixed-gender couple. As a result, GIFT/ZIFT allows for a new type of lesbian family: one whose kinship is supported by both biology and the law.

---

12 (1994) (stating that the introduction of ARTs, especially surrogate parenting, raises many new questions about kinship).

234. See *id.* (discussing the separation of biological motherhood from social motherhood). But cf. Callahan, *supra* note 230, at 198 (arguing that sperm donation harms kinship ties).

235. Concerns about the effect of sperm donation on kinship are implicated by lesbian couples who utilize GIFT/ZIFT. However, the harm to kinship because of sperm donation results from the removal of men's responsibility for the children conceived via their sperm; the child is harmed by sperm donation because the child only has one parent. See Callahan, *supra* note 230, at 198 (arguing that sperm donors disrupt kinship to the same degree as surrogacy). Children of lesbian couples, conceived with donor sperm as part of GIFT/ZIFT, will have two parents and will experience the degree of "familial bonding necessary for multigenerational families to flourish." *Id.*