Notes

Daddy or Donor? Uncertainty in California Law in the Wake of *Jason P. v. Danielle S.*

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The era of technology has provided a proliferation of new scientific and technological methods designed to assist individuals and couples to successfully conceive children when they otherwise would not be able to: collectively known as "assisted reproduction technology" ("ART"). ART undoubtedly provides significant benefits, but at the same time opens the door to a new realm of legal disputes. Particularly, various forms of ART involve a third-party—such as a sperm donor or a surrogate—which raises the question of who will be treated as a legal parent of the child so conceived. The use of third-parties in ART has confounded traditional notions of parent-child relationships by involving individuals who have a biological relationship with the child, but may or may not intend to act as a legal parent. This Note focuses on parentage disputes between unmarried individuals who conceive children through the use of third-party assisted ART.

Specifically, this Note provides a critique of a 2014 case in which a California court established paternity rights for a sperm donor who undisputedly did not intend to father at the time of conception, but attempted to assert parental rights over the vehement objections of the child's mother after the child was born.[1] *This Note argues that the court's decision was legally incorrect and left California law in a state of confusion resulting in public policy consequences. This Note proposes that California resolve this confusion by adopting an intent-based approach to parentage decisions in the ART context. Such an approach would provide certainty in application of the law that is essential in making informed decisions about whether to engage in third-party assisted ART.*

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1. *See generally* Jason P. v. Danielle S., 171 Cal. Rptr. 3d 789 (Cal. Ct. App. 2014).

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INTRODUCTION

Technological and scientific advancements in the realm of assisted reproduction have resulted in the proliferation of new methods that allow individuals and couples who cannot conceive children through intercourse[2]—for example, couples who are infertile or single women wishing to pursue motherhood—to successfully have children. Such methods of conception are often referred to collectively as assisted reproductive technology.[3] As of the time of the writing of this Note, the term "assisted

2. *See Infertility FAQs*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/reproductivehealth/infertility/ (last visited Apr. 23, 2017).

3. The Centers for Disease Control and Prevention established its own official definition of what constitutes "assisted reproductive technology" that does not include all types of reproductive technology, as does the more generally used umbrella definition including all procedures. 5 *Treatments in Assisted Reproductive Technology*, CREATE FERTILITY, https://www.createhealth.org/news/2015/5-treatments-in-assisted-reproductive-technology (last visited Apr. 23, 2017). This Note will not use the Centers for Disease Control definition, however, and all references to "assisted reproductive technology" herein

reproductive technology" ("ART") does not carry any single, universal definition, but is frequently used as an umbrella term encompassing a wide range of techniques designed to increase the likelihood of pregnancy.[4] This Note uses the term in that general, all-encompassing sense, referring to no particular technology, nor excluding any.

While there are many benefits associated with these technologies—the most obvious, of course, being the ability to conceive children that could not have been conceived naturally—such rapid development of technology inevitably leads to unanticipated circumstances that give rise to novel questions of law not previously addressed. One particular issue that has arisen concerns disputes about parental rights over children conceived through the use of ART when *unmarried* individuals are involved.[5] More specifically, disputes have arisen between unmarried individuals claiming parental rights over children conceived through "third-party assisted ART"—a method of ART involving a third-party donor or surrogate.[6] This realm of ART-related disputes is the focus of this Note.

A California court recently decided the case of *Jason P. v. Danielle S.*, which involved the type of dispute over parental rights just described.[7] The dispute unfolded after the birth of a child conceived through artificial insemination involving a sperm donor. Specifically, Danielle, the mother of that child, was artificially inseminated[8] with sperm provided by a man named Jason, who she had previously been romantically involved with.[9] Though the two had been involved in the past they were never married and were no longer together at the time of Danielle's insemination.[10] Thus, at the time of birth, Danielle was recognized as the sole legal parent of the child. This lawsuit arose several years later when Jason filed suit to legally establish paternity rights to the child against Danielle's wishes.[11] The circumstances surrounding the suit will be discussed in much further detail later in Part I.B.

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include all available procedures. For further information about the various types of technology and the advantages and disadvantages of each, see *id.*

4. *Id.*

5. *See, e.g.*, Elisa B. v. Super. Ct., 117 P.3d 660 (Cal. 2005); K.M. v. E.G., 117 P.3d 673 (Cal. 2005); Johnson v. Calvert, 851 P.2d 776 (Cal. 1993); *Jason P.*, 171 Cal. Rptr. 3d 789; Steven S. v. Deborah D., 25 Cal. Rptr. 3d 482 (Cal. Ct. App. 2005); Jhordan C. v. Mary K., 224 Cal. Rptr. 530 (Cal. Ct. App. 1986); Statement of Decision, Findley v. Lee, No. FDI-13-780539, 2016 WL 270083 (Cal. Super. Ct. Jan. 11, 2016).

6. *See Assisted Reproductive Technology (ART)*, NAT'L INSTS. OF HEALTH, https://www.nichd.nih.gov/health/topics/infertility/conditioninfo/Pages/art.aspx#art (last visited Apr. 23, 2017).

7. *Jason P.*, 171 Cal. Rptr. 3d at 791.

8. Artificial insemination—also known as intra-uterine insemination—is one of the simplest types of assisted reproductive technology currently available. *See 5 Treatments in Assisted Reproductive Technology*, *supra* note 3 ("It involves collection of the sperm, preparing the sperm in the lab and then inserting the prepared sperm into the uterus (womb) of the woman close to the time of ovulation.").

9. *Jason P.*, 171 Cal. Rptr. 3d at 791–92.

10. *Id.* at 791.

11. *Id.*

The dispute between Jason and Danielle presented a California court with two conflicting provisions of the California Family Code ("Family Code"),[12] which is the state statutory scheme governing legal recognition of parent-child relationships, among other things. Jason relied upon a provision commonly known as the "parenthood presumption"[13] to support his argument that he was entitled to paternity rights. Danielle pointed to another provision of the Family Code commonly known as the "nonparentage provision"[14] in support of her claim that Jason, as a sperm donor to whom she was not married, was precluded from seeking to establish paternity as a matter of law.[15] While both provisions are found in the same statutory scheme, neither nor any other in the Family Code provided any definite guidance as to how the two provisions should work together at the time of the case. Further, due to the novelty of the issue involved in *Jason P.* at the time there was very little settled case law for the court to look to in guiding its decision. Thus, the trial court that first heard the case was tasked with determining where to appropriately look for legal guidance on how to reconcile the provisions. The trial court ultimately found for Danielle, relying on a previously decided California case.[16] On appeal, however, the appellate court reversed, finding that Jason was not precluded from establishing paternity despite the applicability of the nonparentage provision as well as the existence of the precedent relied on by the trial court.[17]

This Note argues that the trial court in *Jason P.* correctly relied on past precedent and reached the appropriate conclusion (finding in favor of Danielle) based on the existing sources of law at the time. The appellate court's decision, on the other hand, was not only unsupported by law, but

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12. *Id.*

13. The parenthood presumption Jason relied upon is found in section 7611 of the California Family Code and it provides that:

> A person is presumed to be the natural parent of a child if the person meets . . . any of the following subdivisions:
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> . . . .
>
> (d) The presumed parent receives the child into his or her home and openly holds out the child as his or her natural child.

CAL. FAM. CODE § 7611(d) (West 2016).

14. The nonparentage provision relied on by Danielle is also found in the California Family Code in section 7613, and it provides that:

> The donor of semen provided to a licensed physician . . . for use in assisted reproduction by a woman other than the donor's spouse is treated in law as if he were *not* the natural parent of a child thereby conceived, *unless* otherwise agreed to *in a writing* signed by the donor and the woman *prior* to the conception of the child.

Id. § 7613(b)(1) (emphasis added).

15. *Jason P.*, 171 Cal. Rptr. at 791.

16. *Id.* at 792–93.

17. *Id.* at 797. For a detailed discussion of the facts underlying *Jason P.* as well as the court's analysis, see *infra* Part I.B.

also outright contradicted California precedent, unraveling what had been the common understanding of how the Family Code applied to third-party sperm donors. Part I begins by providing background on the Family Code and the model federal statute from which it was adopted: the Uniform Parentage Act ("Model UPA"). Part I then details the facts underlying the *Jason P.* dispute, placing it in the framework of California's statutory scheme governing parentage determinations that was just briefly introduced. Part II performs a multi-faceted critique of the *Jason P.* decision, arguing that the appellate court's decision was incorrect and irresponsible when analyzed in the each of the following contexts: (1) California case law; (2) common tools of statutory interpretation; and (3) public policy considerations. Finally, Part III proposes California adopt an intent-based approach as its default rule for parentage disputes concerning children conceived by unmarried individuals through the use of ART. At the most general level, the idea behind this approach is premised on resolving parentage disputes in a way that gives legal effect to the intentions expressed by both parties involved prior to conception.[18]

I. THE ROLE OF THE MODEL UPA AND CALIFORNIA FAMILY CODE

A. HISTORY OF THE STATUTORY SCHEMES

The Family Code provisions governing parentage determinations in California reflect a slightly modified version[19] of the previously mentioned Model UPA, which was initially promulgated by the Uniform Law Commission in 1973.[20] The model code was promulgated as a uniform set of rules governing legally recognized familial relationships that states could voluntarily adopt or use to model their own laws after.[21] California first implemented its version of the Model UPA by codifying it in various portions of the Family Code in 1975.[22] Both of the statutory provisions at issue in *Jason P.* (the parenthood presumption and the nonparentage provision) were modeled very closely after the equivalent Model UPA provisions.[23]

At the most basic level, the two provisions are at odds because one seeks to *preclude* the possibility of paternity in a certain, narrow set of circumstances,[24] while the other was enacted as a tool to aid courts in

18. Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 323.

19. For a discussion of the relevant modifications the California legislature made to the Model UPA prior to adopting it into state law, see *infra* Part II.B.

20. *Parentage Act Summary*, NAT'L CONF. OF COMMISSIONERS ON UNIFORM ST. LAWS, http://www.uniformlaws.org/ActSummary.aspx?title=Parentage%20Act (last visited Apr. 23, 2017).

21. *See id.*

22. Melissa Murray, *Family Law's Doctrines*, 163 U. PA. L. REV. 1985, 1992 (2015).

23. *See infra* Part I.B.

24. CAL. FAM. CODE § 7613(b) (West 2016).

establishing paternity obligations against individuals in a much broader set of circumstances.[25] Prior to *Jason P.*, there was very limited guidance as to how courts should apply the two provisions in circumstances that could at least arguably be covered by both. Section 7613 of the Family Code, the provision seeking to *preclude* the possibility of paternity for sperm donors in particular—the nonparentage provision—reads as follows:

> (b) (1) The donor of semen provided to a licensed physician and surgeon or to a licensed sperm bank for use in assisted reproduction by a woman *other than the donor's spouse* is treated in law as if he were *not* the natural parent of a child thereby conceived, *unless* otherwise agreed to in a writing signed by the donor and the woman prior to the conception of the child.[26]

Section 7611 of the Family Code, the provision that seeks to *establish* paternity obligations—the parenthood presumption[27]—reads in relevant part as follows:

> A person is presumed to be the natural parent of a child if the person meets the conditions provided . . . in any of the following subdivisions:
>
> . . . .
>
> (d) The presumed parent receives the child into his or her home and openly holds out the child as his or her natural child.[28]

While it may not be immediately apparent that the nonparentage provision and the parenthood presumption clash, the tension between them surfaces primarily because the nonparentage rule is a specific provision focused exclusively on parentage determinations concerning unmarried sperm donors in the context of ART. On the contrary, the parentage presumption is a general provision providing a number of circumstances (subsection (d) just discussed is one of them) deemed by the California legislature to presumptively establish parentage in a variety of contexts *not limited to* those involving ART. Not only does the parenthood presumption not deal exclusively with ART, it does not make any mention of it whatsoever.

Thus, a gap existed in the statutory scheme that failed to explain how the general parenthood presumption and the very specific nonparentage provision were to be reconciled in situations where either provision standing alone arguably could govern, but both could not be given effect simultaneously. As a result of this ambiguity in the statute, and without any existing California Supreme Court precedent, individual California courts were left to apply the provisions however they saw fit based on a particular court's own subjective views, therefore making case-by-case determinations as to how the provisions should be applied in tandem. Leaving such a determination in the hands of many individual courts to

25. *Id.* § 7611.
26. *Id.* § 7613(b)(1) (emphasis added).
27. *Id.* § 7611(d).
28. *Id.*

be made on an ad hoc basis is particularly troubling because of the incredibly high stakes involved in a dispute over legal parental rights over a child—or the lack thereof.

Prior to the statutory guidance eventually put forth by the California legislature, California courts essentially had two plausible interpretations of the provisions available to them in circumstances fitting within the text of both provisions simultaneously:

- **Interpretation 1:** The nonparentage provision is the exclusive means for determining parentage in the specific and narrow context of unmarried sperm donors. Therefore, once the provision is deemed applicable in a given case, the sperm donor in question is precluded from establishing parentage as a matter law.
- **Interpretation 2:** The nonparentage provision can be overridden by other provisions in the Family Code, such as the parenthood presumption, despite the nonparentage provision's specific directive regarding unmarried sperm donors.

The first interpretation reflects the common understanding of the law prior to *Jason P.*, which was relied upon by the trial court that initially found in Danielle's favor.[29] This Note argues that this was the correct interpretation at the time *Jason P.* was decided for a multitude of both legal and policy-based reasons, which will be detailed later in Part II. The appellate court that rendered the final decision in *Jason P.*, however, adopted the second interpretation. The appellate court allowed the general parenthood presumption to override the very specific nonparentage provision.[30] This ruling severely upset reliance interests of many Californians who, until then, shared the common understanding that the nonparentage provision conclusively protected both unmarried women and unmarried donors against the threat of a subsequent paternity suit, as demonstrated in a 2005 case that will be discussed in Part II.A.1.

B. *JASON P. v. DANIELLE S.*

1. The Facts

The dispute in *Jason P.* arose between famous actor, Jason Patric, and his former girlfriend, Danielle Schreiber, who were at one time romantically involved but never married.[31] In 2006, while together, Jason and Danielle tried to conceive a child naturally but were unsuccessful, leading them to seek the assistance of reproductive technology.[32] The couple used Jason's sperm to artificially inseminate Danielle on two separate occasions, but

29. *See* Steven S. v. Deborah D., 25 Cal. Rptr. 3d 482, 487 (Cal. Ct. App. 2005) (concluding that a sperm donor "will be denied a paternity claim so long as the semen was provided to a licensed physician for insemination of an unmarried woman.").

30. Jason P. v. Danielle S., 171 Cal. Rptr. 3d 789, 791 (Cal. Ct. App. 2014).

31. *Id.*

32. *Id.*

both attempts were unsuccessful.[33] Prior to Danielle's successful conception that led to this dispute, she had moved out of Jason's home in May 2008.[34] One month later, she purchased an anonymous sperm sample from a donor bank and informed Jason that she intended to pursue single motherhood.[35] The trial court record provides evidence establishing that Danielle decided to pursue single motherhood after conducting her own online research, during which she visited a web site created for women pursuing single motherhood. There she learned that "in California, a man who gives his sperm for artificial insemination [to a woman to whom he is not married] is never treated in the law as though he is the father."[36] The record further evidences that after Danielle informed Jason of her intentions, he wrote her a letter stating "he was *not ready to be a father*, but if Danielle wanted to use his sperm to conceive, she had his blessing *as long as she did not tell others.*"[37] Based on Danielle's research, she believed that even if she used Jason's sperm he still could not bring a paternity suit. Relying on this research as well as the letter Jason wrote to her, Danielle accepted Jason's offer and subsequently underwent an in vitro fertilization procedure[38] using Jason's sperm.[39] The procedure was successful and resulted in the birth of baby Gus in December 2009.[40]

After Gus was born, Jason and Danielle briefly attempted to repair their relationship, during which time Jason became involved in the lives of Danielle and Gus, which Danielle consented to at the time.[41] The relationship did not last, however, and Jason petitioned the court to establish himself as Gus' legal parent during the summer of 2012.[42] Danielle vehemently opposed the petition, relying upon her understanding that the nonparentage provision provided her full protection against a paternity suit by precluding Jason as a matter of law from any legal right to parentage due to his status as an unmarried sperm donor.[43] Jason responded that despite the text of the nonparentage provision, he should not be treated as a sperm donor within the meaning of that statute.[44] He argued that instead, he should be permitted to establish parentage based on the Family

33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 792 (emphasis added).
38. "In vitro fertilization (IVF) is the joining of a woman's egg and a man's sperm in a laboratory dish. In vitro means outside the body. Fertilization means the sperm has attached to and entered the egg." *In Vitro Fertilization (IVF)*, U.S. NAT'L LIBR. OF MED., https://medlineplus.gov/ency/article/007279.htm (last visited Apr. 23, 2017).
39. *Jason P.*, 171 Cal. Rptr. 3d at 792.
40. *Id.*
41. *Id.*
42. *Id.* at 791–92.
43. *Id.* at 791.
44. *Id.*

Code's parenthood presumption, specifically because he had "receive[d] [Gus] into his . . . home" and presented him as his own "natural child."[45]

2. *The Appellate Court Ruling and the Law in California Today*

The trial court in *Jason P.* found for Danielle, relying on a decision rendered in 2005 in *Steven S. v. Deborah D.*,[46] a case involving facts strikingly similar to those underlying *Jason P.*[47] In *Steven S.*, a California Court of Appeal interpreting the nonparentage provision held that "[t]here c[ould] be no paternity claim from a sperm donor who [wa]s not married to the woman who becomes pregnant with the donated semen, so long as it was provided to a licensed physician."[48] The *Steven S.* court further established that "[t]he [nonparentage provision] does not make an exception for *known* sperm donors, who will be denied a paternity claim so long as the semen was provided to a licensed physician for insemination of an unmarried woman."[49] Based on *Steven S.*, the trial court that first heard *Jason P.* quickly rejected Jason's argument that he should be considered a presumed parent based on the parenthood presumption found in section 7611 despite the applicability of the nonparentage provision. The court stated that "section 7613(b) [the nonparentage provision] is the exclusive means of determining paternity in cases involving sperm donors and unmarried women."[50]

Turning back to the dispute between Jason and Danielle, Jason appealed the trial court's decision and the appellate court reversed, finding *Steven S.* distinguishable and therefore not controlling.[51] The appellate court went on to hold that "section 7613(b) *should be* interpreted only to preclude a sperm donor from establishing paternity based upon his *biological* connection to the child, and does not preclude him from establishing that he is a presumed parent under section 7611(d) *based upon postbirth conduct.*"[52] Danielle then appealed, but the California Supreme Court denied review in July of 2014[53] despite efforts by the

45. CAL. FAM. CODE § 7611(d) (2014).

46. *Jason P.*, 171 Cal. Rptr. 3d at 793.

47. *See generally* Steven S. v. Deborah D., 25 Cal. Rptr. 3d 482 (Cal. Ct. App. 2005).

48. *Id.* at 487.

49. *Id.*

50. *Jason P.*, 171 Cal. Rptr. 3d at 793.

51. *Id.* at 793, 799.

52. *Id.* at 795 (emphasis added). It is worth noting that the appellate court stated that section 7613(b) "*should be*" interpreted in the way the court chose to in *Jason P.*, not that it *must be* interpreted that way based on its text. *Id.* This in itself indicates that the *Jason P.* court did not believe that its interpretation was necessarily correct based on the text of the statute.

53. Jason P. v. Danielle S., No. S219507, 2014 Cal. LEXIS 5345, at *1 (Cal. July 30, 2014).

public to convince the court of the necessity of granting review in this particular case.[54]

Also in 2014, the California legislature began several efforts to amend the Family Code. These efforts were significant because they began while *Jason P.* was already pending, but before the case was decided by the appellate court. This timing is at the very least a bit suspect with respect to whether the legislature's actions may have been in an effort to influence the *Jason P.* decision that it thought would otherwise come out the opposite way. Specifically, the legislature introduced Assembly Bill 2344 ("AB 2344") in 2014, which included language explicitly establishing the permissibility of invoking another Family Code provision to override the otherwise controlling nonparentage provision[55]—that amendment would, in all practical respects, codify the interpretation of the law as articulated in the not yet final case of *Jason P.*, while simultaneously foreclosing the interpretation announced years ago in *Steven S.* The legislature ultimately refrained from formally enacting AB 2344 until the appeal process in *Jason P.* was complete, possibly because of the amendment's undeniable relevance to the precise question already pending, which had been previously answered in *Steven S.* in a way that conflicted with AB 2344 (though the *Steven S.* decision interestingly did not result in any action by the legislature in response to it). AB 2344 was then enacted shortly after the appellate court's decision became final in 2014.[56]

More specifically, AB 2344 amended the Family Code to include a provision providing certain forms that the intended parent or parents of a donor-conceived child could fill out in order to "demonstrate his or her intent to be a legal parent of a child conceived through assisted reproduction."[57] The amendment, however, went on to significantly qualify any potential legal effect of the forms, stating that "[the] forms do not affect any presumptions of parentage based on Section 7611, and do not preclude a court from considering any other claims to parentage under California Statute or case law."[58]

The legislature amended the Family Code again in October 2015, after the introduction of Assembly Bill 960 ("AB 960"), which the legislature claimed was intended to clarify and expand upon AB 2344.[59]

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54. *See* Letter from Reproductive Technology & Family Law Scholars to the Hon. Tani Cantil-Sakauye, Cal. Supreme Court, Chief Justice, and the Assoc. Justices (June 24, 2014) (on file with Author).

55. *AB-2344 Family Law: Parentage (2013-2014)—History*, CAL. LEGIS. INFO., http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201320140AB2344 (last visited Apr. 23, 2017).

56. *Id.*

57. CAL. FAM. CODE § 7613.5(a) (West 2016).

58. *Id.*

59. *AB-960 Parentage: Assisted Reproduction (2015-20160—Bill Analysis: 08/19/15 - Assembly Floor Analysis*, CAL. LEGIS. INFO., http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160AB960 (last visited Apr. 23, 2017).

AB 960 ultimately did revise some of the content included in the intended parent forms,[60] but it also made quite clear that the forms were still not determinative or legally binding, and could not preclude a donor from establishing parentage based on another Family Code provision.[61] Upon enacting AB 960, the California legislature provided nothing more than the following statement to explain the forms' lack of legal effect: "[B]ecause parentage laws can be very complicated, the forms do not—nor can they—disestablish the parentage rights of any other person or affect other presumptions of parentage. [The forms] only evidence the intent of the parties executing the forms."[62]

AB 960 did little to clarify the legal effect, if any, of these intended parent forms, but the amendment, in addition to AB 2344, did effectively codify the *Jason P.* court's interpretation of the conflicting Family Code provisions. As a result, the Family Code today explicitly allows for the nonparentage provision to be overridden by other Code provisions, and there does not appear to be any limitation on which provisions can be used to do so.

The problematic reality of the law as it currently stands is that unmarried women in California do not have any way to pursue single motherhood without fear that a sperm donor not intended to be the father will later claim paternity, unless she uses a strictly anonymous donor. While use of an anonymous donor might seem like a simple solution for a woman wishing to pursue single motherhood, there are a variety of compelling reasons that she may not wish to do so. Some of those reasons will be described later in Part II.C.2.

This result with respect to women wishing to pursue single motherhood is especially puzzling because the legislature claims the purpose behind implementing the nonparentage provision was to create a statutory guarantee of the right to fearlessly pursue single motherhood,[63] which will be discussed further in Part II.A. Additionally, if the parenthood presumption can successfully invalidate the nonparentage provision's prohibition on treating donors as legal parents, it presumably can also be used *against* a sperm donor to legally order him to financially support a child that he did not intend to father at the time of conception. Overall, the *Jason P.* decision undermined any certainty previously enjoyed by unmarried women and donors involved in third-party ART in California.

An additional consequence of the current law is that it now provides very different protections for the legal rights and intentions of individuals

60. *Id.*
61. *Id.*
62. *Id.*
63. Jason P. v. Danielle S., 171 Cal. Rptr. 3d 789, 793 (Cal. Ct. App. 2014).

engaging in the use of one type of ART versus another.[64] This discrepancy in legal protection is illustrated by the stark difference between protections available to individuals using artificial insemination procedures versus those who engage in surrogacy.[65] To date, the legislature has not provided any justification for the disparate treatment of individuals using different types of ART, and this Note argues that no such justification exists.

II. A CRITIQUE OF THE *JASON P.* DECISION

This Part performs a thorough critique of the *Jason P.* decision and its underlying reasoning. This Part's goal is to demonstrate that not only was the outcome in *Jason P.* not supported by existing law or legislative intent at the time it occurred, it further resulted in negative policy outcomes. Prior to *Jason P.*, there was no indication that the law intended for any exceptions to the nonparentage provision to exist. The legal support for the existence of exceptions did not come about until *after* the *Jason P.* decision was made final, when the Family Code was amended by AB 2344 and AB 960. The *Jason P.* opinion itself created an exception, however, constructively applying the Code amendments before they had been codified. The remainder of this Part details various critiques of the decision, approaching it from three different legal angles.

A. CALIFORNIA PRECEDENT

When *Jason P.* was decided in 2014, there was very minimal case law concerning the issue. Of the handful of relevant cases that did exist, however, none provided any basis for the decision reached by the appellate court in *Jason P.* To the contrary, the previously introduced case *Steven S.*, among others, supported the opposite outcome. The remainder of this Subpart will detail the facts underlying *Steven S.* along with two additional California cases that should have informed the *Jason P.* court, leading it to reach the opposite conclusion.

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64. *See* CAL. FAM. CODE § 7962 (2014) (providing strong protections for the parenthood-related intentions of individuals engaging in surrogacy agreements, including allowing for enforcement of such agreements reflecting the parties' intentions *prior to* the birth of the child in question); *Jason P.*, 171 Cal. Rptr. 3d at 789 (permitting a sperm donor meeting all requirements necessary to trigger the nonparentage provision to establish paternity against the contrary wishes of the child's mother that were clearly expressed prior to conception); Statement of Decision, Findley v. Lee, No. FDI-13-780539, 2016 WL 270083 (Cal. Super. Ct. Jan. 11, 2016) (upholding the intentions of parties that were express *prior to* freezing embryos created by both parties).

65. Surrogacy is another form of third-party ART, and it is a good option for women with no eggs or unhealthy eggs. *Infertility FAQs*, *supra* note 2 ("A surrogate is a woman who agrees to become pregnant using the man's sperm and her own egg. The child will be genetically related to the surrogate and the male partner.").

1. Steven S. v. Deborah D.

The facts underlying the relationship between Steven and Deborah in *Steven S.* are strikingly similar to those in *Jason P.*[66] Steven and Deborah were romantically involved but never married.[67] While together, the couple first tried to conceive a child naturally, but after repeated failed attempts they turned to artificial insemination.[68] The couple used Steven's sperm to inseminate Deborah, but their first attempt was unsuccessful. A second attempt, however, resulted in the birth of baby Trevor.[69] Subsequently, Steven and Deborah's relationship deteriorated (similar to that of Jason and Danielle), and when Trevor was approximately three years old Steven petitioned to establish paternity over Deborah's objections.[70] The trial court determined that public policy considerations warranted a finding that the nonparentage provision was inapplicable to Steven under the circumstances, and the court went on to find that the law should recognize Steven as Trevor's legal father.[71] Deborah appealed, and the very same appellate court that would later write the *Jason P.* decision reversed.[72] The appellate court concluded that "[t]he words of section 7613, subdivision (b) [the nonparentage provision were] clear. There c[ould] be no paternity claim from a sperm donor who [wa]s not married to the woman who bec[ame] pregnant with the donated semen, so long as it was provided to a licensed physician."[73]

Steven urged the appellate court to look beyond the mere words of the statute as the trial court had done, and to hold that under the circumstances public policy warranted a finding that he was Trevor's legal father despite the nonparentage provision.[74] The appellate court refused, however, stating that "there [was] no indication that the Legislature intended to establish a public policy against donating sperm for use by a woman who is not the donor's wife, even where there is an intimate relationship."[75] The court further asserted that the role of the judiciary is "simply to ascertain and declare what is in terms or in substance contained therein [in the statute], not to insert what has been omitted" by the legislature.[76]

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66. *See generally* Steven S. v. Deborah D., 25 Cal. Rptr. 3d 482 (Cal. Ct. App. 2005).
67. *Id.* at 484.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.* at 487 (internal citations omitted).
74. *Id.* at 486.
75. *Id.* at 487.
76. *Id.*

> [I]t is presumed that the Legislature knows how to create an exception to the provisions of a statute, and that where it does not create an exception, it is presumed that it did not intend to do so. If the Legislature deemed it appropriate to exempt men who donate sperm through a licensed physician for use by their unmarried sexual partners, it would have done so.[77]

Turning back to *Jason P.*, the appellate court made a drastic departure from the firm stance just articulated that it took in *Steven S.* when it reversed the trial court's finding in favor of Danielle. The *Jason P.* court read the nonparentage provision to include the precise exception the *Steven S.* court unequivocally deemed nonexistent in the language quoted above.[78] The *Jason P.* court dovetailed from its reasoning in *Steven S.* and purported to distinguish the two cases on the basis that Steven had not explicitly tried to invoke the parenthood presumption of section 7611 like Jason had done, but instead relied only on public policy arguments.[79] This is the only justification offered in the *Jason P.* opinion that attempts to reconcile the divergent outcomes in *Jason P.* and *Steven S.* despite their factual similarity. The distinction the court purports to exist between *Jason P.* and *Steven S.* is an inadequate explanation for how the court could make such a significant departure from its previous holding in *Steven S.* with respect to the nonparentage provision as well as the proper role of the judiciary in the context of statutory interpretation.

The distinction offered in the *Jason P.* opinion is unpersuasive, first because there is no substantive difference between the arguments raised by Jason and Steven. Both arguments were based on essentially the same public policy rationale. The parenthood presumption successfully invoked by Jason is in and of itself a public policy-based argument, and while Steven may not have made explicit reference to the presumption, most of his argument was also based on similar public policy reasons. Jason's argument in effect asked the very same thing of the court as did Stevens: to look beyond the lack of an explicit, textual exception in the nonparentage provision under the circumstances. It made little sense for the court to reject Steven's policy-based argument simply because he did not literally cite the Family Code. The court's distinction between *Steven S.* and *Jason P.* seems to be one of form and not of substance, and it does not provide compelling justification for treating differently two cases that were so factually similar without some other legal basis. Thus, *Steven S.* should have controlled the court's decision in *Jason P.*

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77. *Id.* at 487–88 (internal citations omitted).
78. *See* Jason P. v. Danielle S., 171 Cal. Rptr. 3d 789 (Cal. Ct. App. 2014).
79. *Id.* at 794.

2. *Jhordan C. v. Mary K.*

Jhordan C. v. Mary K. was decided prior to the enactment of the nonparentage provision as it reads today.[80] However, Civil Code section 7005(b)—the statutory provision upon which the court ultimately relied in *Jhordan C.*—was identical to the current nonparentage provision for all purposes relevant to the analysis in this Note.[81] Section 7005(b) stated that a "donor of semen *provided to a licensed physician* for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived."[82]

Jhordan C. involved two women, Mary and Victoria, who wished to conceive a child that they planned to raise together. The women intended to parent the child jointly, and upon deciding that Mary would be artificially inseminated, the two women together interviewed potential donors eventually selecting Jhordan.[83] The trial court record indicates that Mary was a nurse, and it is believed that she inseminated herself at home using sperm that Jhordan had delivered directly to her house rather than to a physician who would then inseminate Mary.[84] The insemination was successful, and Mary gave birth in March 1980, during which Victoria was present and assisted with the delivery.[85]

After the child was born, Jhordan expressed interest in visiting, and Mary initially allowed him to do so.[86] Jhordan then continued to ask to see the child, and for approximately six months Mary somewhat reluctantly permitted him to visit the baby on a relatively regular basis.[87] Mary eventually terminated Jhordan's visits in August 1980,[88] however, leading Jhordan to file a paternity suit.[89] Jhordan and Mary never created any form of written agreement prior to insemination, and at trial they gave contradictory accounts of the oral agreement they reached regarding the role Jhordan would play in the child's life.[90] According to Jhordan, he and Mary agreed that he would be allowed to have an ongoing relationship with the child.[91] On the contrary, Mary testified that she never agreed to Jhordan having any continued involvement. Instead, she said that she had

80. *See* Jhordan C. v. Mary K., 224 Cal. Rptr. 530, 531 (Cal. Ct. App. 1986).
81. *Id.*
82. *Id.*
83. *Id.* at 532.
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* at 533.
90. *Id.* at 532.
91. *Id.*

made clear while interviewing Jhordan as a potential donor that she did not want a donor who wished to be involved in the child's life.[92]

An appellate court in California ultimately ruled in Jhordan's favor, finding him to be the legal father of Mary's child.[93] While Jhordan was *not* precluded from establishing paternity, this case is significant with respect to the *Jason P.* analysis because the court's decision in *Jhordan C.* did not rest upon the existence of an exception to the nonparentage provision. Rather, the court held that the nonparentage provision was not applicable to Jhordan at all because he did not provide his sperm to a licensed physician prior to insemination as was required.[94] Thus, the court could not apply the nonparentage provision to preclude Jhordan from establishing paternity.[95]

Despite the inapplicability of the nonparentage provision, the court's opinion placed great emphasis on Jhordan's post-birth involvement in the child's life, which included regular visits, purchasing baby equipment, and establishing a trust fund for the child—none of which Mary objected to at the time.[96] The court went as far as discussing whether the trial record reflecting Jhordan and Mary's conduct after the child was born demonstrated a clear understanding that Jhordan would only be a sperm donor and would have no parental relationship with the child, concluding that the "the parties' conduct indicate[d] otherwise."[97] The court's emphasis on the particulars of Jhordan and Mary's post-birth conduct and what it did or did not suggest is relevant because it indicates the *Jhordan C.* court viewed post-birth conduct as important to the determination of whether the parties' intended that Jhordan be involved in the child's life—which the court further seemed to find relevant to the overall paternity determination. The court apparently found such conduct to be important enough to discuss thoroughly despite the fact that it did not even need to address post-birth conduct at all in order to reach its ultimate conclusion: that Jhordan would be treated by law as the legal father. Rather, as soon as the court determined that the nonparentage provision was inapplicable, it could have ended its analysis right there and still reached the same conclusion.

The court's opinion also suggests that it did not interpret the law to provide any legal basis on which it could find Jhordan to be the father if the nonparentage provision was triggered, as evidenced by the court's statement

92. *Id.*
93. *Id.* at 537–38.
94. *Id.* at 537.
95. *Id.*
96. *Id.* at 532, 536.
97. *Id.* at 536. The court concluded that the trial court "properly declared Jhordan to be [the child's] legal father" because Mary failed to invoke the nonparentage provision because she did not obtain the semen from a licensed physician, *and* "because the parties by all other conduct preserved Jhordan's status as a member of [the child's] family." *Id.* at 537–38.

that "[s]ubdivision (b) [of the nonparentage provision] states *only one limitation* on its application: the semen must be 'provided to a licensed physician.'"[98] It is difficult to imagine what else that statement could mean other than that if all of the statutory requirements of the nonparentage provision were satisfied, then it precludes paternity for all donors.

Jhordan C. is of further significance to this Note's analysis because the underlying facts of the case provide an even stronger justification for overriding the nonparentage provision than the facts of *Jason P.* for two important reasons. First, the record in *Jason P.* contained undisputed evidence that Jason *did not* intend to be Gus' father at the time Danielle was inseminated with his sperm.[99] In *Jhordan C.*, in contrast, the court had no documented evidence whatsoever of the parties' intent prior to conception.[100] Therefore, there was a possibility that Jhordan's version of the oral agreement between him and Mary was the truth, whereas no such possibility existed in *Jason P.* Second, Jhordan was clearly providing significant financial support for the child by purchasing baby equipment and establishing a trust fund.[101] To the contrary, nothing in the *Jason P.* opinion suggests that Jason was providing any particular financial support for baby Gus.[102] In sum, the financial support Jhordan provided, coupled with the lack of any evidence contradicting his claimed preconception intentions to be involved in the child's life offers a more persuasive justification for finding Jhordan to be a legal father than the circumstances present in *Jason P.* Overall, the dicta and holding in *Jhordan C.* are significant because together they suggest that the court interpreted the law in a way that was consistent with the *Steven S.* decision—requiring the court to find the nonparentage provision inapplicable in order to establish Jhordan as a legal father—which conflicts with the *Jason P.* court's interpretation.

3. Elisa B. v. Superior Court

The California Supreme Court decided the case of *Elisa B. v. Superior Court* in 2005.[103] Elisa and her partner Emily wanted to have a child together so they pursued artificial insemination.[104] Emily was inseminated with a donor's sperm and gave birth to twins in 1998.[105] The couple split up the following year.[106] Elisa made voluntary support payments for a while

98. *Id.* at 534 (emphasis added).
99. Jason P. v. Danielle S., 171 Cal. Rptr. 3d 789, 792 (Cal. Ct. App. 2014).
100. *Jhordan C.*, 224 Cal. Rptr. at 532.
101. *Id.*
102. *See Jason P.*, 171 Cal. Rptr. 3d at 791–93.
103. *See* Elisa B. v. Super. Ct., 117 P.3d 660 (Cal. 2005).
104. *Id.* at 663.
105. *Id.*
106. *Id.*

afterward, but eventually stopped, claiming she could no longer support Emily and the twins because she had lost her full-time job.[107] As a result, the county district attorney filed a complaint on Emily's behalf to establish Elisa as the twin's legal parent so that the state could order her to pay child support.[108] The court ruled in favor of Emily, using the parenthood presumption *against* Elisa in order to mandate child support payments on the basis that Elisa had taken the twins into her home and held them out as her own, making her a presumed parent[109]—just like the appellate court deemed Jason to be.

While *Elisa B.* differs factually from *Jason P.* in some significant respects, it is important because it provides an illustration of the commonly understood application of the parenthood presumption prior to *Jason P.*, which was to invoke the presumption *against* a party *denying financial responsibility*. This is distinct from applying it against the will of a child's only legal parent in favor of another individual who possesses no legal rights at the time, which is what occurred in *Jason P.*

This distinction is very important when looked at in the context of the statutory purpose of the presumption. Specifically, the Model UPA asserts that the purpose of including the parenthood presumption was to provide avenues to establish parentage *against* individuals in order to *enforce support obligations.*[110] California did not modify the parentage presumption or its asserted purpose in any way when adopting it into state law, which suggests that the California legislature adopted the provision in its entirety, including the purpose behind it.[111] With this purpose in mind, it is relatively easy to see how the application of the provision in *Elisa B.* achieves that purpose. However, it is very unclear how the unprecedented application of the provision in *Jason P.* serves the purpose of enforcing support obligations, particularly because the child's legal parent at the time did not request such support.

Elisa B. is of further significance due to the court's emphasis on evidence indicating that *prior to conception* both Emily and Elisa *intended* to parent and raise the child together.[112] This suggests that the court gave great weight to the preconception intentions expressed by the parties at the time of insemination. The court then gave legal effect to those intentions by holding that the parenthood presumption sufficiently established Elisa to be a legal parent, indicating to at least some extent

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107. *Id.* at 663–64.

108. *Id.* at 662–63.

109. *Id.* at 668–69.

110. *Parentage Act Summary*, *supra* note 20.

111. CAL. FAM. CODE § 7611(d) (West 1975).

112. *Elisa B.*, 117 P.3d at 669 ("It is undisputed that Elisa actively consented to, and participated in, the artificial insemination of her partner with the understanding that the resulting child or children would be raised by Emily and her as *coparents* . . . ." (emphasis added)).

that the court did not think Elisa was entitled to simply change her mind post-birth and escape any responsibility when that would be detrimental to the other party involved—there, Emily.

If the *Jason P.* court applied the reasoning from *Elisa B.* regarding the ability for an individual to unilaterally change their mind after birth, it would have had no choice but to find that Jason was precluded from establishing himself as a legal father. The trial court record from *Jason P.* clearly evidenced Danielle's intent to pursue single motherhood and Jason's intent *not* to be the father of any child Danielle conceived using his sperm.[113] Therefore, in accordance with *Elisa B.*, the parties' preconception intentions should have been upheld, mandating a ruling in Danielle's favor. The stance taken by the court in *Elisa B.* with respect to preventing individuals from unilaterally changing their minds is important because it is highly consistent with the intent-based approach proposed in this Note.

In sum, little precedent existed at the time of the *Jason P.* decision that was directly on point with respect to the issue facing the *Jason P.* court. However, the cases that did exist either did not lend support to the court's interpretation of the conflicting Family Code provisions or directly contradicted it. Additionally, the outcomes reached in *Steven S.* and *Jhordan C.* both strongly suggest that the courts deciding those cases did not interpret the Family Code to provide any possible exception to the nonparentage provision once found to be applicable. Finally, the California Supreme Court's application of the parenthood presumption in *Elisa B.*—*against* an individual—coupled with the lack of any precedent unilaterally applying it against the will of a child's legal parent provides yet further support for the position taken in this Note: that prior to *Jason P.*, California courts did not believe any exception to the nonparentage provision existed, and in order for one to exist, the legislature would have to explicitly write such an exception into the statute. Thus, the *Jason P.* court should not have judicially created an exception that the legislature did not clearly intend.

B. Tools of Statutory Interpretation

American courts often begin interpreting a statute by first looking to its text alone to determine whether it has a clear meaning.[114] If a court determines that a statute does in fact have a clear meaning, then that is usually the end of the inquiry:[115] "If the statutory language is unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that

113. Jason P. v. Danielle S., 171 Cal. Rptr. 3d 789, 791–92 (Cal. Ct. App. 2014).

114. *See* Morell E. Mullins, Sr., *Tools, Not Rules: The Heuristic Nature of Statutory Interpretation*, 30 J. Legis. 1, 6 (2004).

115. *Id.*

language must ordinarily be regarded as conclusive.'"[116] The court began its interpretation in *Steven S.* in this manner, and concluded that the text of the nonparentage provision was clear and unambiguous in its directive that sperm donors meeting the requirements defined in the provision were necessarily precluded from establishing parentage.[117] Finding the text clear, the court asserted that unless the legislature explicitly wrote an exception into the provision, then the proper interpretation of the statute required a court to treat the nonparentage provision as the exclusive authority over parentage determinations involving unmarried third-party sperm donors.[118]

Despite the *Steven S.* court's conclusion, that the nonparentage provision was clear and unambiguous in 2005, the same appellate court again interpreted the *same* nonparentage provision when it subsequently decided *Jason P.*, that time concluding that the statute was no longer clear in its directive to preclude unmarried sperm donors from establishing parentage so long as they met the requirements of the provision.[119] The discrepancy between these two interpretations of the same statute is particularly puzzling because during the time that lapsed between *Steven S.* and *Jason P.*, the nonparentage provision was amended only once in 2011.[120] The amendment created a single exception to the provision's directive precluding donors from establishing parentage if *both parties* involved clearly expressed the donor's intent to be a father *in writing prior to conception* ("in-writing exception").[121]

It is difficult to ascertain how the addition of the in-writing exception to the nonparentage provision could have provided a reason for the court to completely change its understanding of whether other exceptions existed. On the contrary, the legislature's decision to formally amend the Family Code to establish that single exception supports the contention that the legislature did not intend or believe any exceptions existed prior to the addition of the in-writing exception. Additionally, the amendment explicitly writing one exception into the statute further suggests that the legislature understood it to be possible for exceptions to exist only if it formally amended the statute to say so.

This Note agrees with the *Steven S.* court's conclusion that the nonparentage provision was clear and unambiguous, and contained no exceptions unless and until the legislature explicitly created one. Despite

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116. Reves v. Ernst & Young, 507 U.S. 170, 177 (1993) (quoting United States v. Turkette, 452 U.S. 576, 580 (1981)).

117. Steven S. v. Deborah D., 25 Cal. Rptr. 3d 482, 487 (Cal. Ct. App. 2005).

118. *Id.* at 487–88.

119. *Jason P.*, 171 Cal. Rptr. 3 at 796.

120. CAL. FAM. CODE § 7613(b). For further details on this 2011 amendment, see *AB-1349 Bill Analysis*, CAL. LEGIS. INFO., http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201120120AB1349 (last visited Apr. 23, 2017).

121. *AB-1349 Bill Analysis*, *supra* note 120; *see* CAL. FAM. CODE § 7613(b).

this conclusion, the remainder of this Part discusses and applies additional tools of statutory interpretation. This Note maintains that the consideration of such additional factors is not necessary in the case of the nonparentage provision, because at the time *Jason P.* was decided its text was unambiguous. However, the following considerations provide even more support for the *Steven S.* court's interpretation of the provision while simultaneously contradicting the interpretation of the *Jason P.* court.

1. Statutory Purpose

When a court determines that a statute is ambiguous on its face, it will often look next to whether the "legislative intent"—that is, the purpose the legislature intended the statute to serve when enacting it—is ascertainable.[122] Because the Family Code provisions at issue were adopted from the Model UPA it is important to first understand the purpose the model scheme was intended to serve. According to the commission responsible for promulgating the Model UPA, the primary purpose behind the scheme's enactment as a whole was to "identify[] natural fathers so that child support obligations *may be ordered*."[123] The California legislature expanded upon this purpose when adopting a modified version of the Model UPA into state law, adding that the statutory scheme was further "intended to rationalize procedure . . . and to improve state systems of *support enforcement*."[124] In other words, the Model UPA and California's equivalent scheme were both enacted for the purpose of achieving one primary goal: ensuring the existence and availability of legal mechanisms to aid courts in enforcing child support obligations against individuals.[125]

Looking to California's nonparentage provision in particular, it is important to note that the California legislature did not adopt the Model UPA's provision verbatim. Instead, California modified the nonparentage provision to make it equally applicable to both *married* and *unmarried* women, whereas the original Model UPA restricted the provisions application to only married women.[126] Thus, California articulated its own purpose behind its modified version. The trial court that first heard *Jason P.* stated that purpose in support of its finding in Danielle's favor:

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122. Mullins, *supra* note 114, at 10.

123. *Parentage Act Summary*, *supra* note 20.

124. Jason P. v. Danielle S., 171 Cal. Rptr. 3d 789, 793 (Cal. Ct. App. 2014) (quoting Steven S. v. Deborah D., 25 Cal. Rptr. 3d 482, 484 (Cal. Ct. App. 2005) (emphasis added)).

125. *Parentage Act Summary*, *supra* note 20; *Jason P.*, 171 Cal. Rptr. 3d at 793.

126. *See* CAL. FAM. CODE § 7613(b); UNIF. PARENTAGE ACT § 5(a) (UNIF. LAW COMM'N 1973) ("If . . . *a wife* is inseminated artificially with semen donated by a man not her husband, *the husband* is treated in law as if he were the natural father of a child thereby conceived." (emphasis added)).

> [T]he Legislature has weighed competing public policies regarding paternity and sperm donors, and has reconciled those considerations by affording "to unmarried women a statutory right to bear children by artificial insemination (as well as a right of men to donate semen) *without fear of a paternity claim* [and] likewise provided men with a statutory vehicle for donating semen to married and unmarried women alike without fear of liability for child support."[127]

The appellate court that subsequently heard *Jason P.* made only a mere mention of that purpose and then dismissed it just as quickly, quoting a California Supreme Court case (*K.M. v. E.G.*):

> [T]here is nothing to indicate that California intended to expand the reach of this provision so far that it would apply if a man provided semen to be used to impregnate his unmarried partner in order to produce a child that would be raised in their joint home. It would be surprising, to say the least, to conclude that the Legislature intended such a result.[128]

This Note agrees that it would indeed be surprising, to say the least, if the legislature intended the provision to preclude a man from the right to establish paternity in a situation in which he provided semen to his unmarried partner *with the intent* that the child "would be raised in their joint home." However, the circumstances just described are very different from the circumstances presented to the court in *Jason P.*, making the court's reliance on *K.M.* misguided for several reasons.

First, the scenario described by the *K.M.* court is entirely inapplicable to the *Jason P.* analysis because that scenario is so factually dissimilar to the facts of *Jason P.* The *K.M.* court describes a situation in which both parties shared a *mutual preconception intention* to raise a child together in a *joint home.*[129] These facts are easily distinguishable from those in *Jason P.* Not only were Jason and Danielle never legally married, they also did not share a permanent home at the time of conception or any time after that, and nothing in the trial court record indicates the two ever had any intention of sharing a permanent home let alone jointly raising a child.[130] Instead, the record provides undisputed evidence that Danielle expressed a clear intent to pursue *single motherhood*, and Jason expressed a clear intent *not to be the father* of any child Danielle conceived.[131] Thus, the *Jason P.* court's apparent reliance on *K.M.* in attempting to justify its decision is not at all supported by the facts before it.

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127. *Jason P.*, 171 Cal. Rptr. 3d at 793 (emphasis added) (quoting language from the lower court's opinion).

128. *Id.* at 795 (quoting K.M. v. E.G., 117 P.3d 673, 680 (Cal. 2005)).

129. *Id.*

130. *Id.* at 791–92. Danielle did live with Jason again briefly after the point at which she told him she intended to pursue single motherhood when she moved into his home in September 2008. *Id.* at 791. This was only temporary, however, as Danielle only stayed with Jason during the duration of time that her own home was being remodeled—clearly indicating that she and Jason did not have any intention of cohabiting for an extended period of time or permanently. *Id.*

131. *Id.* at 791–92.

K.M. also provides no explanation for the contradiction between the appellate court's interpretations of the nonparentage provision in *Jason P.* versus in *Steven S.*—two cases involving incredibly similar facts. In *Steven S.*, the court refused to consider looking beyond the text of the statute to establish parentage on the basis that the statute did not state that any exceptions existed. Rather, the *Steven S.* court concluded that there was no indication that the legislature intended a policy where the nonparentage provision would apply differently when the sperm donor was intimately involved with the recipient.[132] The *Jason P.* court then changed course drastically by reading an exception into the nonparentage provision though the text of the statute did not reflect such an exception. The *Jason P.* court's use of the California Supreme Court's language from *K.M.* regarding situations involving unmarried individuals who intend at the time of conception to jointly raise a child contradicted the court's own prior conclusion in *Steven S.*: that no exceptions existed unless clearly indicated by the legislature. The *Jason P.* court provided no justification for this major shift in interpretation.

Interestingly, while the language in *K.M.* that was later quoted in *Jason P.* does not provide any support for the *Jason P.* decision, it *does* express support for the intent-based regime advocated for in this Note.[133] *K.M.* particularly recognized that the nonparentage rule should not be deemed applicable to parties who, *at the time of conception*, "*intended* that the resulting child would be raised in their joint home."[134] That position suggests a preference of the California Supreme Court for upholding individuals' preconception parentage intentions, which is precisely what an intent-based approach aims to achieve.

Additionally, the *Jason P.* court failed to cite a single instance in which the parenthood presumption of section 7611 was used by a California court to establish parentage for an individual with no legal parental rights over the objections of the sole legal parent of a child.[135] The presumption had commonly been applied *against* individuals attempting to escape financial responsibilities in order to impose child support obligations.[136] It is easy to see how using the presumption against an individual serves the statutory purpose of the Model UPA and California's equivalent state statutory scheme: *enforcing* child support obligations.[137] However, it is difficult to understand how the application of the presumption against the will of the only legal parent of a child who is not asking a court for financial support

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132. Steven S. v. Deborah D., 25 Cal. Rptr. 3d 482, 487 (Cal. Ct. App. 2005).

133. *See infra* Part III. *See generally* Schultz, *supra* note 18 (discussing the features of an intent-based regime in the context of ART and advocating for its benefits).

134. *See* K.M. v. E.G., 117 P.3d 673, 680 (Cal. 2005).

135. *See generally Jason P.*, 171 Cal. Rptr. 3d 789.

136. *See, e.g.*, Elisa B. v. Super. Ct., 117 P.3d 660, 668–69 (Cal. 2005).

137. *Steven S.*, 25 Cal. Rptr. at 484.

could be said to serve the purpose of enforcing child support obligations. Yet further, the application of the parentage presumption as applied in *Jason P.* contradicts the clearly stated purpose of California's nonparentage provision: to provide unmarried women a statutory right to pursue single motherhood *without fear of a paternity claim.*[138] This purpose is surely not being served by the current state of the law, as it is now apparently the case that any provision in the Family Code could be used to try to override the nonparentage provision. A consequence of this is that it severely undermined the supposed right for unmarried women to *fearlessly* pursue single motherhood, as well as for unmarried donors to have certainty at the time of conception that they cannot be later sued over child support.

2. Legislative History

Another tool of statutory interpretation often utilized by American courts involves looking to the legislative history surrounding a statutory provision.[139] There are three pieces of legislative history associated with California's nonparentage provision and the parenthood presumption that are of particular importance here, as each calls the validity of the *Jason P.* court's decision even further into question.

First is the California legislature's previously discussed modification of the nonparentage provision making it applicable to both unmarried and married women.[140] While the original version of the Model UPA promulgated in 1973 restricted application of the nonparentage provision to only married women, the model statute was[141] amended in 2002 to make it equally applicable to unmarried women.[142] Of significance is the fact that the official comments to the amended provision still foresaw no exceptions for either married or unmarried women:

> If a child is conceived as the result of assisted reproduction, this section clarifies that a donor (whether of sperm or egg) is not a parent of the resulting child. *The donor can neither* sue to establish parental rights, *nor be sued* and required to support the resulting child. In sum, *donors are eliminated from the parental equation.*[143]

The official comment's assertion that donors are "eliminated from the parental equation"[144] leaves little room for argument that the drafters of the Model UPA intended the provision to carry with it unwritten exceptions. The California legislature did not amend California's version of the nonparentage provision following the 2002 amendments to the

138. *Id.* at 486.
139. Mullins, *supra* note 114, at 10.
140. CAL. FAM. CODE § 7613(b).
141. UNIF. PARENTAGE ACT § 5(b) (UNIF. LAW COMM'N 1973).
142. UNIF. PARENTAGE ACT § 702 (UNIF. LAW COMM'N 2002).
143. *Id.* § 702 cmt. (emphasis added).
144. *Id.*

model statute, which included the above official comment. The legislature also did not add any of its own guiding comments to the Family Code to indicate that they intended California's provision to apply differently than that in the Model UPA (which mirrored California's in its application to married and unmarried women after the amendment). Therefore, without anything to indicate otherwise, the logical inference that can be drawn is that the nonparentage provision in the Code was intended to apply in precisely the same way that the equivalent provision in the Model UPA did, meaning that "donors are eliminated from the parental equation."[145]

The second relevant piece of legislative history is a 2011 amendment to the Family Code that added the "in-writing exception"[146]—a single exception to the nonparentage provision[147] allowing for a donor to establish legal parentage only if *both* the donor and the woman agreed in a signed writing *prior to conception* that he would be the child's father.[148] The California legislature's deliberate creation of the in-writing exception through a formal amendment to the statute again supports the contention that the legislature did not intend for any exception to exist prior to the in-writing exception, nor did they believe any currently existed at the time that it was added. If this were not the case, it is difficult to understand why the legislature would have added a formal amendment for this one particular exception but not others that it also intended and believed to exist.

The third piece of legislative history is a 2015 amendment to the Family Code's nonparentage provision which, for all practical purposes, codified the *Jason P.* decision into the Family Code.[149] As previously explained, the proposal for AB 2344 indicated that it "would establish statutory forms" that the intended parent(s) of a child conceived through the use of a sperm donor could fill out as evidence of their parentage intentions at the time of conception.[150] The legislature, however, made quite clear that the forms did "not affect any presumptions of parentage based on Section 7611, and do not preclude a court from considering any other claims to parentage under California statute or case law."[151] Therefore, the forms appear to be merely symbolic, and do not themselves seem to provide any meaningful legal guarantee of protection for intended parents even if they are filled out.

Overall, the 2015 amendment appears to have provided for these intended parent forms, but then essentially used them to carve out the

145. *Id.*

146. *See supra* Part II.B. for an initial introduction to the "in-writing exception" to the nonparentage provision.

147. CAL. FAM. CODE § 7613(b) (2011).

148. *Id.*

149. *AB-2344 History*, *supra* note 55.

150. *Id.*

151. *Id.*; CAL. FAM. CODE § 7613.5(a) (West 2016).

exception to the nonparentage provision declared by the *Jason P.* court to exist, by making clear that the forms specifically did not affect any presumptions under section 7611. This amendment, viewed in isolation, begs the question of what possible purpose the creation of the intended parent forms serves if they cannot be relied on for any legal protection. It is unclear why the legislature would formally amend the statute if the change that they made would be essentially irrelevant in a legal dispute. However, the fact that the 2015 amendment was not even introduced until *after* the *Jason P.* dispute was underway at least raises the question of whether it was entirely in response to *Jason P.* and was introduced in an attempt to influence the outcome of the case.

Similar to the addition of the in-writing exception, if the legislature believed the exception recognized by the appellate court in *Jason P.* already existed then it would have been redundant and unnecessary to enact the 2015 amendment explicitly mentioning section 7611. The amendment raises particular concerns due to the fact that it appears the legislature went about carving out the *Jason P.* exception not by explicitly adding it to the text of the provision (as it did for the in-writing exception), but instead by appending it to the intended parent forms as if it were merely a clarification of those forms rather than an "exception." Regardless of exactly where in the statute the legislature added the text, it nonetheless codified the *Jason P.* decision into the Family Code.

When considered together, the Model UPA's official comment in 2002 regarding the elimination of donors from the parental equation, the formal addition of the in-writing exception in 2011, and the 2015 amendment establishing intended parent forms all support the contention that the California legislature did not intend for any exceptions to the nonparentage provision to exist beyond the in-writing exception until *after* the *Jason P.* decision was final. Thus, the *Jason P.* court had no statutory authority to rely on in its decision to recognize an exception. While that exception is today codified in the Family Code, it could not have been applied retroactively to Jason and Danielle's case.[152] Yet the practical reality of the outcome of *Jason P.* is that the court did essentially apply the now existent exception retroactively in a manner that completely undermined Danielle's reliance interests in the protections that she reasonably believed were guaranteed by the nonparentage provision.

152. *See id.* § 4(h) ("If a party shows, and the court determines, that application of a particular provision of the new law . . . would substantially interfere with the . . . rights of the parties . . . in connection with an event that occurred or circumstance that existed before the operative date, the court may . . . apply . . . the old law to the extent reasonably necessary to mitigate the substantial interference.").

3. General vs. Specific Provisions

The California Supreme Court has provided the following guidance for lower courts as to how they should interpret conflicting statutes, particularly when one provision is very specific while the other is general:

> [S]pecific provisions of a statute control over general provisions where there is a conflict. . . . [W]here one provision of a statute *treats specially and solely of a matter*, it prevails over other provisions . . . because the attention of the Legislature was directed to the particular matter.[153]

The court further added that the provisions "should be interpreted in the light of the purpose sought to be achieved and any inconsistency should be harmonized to the end that such purpose is not thwarted."[154] The court's guidance on this matter indicates that the specific, narrow nonparentage provision should have been read to prevail over the general parenthood presumption.

The nonparentage provision is a specific provision that "treats specially and solely of a matter"—parentage for sperm donors[155]—while the parenthood presumption invoked in *Jason P.* is merely one of many circumstances in a laundry list of scenarios where a court is permitted to establish parental obligations if it finds those circumstances exist.[156] The presumptions in section 7611 are generally applicable to parent-child determinations, and were not drafted with any aim toward donor-conceived children or children conceived through any type of ART.[157] Put in the framework provided by the California Supreme Court, the legislature was inevitably "directed to the particular matter" of parentage for sperm donors when enacting the nonparentage provision. It is entirely unclear, however, whether the legislature even considered the possibility of application to sperm donors when it drafted the laundry list of circumstances giving rise to a presumption of parenthood.

To date there has not been a single California decision ever published that applied the parenthood presumption to make a determination with respect to the parental rights of sperm donors,[158] which indicates a strong likelihood that the legislature did not consider or envision application of the parenthood presumption in cases involving third-party sperm donors. The California Supreme Court's guidance would therefore direct that the more specific, narrowly focused nonparentage provision should prevail over the general parenthood presumption. The court's additional directive to interpret conflicting provisions in the way that best serves their intended

153. People v. Moroney, 150 P.2d 888, 891 (Cal. 1944) (emphasis added) (internal citations omitted).
154. *Id.*
155. CAL. FAM. CODE § 7613(b).
156. *Id.* § 7611.
157. *See id.*
158. Letter from Reproductive Technology & Family Law Scholars, *supra* note 54, at 2.

purpose also supports the argument that the nonparentage provision should have overridden the parenthood presumption when in conflict.

C. The Role of Public Policy and Social Influences

1. *"Institutional Roles"*

The concept of "institutional roles" is commonly invoked in American jurisprudence, and it hinges on the principle of separation of powers, focusing on the fact that certain tasks belong to certain institutions and should therefore be reserved for those institutions.[159] Courts often raise arguments based on the concept of institutional roles in decisions in which a court feels that it is being asked to do something that the court believes would cross the line from interpreting the law into the realm of making law, which is reserved for the legislature.[160]

Steven S. provides an illustration of the institutional roles argument in practice. There, the court invoked the argument by refusing to "'fill in the blanks' [in the Family Code] left by the Legislature," asserting that the authority of the court was "simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted."[161] In other words, the court refused to read into the statute something that it simply did not say because the task of drafting laws belongs to the legislature, not the courts. The *Jason P.* court too should have acknowledged the concept of institutional roles and restrained itself from going beyond the proper role of the judiciary—that is, to say what the law is as written,[162] not to fill in the blanks based on its own independent judgments. The *Jason P.* court instead read into the nonparentage provision an exception that did not exist in order to reach an unprecedented result under the circumstances.

2. *The Vagueness of the Parenthood Presumption and Its Potential Consequences for Sperm Donation*

The text of the parenthood presumption provides no guidance for lower courts on how to determine at what point an individual has sufficiently "receive[d] [a] child into his or her home and openly [held] out the child as his or her natural child"[163] such that the parenthood presumption is triggered. Rather, the provision raises more questions than it answers:

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159. *See generally* Romer v. Evans, 517 U.S. 620 (1996); Lochner v. New York, 198 U.S. 45 (1905); Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 Harv. L. Rev. 561, 575 (1983).

160. U.S. Const. art. I, § 2.

161. Steven S. v. Deborah D., 25 Cal. Rptr. 3d 482, 487 (Cal. Ct. App. 2005) (citing Cal. Code Civ. Proc. § 1858).

162. *See id.*; United States v. Nixon, 418 U.S. 683, 704–05 (1974) (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803)) (discussing the proper role of the judicial branch relative to the other two branches of government).

163. Cal. Fam. Code § 7611(d) (2014).

- Does receiving the child into your home require that the child actually live with you? If so, does it have to be full-time or permanent?
- How long must an individual hold the child out as his or her own before they could successfully petition to establish parentage rights—or have such rights established against their wishes?
- Are there any factors that courts can look to that would indicate, or even conclusively establish, that the presumption had arisen?
- Importantly, if the facts of *Jason P.* remained exactly the same, except Jason instead terminated his relationship with Danielle and Gus, would the court have applied the parenthood presumption *against* Jason to order him to pay child support despite the nonparentage provision as well as his clear preconception intent not to be a father?

The result of the vague nature of the presumption is that its application in any given set of circumstances is highly subjective and up to the discretion of the particular court presiding. Even more concerning, a presumption of parentage requires nothing more than a showing by a preponderance of the evidence.[164] *Jason P.* illustrates the practical problems with the vagueness of this provision: As a result of its subjectivity and low evidentiary standard, "a person seeking parental rights can effectively 'hold out' a child as his or her own regardless of the *birth parent's lack of consent, participation or knowledge.*"[165]

The *Jason P.* decision and the current law in California serve as significant deterrents for unmarried women wishing to pursue single motherhood due to the fear of a paternity claim that now necessarily exists. Women wishing to pursue single motherhood are now left with only one safe option to ensure their protection against a paternity suit prior to conception: using a completely anonymous donor. This, however, unfairly forces single women to use anonymous donors, which may not be desirable for the child subsequently conceived.[166]

Likewise, potential donors will likely be deterred by the fear of being ordered to pay child support after a child is born. While the law does not likely serve as a deterrent to men wishing to donate *anonymously*, an increase in anonymous donation is currently undesirable in light of an ongoing international trend moving away from anonymous sperm donation.[167] As of 2013, prohibitions on anonymous donation already existed in eleven foreign jurisdictions,[168] and in 2011, Washington State became the first in the United States to pass a law making non-

164. Letter from Reproductive Technology & Family Law Scholars, *supra* note 54, at 5.

165. *Id.* (emphasis added).

166. *See infra* text at note 167.

167. Gaia Bernstein, *Unintended Consequences: Prohibitions on Gamete Donor Anonymity and the Fragile Practice of Surrogacy*, 10 IND. HEALTH L. REV. 291, 299 (2013). "[A]dvocates of these prohibitions emphasize the importance of allowing donor conceived children to develop their identities, to access their family medical history and to avoid accidental incest with another offspring of the donor." *Id.* at 300. For further discussion of the concerns raised in this article, see *id.* at 300 n.35.

168. *Id.* at 299–300.

anonymous donation the "default," meaning that donors' identities *will be* revealed unless they deliberately opt out of being identified.[169]

This non-anonymous donation trend has been gaining support, and the fact that a version of it has already appeared as law in the State of Washington makes it entirely possible that prohibitions on anonymous donation could eventually become the norm in America. If California were to adopt anonymous donation prohibitions or even restrictions, there could be dire consequences for sperm donation overall. Sperm banks would likely observe a potentially significant decrease in the aggregate number of donors if the law could not guarantee them protection against a future paternity suit.

3. Societal Norms and Social Stereotypes

While legal decisions should, in theory, be entirely neutral and based exclusively on the law, it is an inescapable reality that legal outcomes are often influenced by social norms and stereotypes, whether it is on a conscious or subconscious level.[170] This tends to be particularly true the more controversial or emotional the nature of a dispute is. *Jason P.* involved the very sensitive, intimate issue of conception and parental rights, unsurprisingly leading to an emotionally charged case that sparked a great deal of controversy nationwide.[171] It is therefore worth discussing a few of the social factors that I speculate likely came into play in *Jason P.*, or at least certainly could have.

At the time of the writing of this Note, the Family Code still contained a provision asserting that California public policy favors "establishing *paternity* for all children," so that child support orders can be awarded.[172] This policy expresses a preference for the traditional concept of the proper family unit, which requires both a mother and a father. The policy also reinforces the common, gendered stereotype that men are the breadwinners, meaning that the law must provide ways to enforce child support obligations against *men* specifically. This is, of course, operating

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169. *Id.* at 300.

170. For a brief discussion of the theory promoted by legal Realists as to the impact social and cultural influences have on judges' decisionmaking process, see Joseph A. Reinert, *The Myth of Judicial Activism*, 29 VT. B.J. 35, 35 (2004) ("The uncertainty and flexibility of all legal rules places great emphasis on external factors in making law, notably the individuals (and their social influences) bringing and arguing cases and making decisions—lawyers and judges."). Reinert's article further states that "it is important to note that the Realists did not see the subversion of legal rules by judges as intentional or partisan. Rather, judges fall prey as much as, if not more than, anyone else to the belief that their decisions are firmly rooted in legal rules and principles." *Id.* The result of this being that "[t]he real reason behind a decision remains unarticulated." *Id.*

171. *See* Vanessa Grigoriadis, *Tempest in a Test Tube: Jason Patric's Brutal Custody Battle*, ROLLING STONE (July 15, 2014), http://www.rollingstone.com/culture/news/tempest-in-a-test-tube-jason-patrics-brutal-custody-battle-20140715 ("For the past year, the actor [Jason Patric] has embarked on a medial crusade to convince the world that his ex-girlfriend stole his son.").

172. CAL. FAM. CODE § 7570 (emphasis added).

under the outdated assumption that single women cannot support themselves and a child without assistance from the child's father. Ingrained stereotypes such as these often work their way into individuals'—including judges—views and judgments about controversial social issues.[173]

Such underlying preferences for the traditional family unit can be observed in California cases from the last several decades, particularly those involving ART-related disputes.[174] This preference takes the form of an ascertainable pattern of cases resulting in decisions that favor establishing paternity, while simultaneously avoiding single motherhood.

- ***Jhordan C. v. Mary K.:***[175] Here the court was able to find the nonparentage provision inapplicable to Jhordan because he had not provided his sperm to a licensed physician prior to insemination as required. Yet the court still put significant emphasis on Jhordan's post-birth conduct and what the court believed it suggested.[176] While one can of course only speculate about what the court would have done had the provision applied, the court's unnecessary emphasis on Jhordan's post-birth conduct at the very least allows for the plausible inference that the court overall thought Jhordan should be established as the child's legal parent regardless of what the nonparentage provision directed. Such an approach reflects a preference for establishing a complete "family unit" in the traditional sense.

- ***Elisa B. v. Superior Court:*** *Elisa B.* involved a lesbian couple who conceived a child using ART.[177] There, the court expressed some hesitancy in finding that a child could have *two mothers*, but ultimately held that Elisa was estopped from denying that she was the legal parent of the child in question.[178] The court ultimately held that both women were legal mothers of the child, but the court's initial uneasiness about doing so reflects a preference that favors establishing *paternity* for all children. And further, even though this case involved two women, the fact that the court overcame its uneasiness about a child having two mothers instead of just one mother also reflects the view that two parents—even if they are both mothers—is still the lesser evil if the alternative would be to find that a child's only legal parent was a single mother.

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173. *See supra* sources cited at note 170 and accompanying text.

174. *See* Elisa B. v. Super. Ct., 117 P.3d 660 (Cal. 2005); Johnson v. Calvert, 851 P.2d 776 (Cal. 1993); Jason P. v. Danielle S., 171 Cal. Rptr. 3d 789 (Cal. Ct. App. 2014); Jhordan C. v. Mary K., 224 Cal. Rptr. 530 (Cal. Ct. App. 1986); Statement of Decision, Findley v. Lee, No. FDI-13-780539, 2016 WL 270083 (Cal. Super. Ct. Jan. 11, 2016).

175. For an in-depth discussion of the facts underlying *Jhordan C.*, see *supra* Part II.A.2.

176. *See Jhordan C.*, 224 Cal. Rptr. at 537–38; *supra* text at note 97.

177. *Elisa B.*, 117 P.3d at 663. For an in-depth discussion of the facts underlying *Elisa B.*, see *supra* Part II.A.3.

178. *Elisa B.*, 117 P.3d at 666, 670.

- ***Jason P. v. Danielle S.:*** The decision in *Jason P.* is also consistent with this pattern.[179] Unlike in *Jhordan C.*, where the court had nothing more than the oral testimony of each party to look to in trying to determine their preconception intentions, the trial record in *Jason P.* included undisputed evidence of both Jason and Danielle's clearly expressed intentions regarding parenthood *at the time of conception.* One would think the existence of this evidence would make the court's decision easier—it could have simply upheld *both parties* clearly expressed preconception intentions. Instead, however, the court reached a conclusion that did not uphold the undisputed preconception intentions of either party. It did, however, successfully avoid a holding resulting in single motherhood.[180]

Turning back to the decision in *Jason P.* in particular, an additional factor in the case cannot be ignored: Jason's social status at the time that this legal battle unfolded was that of a famous actor.[181] Jason is also the son of a Pulitzer Prize-winning actor-playwright, and as such, Jason is very well connected in Hollywood.[182] Unsurprisingly, Jason's involvement in the case resulted in national media attention creating a platform for him to speak out and foster sympathy for his case, as well as to obtain financial and emotional support.[183]

An illustration of the power Jason had in this case due to his fame is illustrated by the fundraising campaign he started during the legal dispute called "Stand Up for Gus"[184] (Gus being the name of the child Danielle gave birth to), which had received more than $300,000 in donations as of July 2014.[185] Jason also released promotional videos through Stand Up for Gus that fostered emotion in viewers. For example, one video displayed Jason and Gus in Gus' room in which Jason thanks all of the donors for their support as the camera pans around Gus' room. Jason then delivered the following heart tugging message: "We're sitting in Gus' room. This is a place I don't come into or normally open the door, but I thought it was important to be in here. It's painful. But it's also a reminder of what we're fighting for."[186]

Jason was clearly not in the same position as an ordinary individual not enjoying the benefits of fame, power, and high social status. Thus, it

179. *See generally* Jason P. v. Danielle S., 171 Cal. Rptr. 3d 789 (Cal. Ct. App. 2014).

180. *See generally id.*

181. *See* Grigoriadis, *supra* note 171.

182. *Id.*

183. *Id.* (discussing Jason's use of national media attention to garner support for his case as well as the nonprofit he established during the litigation to support his case—Stand Up for Gus). "For the past year, the actor has embarked on a media crusade to convince the world that his ex-girlfriend stole his son." *Id.*

184. *Id.* Stand Up for Gus is a nonprofit organization Jason Patric founded "which helps arrange legal counsel for other parents who don't have custody but want to see their kids." *Id.* Celebrity friends of Jason's have provided funding for Stand Up for Gus, including Mark Wahlberg, Chris Evans, Brad Pitt, and Chris Rock. *Id.*

185. *Id.*

186. *Id.*

is difficult not to wonder what effect Jason's fame may have had on the support he received, the amount of media attention involved (and the way in which the media painted the dispute), or possibly even the outcome of the case.

How would the entire dispute have unfolded if it had been between two unknown California citizens, like the dispute in *Steven S.*? Considering that *Steven S.* and *Jason P.* involved almost identical facts but had drastically different results, it seems quite plausible that Jason's fame had at least some impact on the results, and possibly even a rather significant impact. While one can only speculate about the true impact social factors have on any given decision, it is nonetheless important to take note of such factors and be aware of their possible influence. This is particularly true when patterns begin to surface, such as that described earlier in this Subpart with respect to the avoidance of single motherhood, as well as when the results of two very similar cases like *Jason P.* and *Steven S.* are so vastly different despite application of the same law in each case.

III. Proposal: An Intent-Based Approach

According to Berkeley law professor Marjorie Schultz, an intent-based approach to ART-related parentage disputes encompasses the idea that "intentions that are voluntarily chosen, deliberate, express and bargained-for ought presumptively to determine legal parenthood."[187] This approach—focusing only on parentage disputes for purposes of this Note—directs that post-birth disputes be resolved in the manner that best gives legal effect to the intentions held by the parties *prior to conception.*[188] So long as a court is able to ascertain the parties' preconception intentions with respect to parentage, then those intentions must conclusively determine the outcome of a dispute, unless *both* parties agree otherwise. If an intent-based regime governed the court's decision in *Jason P.*, there is no doubt that Jason would have been denied paternity and Danielle deemed Gus' sole legal parent based on their undisputed preconception intentions.[189] Additionally, in order to ensure that courts are generally able to ascertain the parties' intentions, a well-established intent-based regime should require individuals to enter into written agreements regarding parentage prior to the use of ART.

To further illustrate how an intent-based approach works, consider the following hypothetical: What would happen in a case where there was a clear written agreement entered into prior to conception, but it is later contradicted by a course of conduct that is clearly inconsistent with

187. Shultz, *supra* note 18, at 323.

188. *Id.*

189. Jason P. v. Danielle S., 171 Cal. Rptr. 3d 789, 791–92 (Cal. Ct. App. 2014). For further details on the specific intentions expressed by Danielle and Jason respectively prior to conception, see *supra* Part I.B.I.

that agreement? The answer under this approach is that the written agreement entered into prior to conception would still dictate the outcome, unless both parties *mutually agreed* otherwise in writing. This means that an intent-based regime by no means attempts to preclude any possibility for parties to change their minds after conception. Rather, it seeks only to preclude the possibility of either party *unilaterally* changing their mind to the detriment of the other.

This prohibition on unilaterally changing one's mind after conception is entirely consistent with the understanding of the law held by many Californians prior to *Jason P.* Before *Jason P.* was decided, there were already two possible ways that a donor covered by the nonparentage provision could still establish parentage, but each required both mother and donor to mutually agree otherwise.[190] The regime proposed in this Note would continue to allow parties to mutually agree to no longer uphold their preconception agreements. But it would also prevent the potential damage caused by the ability for an individual to unilaterally change their mind to the detriment of another individual and possibly the child, which California's law currently permits.

Permitting departures from preconception intentions only when such departure is mutually agreed upon provides an additional advantage: An intent-based regime puts individuals on notice that they will not be able to make a unilateral decision to change their mind and demand legal effect be given to their changed intent. This allows individuals to at least decide how they wish to conduct themselves post-birth with full knowledge that no matter what they do they still cannot change their mind without the consent of the other person involved. This would create an aspect of certainty of outcomes that is currently lacking.

The unique nature of conception through ART makes an intent-based approach particularly appropriate. Unlike conception through sexual intercourse, there is necessarily a great deal of time, planning, effort, and money that goes into conception via the use of ART.[191] An individual's decision to use such technology, whether as recipient or donor, inevitably must be made with the intent either to be or not to be a parent of any child subsequently conceived.[192] Because of the inevitable existence of conscious preconception intent by each party, those intentions should have binding legal effect unless *both* affected parties mutually agree otherwise.

This approach is desirable for both donors and recipients. Something as important as the right to parenthood (or lack thereof) should not be decided by vague and uncertain laws that allow for case-by-case

190. Letter from Reproductive Technology & Family Law Scholars, *supra* note 54.
191. Shultz, *supra* note 187, at 324.
192. *See id.*

determinations by individual courts. Such ad hoc decisionmaking provides no certainty or stability for the individuals that it governs. Future disputes could be prevented if the legislature were to adopt this intent-based approach, including requiring all parties to enter written agreements clarifying their intent with respect to parentage before being permitted to undergo ART procedures. It is both realistic and feasible to require such written agreements. The doctor providing the ART services could administer the agreements prior to beginning any procedures, which would in most cases add no additional burdens because the majority of ART procedures require the donor and mother to go to a clinic in order to receive such services anyway.

Various pieces of California family law already in existence today provide support for the adoption of an intent-based regime. California case law[193] as well as various sections of the Family Code governing other aspects of assisted reproduction[194] reflects the principles observed in an intent-based regime. This suggests that the legislature has already determined that the concept advanced by this regime would be advantageous in some situations. Two examples of California courts applying what looks like an intent-based approach are worth noting.

First, *Johnson v. Calvert* was a case involving a dispute about a surrogacy agreement,[195] in which the California Supreme Court established what has come to be commonly known as the intent-test.[196] In *Johnson*, the Calverts hired Ms. Johnson as a surrogate and she was inseminated with Mr. Calvert's sperm.[197] The Calverts and Ms. Johnson entered into a written agreement which made clear that the Calverts would be the legal parents of the child subsequently conceived, and that Ms. Johnson would retain no legal parental rights.[198]

After conception, the relationship between the Calverts and Ms. Johnson deteriorated as it turned out that Ms. Johnson had experienced multiple stillbirths and miscarriages in the past but failed to disclose that information.[199] This led Ms. Johnson to eventually send a letter to the Calverts threatening that she would refuse to give up the baby if they did not pay the remainder of the outstanding balance to her at that time.[200] In

193. *See* Johnson v. Calvert, 851 P.2d 776 (Cal. 1993); Statement of Decision, Findley v. Lee, No. FDI-13-780539, 2016 WL 270083 (Cal. Super. Ct. Jan. 11, 2016).

194. *See* CAL. FAM. CODE §§ 7613(b), 7630(f), 7962 (West 2016).

195. *Johnson*, 851 P.2d at 777–78. For a definition of surrogacy, see *supra* note 65 and accompanying text.

196. *Johnson*, 851 P.2d at 782 (holding that the legal mother of the child at issue was "she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother under California law.").

197. *Id.* at 778.

198. *Id.*

199. *Id.*

200. *Id.*

response, the Calverts filed a lawsuit "seeking a declaration they were the legal parents of the unborn child."[201] Ms. Johnson then also filed her own lawsuit seeking a declaration that she was the legal mother of the unborn child. The two suits were consolidated and both were decided by the *Johnson* court.[202]

When *Johnson* was decided, the validity and enforceability of surrogacy contracts was still debated as some argued such contracts ran afoul of public policy.[203] The California Supreme Court in *Johnson* found no merit in Ms. Johnson's arguments that the contract she had entered into with the Calverts should be deemed unenforceable as against public policy,[204] but the court still did not decide the case solely on the basis of the existence of the contract.[205] Rather, the court focused its analysis more so on the *intentions* of the parties prior to conception (which were necessarily evidenced in the contract) instead of focusing on the existence of a contract as alone being determinative.[206]

The court concluded that the evidence of the events occurring prior to conception made clear the preconception intentions held by all parties: that the Calverts were to be the legal parents of the child and Ms. Johnson's role was only to provide surrogacy services.[207] The court then went on to state that "[n]o reason appears why [Ms. Johnson's] later change of heart should vitiate the determination that [Ms. Calvert] is the child's [legal] mother."[208] Therefore, the court held that the Calverts were the legal parents of the child and Ms. Johnson retained no parental rights.[209]

A more recent case, *Findley v. Lee*, involved a divorced couple disputing the fate of frozen embryos they had created while married.[210] The ex-husband, Findley, wanted the embryos destroyed pursuant to a contract the couple signed prior to freezing the embryos, which directed they be destroyed upon divorce.[211] The ex-wife, Lee, however, had been previously diagnosed with cancer and had become infertile, making the embryos her only chance at ever conceiving a child biologically related to her.[212] Therefore, despite the contract, she argued that she should be

201. *Id.*
202. *Id.*
203. *Id.* at 784.
204. *Id.* at 785.
205. *Id.* at 782.
206. *Id.* ("[W]e do not believe this case can be decided without enquiring into the parties' intentions as manifested in the surrogacy agreement.").
207. *Id.*
208. *Id.*
209. *Id.* at 778.
210. Statement of Decision, Findley v. Lee, No. FDI-13-780539, 2016 WL 270083, at *1 (Cal. Super. Ct. Jan. 11, 2016).
211. *Id.* at *2–3.
212. *Id.*

permitted to use the embryos herself due to her infertility.[213] *Findley* was argued recently, so the decision was not yet entirely final at the time of the writing of this Note.[214] However, the tentative decision upheld the contract the couple had voluntarily entered into prior to freezing the embryos, therefore ordering the destruction of the embryos as directed in the contract.[215]

This case is a bit different from the others discussed in this Note because there was a valid, enforceable agreement for the court to look to.[216] However, the court's decision to uphold the agreement despite the devastating infertility of Lee demonstrated that the *Findley* court recognized the importance of providing certainty to individuals by honoring the agreements they voluntarily make. Additionally, this case provides a great example of some of the advantages of an intent-based approach. *Findley* was a particularly emotional case due to the consequences Lee faced, as she would never be able to reproduce without the embryos.[217] Such a sensitive and potentially life-changing decision is precisely the type that is most likely to trigger the personal beliefs of those observing or deciding the case. But, because the written agreement existed here and its validity was not disputed by either party, the court was better equipped to make the difficult decision in the most objective and fair way possible, despite the emotional nature of that decision.

Turning now to the Family Code, several existing provisions in particular reflect an intent-based approach to ART disputes. First, the in-writing exception previously discussed added an exception to the nonparentage provision which could only be invoked "*prior to the conception of the child*," thus requiring decisions to be made based on preconception intentions.[218] Next, section 7630(f) of the Code allows individuals to file suit and obtain a court judgment ordering that legal effect be given to the expressed intent of parties to an ART contract that was entered into prior to conception.[219] Both of these provisions reflect a policy choice by the legislature to uphold preconception expectations of individuals in the context of ART.

Lastly, Code section 7962 allows for the intended parents of a child conceived through surrogacy to obtain a court order giving legal effect to their preconception intent to be the legal parents of the child if those intentions were expressed in a written agreement *prior to* conception.[220]

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213. *Id.*
214. *Id.*
215. *Id.* at *44.
216. *Id.*
217. *Id.* at *37.
218. CAL. FAM. CODE § 7613(b) (2011) (emphasis added).
219. *Id.* § 7630(f).
220. *Id.* § 7962.

Section 7962 also strongly encourages parties to use statutory forms similar to those added to the nonparentage provision in 2015. But, unlike those forms, the statutory forms provided in section 7962 *do* carry legal weight by enabling the court to enforce the agreement before the child is even born.[221] Thus, the question arises: Why should the forms in Code section 7962 provide real legal protection to individuals who conceive through one type of ART while the forms in section 7613 do not provide even remotely the same protection for individuals that use a different method of ART? California law currently provides no answer.

In addition to the general proposal for an intent-based regime governing ART disputes, this Note further proposes California remedy the puzzling discrepancies among the protections for various types of ART. Specifically, the California legislature should amend the Family Code to extend the protections provided in section 7962 to all individuals utilizing any of the various types of ART procedures, unless there is some objective, compelling reason to treat a certain procedure differently. Extending section 7962's protections to all forms of ART would be an ideal way to start implementing an intent-based regime, as the current text of 7962 already applies an intent-focused approach very similar to what this Note advocates for.

In particular, section 7962 provides certainty and predictability that is currently missing from the nonparentage provision. It allows for courts to enforce section 7962 surrogacy agreements *prior* to the birth of the child in question. It also provides certainty by unequivocally stating that the existence of a notarized agreement signed by all parties "shall rebut any presumptions contained within . . . Section 7611 . . . as to the gestational carrier surrogate . . . being a parent of the child."[222] This particular language provides precisely the protection and stability that an intent-based approach seeks to provide: protection and stability that should also be afforded sperm donors, recipients, and all other individuals utilizing any of the various forms of ART.

221. *Id.*
222. *Id.* § 7962(f)(1).

CONCLUSION

Every day individuals enter into countless types of contracts in order "to protect the justified expectations that arise from promises underlying bargains."[223] Courts no longer hold that contracts governing human reproduction are repugnant and invalid.[224] Therefore, there is no logical reason that such contracts should not be a requirement for parties attempting to conceive through the use of ART. Further, there is no reason that parties should not be legally bound by the ART-related agreements they choose to enter in the same way that they would be bound by any other contractual agreement they voluntarily entered into. The law should protect the intentions of individuals with respect to parenthood the same way that it protects intentions and expectations in all types of contractual agreements concerning much less significant rights and obligations. In sum, written ART agreements should be thorough, mandatory, and binding. And, all disputes involving children conceived through the use of ART should be resolved in favor of effectuating the intentions of the parties expressed in those agreements entered into *prior to conception*, unless both parties *mutually agree* otherwise.

223. Paul L. Regan, *Great Expectations? A Contract Law Analysis for Preclusive Corporate Lock-Ups*, 21 CARDOZO L. REV. 1, 33 (1999). "The main purpose of contract law is the realization of reasonable expectations induced by promises." *Id.* at 33 n.121 (quoting ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1). "Contract law aids parties 'in planning their future by protecting their expectations.'" *Id.* (quoting E. ALLAN FARNSWORTH, CONTRACTS § 1.3 (3d ed. 1999)).

224. *See* Johnson v. Calvert, 851 P.2d 776, 778 (Cal. 1993) (refusing to find a surrogacy contract invalid because such contracts *do not* offend California public policy).

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