

POSTSCRIPT

OF FINANCIAL RIGHTS OF ASSISTED  
REPRODUCTIVE TECHNOLOGY  
NONMARITAL CHILDREN AND BACK-  
UP PLANS

DARA E. PURVIS\*

Responding to Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177 (2010).

In her article, Courtney G. Joslin persuasively argues that the children born via assisted reproductive technology (“ART”) are placed at a serious financial disadvantage under the law. Joslin is right to point out that parentage provisions that apply only to children born to heterosexual married couples disadvantage nonmarital children of ART financially as well as emotionally and developmentally. Joslin’s solution is to propose extending to such children what she terms the “consent = legal parent” rule,<sup>1</sup> meaning that “*any individual*, regardless of gender, sexual orientation, or marital status, who consents to a woman’s insemination with the intent to be a parent is a legal parent of the resulting child.”<sup>2</sup> Such a rule removes a period of time during which a child is unprotected by the lack of legal recognition of a parent. This response identifies an ambiguity in and proposes a clarification of Joslin’s consent = legal parent rule with regard to conception, and with regard to consent during the period after

---

\* Visiting Assistant Professor, University of Illinois College of Law; J.D., Yale Law School; M.Phil., University of Cambridge; B.A., University of Southern California.

1. Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177, 1222 (2010).

2. *Id.* at 1222–23.

conception and before birth.

In her article, Joslin discusses a New Jersey case in which a lesbian couple had a child together, but before the adoption of the child by the nonbirth mother was complete, the birth mother suddenly died.<sup>3</sup> Because the adoption had not been finalized, the child was found to be ineligible to receive Social Security survivor benefits.<sup>4</sup> Joslin thus identifies an important gap in the protection of a child's financial well-being that is given less attention when the focus is on the child's emotional health. Doctrines such as *de facto* or psychological parenthood focus on the relationships that develop in a child's early years and seek to give legal standing—even to the level of parenthood—to those individuals who are constant, supportive presences in a child's life serving in the role of parent, even if they are not biologically or otherwise legally related to the child.<sup>5</sup> The problem solved by *de facto* parenthood is, therefore, that a person functioning as a parent, with attendant psychological and emotional importance to the child, might not have any protected rights *vis-à-vis* the child. If the boyfriend of the biological mother has raised a child from birth, it is not necessarily in the best interests of the child to treat the boyfriend as a legal stranger and allow the mother to terminate all visitation rights if she and the boyfriend break up. The solution is thus to grant the boyfriend rights as though he were the biological parent of the child in order to give legal protection to a relationship that benefits the child.

For obvious reasons, *de facto* parenthood does not bear on parental rights *vis-à-vis* a child who has not yet been born.<sup>6</sup> But as Joslin points out, the financial consequences of parental rights established long before any *de facto* parental relationship could be created can be significant.<sup>7</sup> Prior to an actual parental relationship developing, financial rights accrue to the child of heterosexual, married parents. For children produced using ART whose parents are unmarried, those same financial rights have to be carefully replicated—to the extent possible—after the child's birth. There is thus a period of time in between conception through to the recreation of parental financial rights when such children are disadvantaged by the law in a way that children of marital relationships are not. Joslin's consent = legal parent rule aims, among other things, to cover this gap.

Joslin's rule addresses some of the most perplexing factual problems

---

3. *Id.* at 1214.

4. *Id.*

5. *See id.* at 1199–1200.

6. *See id.* at 1201–02.

7. *Id.* at 1203–04.

that arise in the context of ART: when something breaks down in the intended parenting relationship during the course of pregnancy.<sup>8</sup> Sometimes the breakdown is the death of one intended parent, but all the messiness of human relationships may also come into play. For example, in the case *In re Marriage of Buzzanca*, a married couple, John and Luanne Buzzanca contracted a surrogate to carry a child biologically unrelated to either of them, and then began divorce proceedings during the surrogate's pregnancy.<sup>9</sup> Furthermore, in the divorce petitions, John and Luanne disagreed as to whether there were any children of the marriage.<sup>10</sup> John asserted that there were none, and convinced the trial court of his logic that because Luanne was neither the biological or gestational mother, nor had she adopted the child—obviously, because the child was not yet born—Luanne was not the legal mother, and thus he could not be deemed the legal father or be liable for any child support.<sup>11</sup> In another example from as early as 1977, a New Jersey court dealt with a case in which an unmarried woman artificially inseminated herself with her boyfriend's sperm at home, explaining that although they were contemplating marriage and she wanted to have a child with him, she did not want to have sexual intercourse with him before marriage.<sup>12</sup> Three months into the resulting pregnancy, the two broke up, and the mother opposed any parental rights being recognized in the ex-boyfriend.<sup>13</sup>

Complicating the picture even further, given the advances in the storage of embryos that remain viable, the time between conception (as defined by sperm and egg creating an embryo) and birth could be a period much longer than the typical nine months of pregnancy, lengthening the period of time when things might go amiss as to the intended parents. Indeed, Washington courts were faced with precisely this problem in 2002. Becky and David Litowitz engaged a surrogate mother to bear the child produced by the in vitro fertilization of a donated egg with David's sperm.<sup>14</sup> Five "preembryos" were created, but only three were implanted in the surrogate.<sup>15</sup> The remaining two preembryos were cryopreserved and

---

8. *See id.* at 1222–23.

9. *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 282 (Ct. App. 1998).

10. *Id.*

11. *Id.* at 282–83. The appellate court found that Luanne Buzzanca was the lawful mother of the child, declared John Buzzanca the legal father, and remanded for a determination of child support. *Id.* at 293–94.

12. *C.M. v. C.C.*, 377 A.2d 821, 821 (N.J. Juv. & Dom. Rel. Ct. 1977).

13. *See id.* at 822.

14. *Litowitz v. Litowitz*, 48 P.3d 261, 262 (Wash. 2002).

15. *Id.*

stored.<sup>16</sup> Not only did the Litowitzes separate before the child was born, but the two also disagreed as to what to do with the remaining preembryos: Becky wished to implant them in a surrogate mother and bring them to term to be brought up by her, whereas David sought to put any resulting children up for adoption.<sup>17</sup>

Joslin correctly points out that solutions such as expanding equitable parenting theories or liberalizing adoption laws may grant greater protection of the financial interest of some children, but these rights may only be secured after the child's birth.<sup>18</sup> Similarly, broadening marriage laws will also expand the ranks of children whose parent-based financial interests will be protected, but the children of unmarried parents will remain unprotected.<sup>19</sup> Joslin's solution is to "give legal effect to a *joint* procreative endeavor" by holding people responsible under the law for an intent to parent at the time of conception.<sup>20</sup> This makes a great deal of conceptual sense: whether the intended parents are involved in the biological conception of a child or not, in the reasoning of John Lawrence Hill, such parents are the "first cause" of procreation, without whom no child would have resulted.<sup>21</sup>

There are thus two points of decision at which parental rights may accrue. First, under Joslin's rubric, parental rights in the context of ART accrue by definition at a specific moment when one or two people decide to have a child.<sup>22</sup> Because such procreation must be sought out in a medical setting, there is no uncertainty as to the procreative intention of the participants (as is the case when sexual intercourse results in pregnancy).<sup>23</sup> Second, after a child's birth, a nonparent may decide, with the consent of the legal parent, to take on a parenting role. This may happen in one of several ways. A nonparent might formally adopt the child, or in some

---

16. *Id.* at 262–63.

17. *See id.* at 264. The Washington Supreme Court ultimately determined that the question was moot because under the terms of the storage contract signed with the clinic the remaining preembryos had already been thawed out and not allowed to undergo further development. *Id.* at 271.

18. Joslin, *supra* note 1, at 1217–21.

19. *Id.* at 1219–20.

20. *Id.* at 1222–25.

21. John Lawrence Hill, *What Does It Mean to Be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 415 (1991). *See also* Nancy D. 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, 493 (1990) (discussing cases standing for the equitable estoppel proposition that "courts will enforce the parental obligation of support if the child would not have entered the family but for the actions of the 'nonparent'").

22. Joslin, *supra* note 1, at 1223.

23. *See* Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 308–09.

jurisdictions take sufficient action that a court would enforce an “equitable adoption.”<sup>24</sup> A nonparent might marry the parent, and choose to take on formal step-parenting roles. Or a nonparent might, with the consent of the parent, perform the role of parent to the extent that courts would recognize *de facto* or psychological parenthood in the best interest of the child.<sup>25</sup>

I query, however, what might happen—and under Joslin’s rubric, what the law should allow to happen<sup>26</sup>—in the period between conception and birth. First, what if a legal parent seeks to abandon the relationship during that time? Although Joslin does not discuss the point explicitly, deeming any individual who consents to a woman’s insemination with the intent to be a parent to be a legal parent of the resulting child means that the individual would have the attendant legal responsibilities toward that child, even if before birth the individual no longer intended to parent the child. Joslin does identify as a failing of *de facto* parent doctrines that it is unclear that such *de facto* parents have all the financial responsibilities of parenting, such as child support obligations,<sup>27</sup> so I believe her proposal is clear that such financial obligations accrue with the status of legal parentage.

But at what point, specifically, does this status accrue? Joslin’s specific definition of her consent = legal parent rule applies to any individual “who consents to a woman’s insemination with the intent to be a parent.”<sup>28</sup> The word “insemination” implies a specific form of ART: donor sperm inserted into a woman’s uterus for the purpose of conception. Artificial insemination—that is, insemination through medical means rather than sexual intercourse—has been recognized by courts as a categorically different form of ART than other methods, such as *in vitro* fertilization, in which embryos are created outside of the uterus and later implanted.<sup>29</sup> For

---

24. Joslin, *supra* note 1, at 1211–12.

25. *Id.* at 1199–1200.

26. I note that my analysis operates within Joslin’s framework, rather than expressing a standalone normative preference. Given the short length of this response, I have chosen not to try to address larger potential criticisms of a binding “intent to parent,” but instead seek to probe potential gray areas within Joslin’s engaging argument.

27. *Id.* at 1207–09.

28. *Id.* at 1223.

29. See, e.g., *In re* Parentage of J.M.K., 119 P.3d 840, 848–49 (Wash. 2005) (dealing with the issue of whether to apply an artificial insemination statute that removes the legal responsibilities of sperm donors to the father of a child conceived through *in vitro* fertilization); *Culliton v. Beth Israel Deaconess Med. Ctr.*, 756 N.E.2d 1133, 1140 n.10 (Mass. 2001) (noting an amicus brief’s definition of “assisted reproductive technology” as *in vitro* fertilization, specifically excluding “procedures in which only sperm are handled, e.g., artificial insemination”); *V.C. v. M.J.B.*, 725 A.2d 13, 31 (N.J. Super. Ct. App. Div. 1999) (referring to “artificial insemination (including known, unknown, and combined sperm donors), *in vitro* fertilization (including egg donation), and other means of reproduction”).

this reason, Joslin footnotes her definition to specify that it is not limited to artificial insemination, and instead would apply to “all nonsurrogacy forms of assisted reproduction.”<sup>30</sup>

With this broader definition, it is unclear at what exact point parentage accrues. I see two possibilities: first, when sperm fertilizes egg (or at some later point in a preembryo’s development); and second, when embryo (or, to be precise, blastocyst) implants in a woman’s uterus. Most of the time, this will be a distinction without a difference. But, as we saw in the case of the Litowitzes above, occasionally a legal parent might attempt to retract his or her intention to parent in between fertilization and implantation.<sup>31</sup> I suspect that Joslin would answer that once given, intent to parent cannot be retracted, as it is a “profound decision . . . that should bring with it appropriately profound consequences.”<sup>32</sup> With a goal of ensuring that “*all children* are provided with adequate financial protections by and through the people who intentionally brought them into the world,” perhaps a bit of overinclusion is preferable to leaving children born years after fertilization with less financial protection.<sup>33</sup>

A harder question, however, is what happens if another person wants to become a parent after conception, but before birth?<sup>34</sup> A variant on such facts has presented itself before courts at least once, in New Jersey. A lesbian couple, V.C. and M.J.B., began dating on July 4, 1993.<sup>35</sup> Unknown to V.C. at the time, M.J.B. had privately and independently planned to use artificial insemination to become pregnant for years before the two met, and began the process of artificial insemination only five days after the two began dating.<sup>36</sup> V.C. only became aware of M.J.B.’s efforts in September of that year.<sup>37</sup> As it turned out, M.J.B. did not successfully become pregnant until February 1994, by which point V.C. had presented at least some outward signs of consenting to the pregnancy and intending to parent any resulting children, as she had moved into M.J.B.’s home and attended at least two appointments with the fertility specialist.<sup>38</sup> Joslin’s rule still might not have answered the eventual disagreement about whether V.C.

---

30. Joslin, *supra* note 1, at 1222 n.228.

31. *See supra* text accompanying notes 14–17.

32. Joslin, *supra* note 1, at 1222.

33. *Id.* at 1182.

34. *See, e.g.*, THE BACK-UP PLAN (CBS Films & Escape Artists 2010) (involving the story of a woman who, after being artificially inseminated but before giving birth, meets her future husband).

35. V.C. v. M.J.B., 748 A.2d 539, 542 (N.J. 2000).

36. *Id.*

37. *Id.*

38. *Id.*

had any parental rights, however, because after the two women ended their relationship M.J.B. argued that she did not consider V.C. to be a coparent.<sup>39</sup> M.J.B.'s argument in response to Joslin, therefore, would be that she had not consented to V.C. being a parent to the resulting child.<sup>40</sup>

Imagine, however, that M.J.B. became pregnant at her first appointment with the fertility specialist. The appointment took place five days after she began dating V.C., and at the time V.C. was not aware of the appointment.<sup>41</sup> It is unquestionable that V.C. would not have met Joslin's consent = legal parent test. Does this further Joslin's equitable concern for a child left less financially protected than he or she might otherwise be, particularly in comparison to legal protections afforded the child of married heterosexual parents?

I do not believe it does. Furthermore, the history of parentage rights has not always focused on conception as the point at which parentage accrues. In the case of unmarried heterosexual parents, the biology of conception vests parental rights and obligations in both mother and father. But couples need not always both be the biological parent of a child in order for parental rights to vest. Rather, fatherhood has been presumed derivatively based on a man's relationship to a child's biological mother.<sup>42</sup> At the common law, the child of a married woman was deemed to be the child of her husband, although occasionally the husband was not physically present at conception.<sup>43</sup>

Such presumptions have famously continued into the modern era, and are probably best known because of the Supreme Court's decision in *Michael H. v. Gerald D.*, which held that a California law establishing a conclusive presumption that a child born to a married woman living with her husband is a child of the marriage did not violate the rights either of the putative biological father or of the child.<sup>44</sup> Four years earlier, a Louisiana court was faced with a similar claim, with the added wrinkle that the husband had married the mother knowing she was already pregnant with another man's baby.<sup>45</sup> The court allowed the putative biological father to petition for paternity and visitation rights, but explicitly recognized a

---

39. *Id.* at 546.

40. *Cf.* Joslin, *supra* note 1, at 1225 (“[T]he law should provide that an individual who consents to alternative insemination by a woman with the intent to be a parent of the resulting child *and with the consent of the woman* is a parent of the resulting child.”).

41. *V.C.*, 748 A.2d at 542.

42. *See* Polikoff, *supra* note 21, at 481–82.

43. Hill, *supra* note 21, at 372–73.

44. *Michael H. v. Gerald D.*, 491 U.S. 110, 113, 131–32 (1989).

45. *Finnerty v. Boyett*, 469 So. 2d 287, 289 (La. Ct. App. 1985).

liberty interest in family privacy on the part of the husband.<sup>46</sup> Furthermore, until June 2005, Louisiana presumed both that the husband of a mother at the time of conception and that the husband of a mother of a child born during their marriage were the father(s) of the resulting child.<sup>47</sup> Accordingly, if a woman conceived a child in marriage, then divorced and remarried before the child's birth, the child would have two presumed fathers under Louisiana law.<sup>48</sup>

The goal of such presumptions was to “protect[] children from the substantial legal and social disadvantages of illegitimacy.”<sup>49</sup> While the social disadvantages of illegitimacy have largely evaporated as unwed parents have become more common, the legal disadvantages of having only one parent in the eyes of the law still exist. Joslin’s concern that “children are denied a host of critical financial rights and protections through their intended but nonlegal parents,” therefore, seems to apply to children who gain an intended parent after conception, but before birth.<sup>50</sup>

It seems to me, therefore, that Joslin should expand her recommendation to include intended parents who make their intentions clear before or at birth, rather than just at insemination. The same factual determination of consent and intent to parent could be performed, and such an expansion would further Joslin’s goal of ensuring that the financial security of children are not dependent on the intended parents complying with a legal formality.

---

46. *Id.* at 292, 297.

47. Katherine Shaw Spaht, *Who’s Your Momma, Who Are Your Daddies? Louisiana’s New Law of Filiation*, 67 LA. L. REV. 307, 310–11 (2007).

48. *Id.*

49. Leslie Joan Harris, *A New Paternity Law for the Twenty-First Century: Of Biology, Social Function, Children’s Interests, and Betrayal*, 44 WILLAMETTE L. REV. 297, 304 (2007).

50. Joslin, *supra* note 1, at 1180.