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## **DIY Artificial Insemination: The Not-So-Great Gatsby**

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# **DIY Artificial Insemination: The Not-So-Great Gatsby**

**Jeffrey A. Parness<sup>1</sup>**

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## I. Introduction

Increasingly, intended parentage by female couples, married and unmarried, and by single women, is pursued via do-it-yourself (DIY) artificial insemination (AI) that utilizes sperm donors (who may be unknown). The clear intentions of would-be parents, and the best interests of later-born children, are often thwarted by incomplete statutes which only address parentage from AI births utilizing medical personnel. Statutory gaps remain unfilled by the courts through common law precedents, often because the statutes are deemed “controlling.” Constitutional procreational interests and equality mandates often are not considered when parentage in DIY AI births is disputed. Disputes could be, but often are not, guided by general parentage norms, like presumed spousal parent, residency/hold out parent, and/or de facto parent laws.

A recent ruling illustrates the difficulties arising from incomplete AI statutes. In *Gatsby v. Gatsby* in 2021, the Idaho Supreme Court determined legal parentage for a child born via AI to a married female couple who later divorced.<sup>2</sup> In a 4-1 ruling, the court found that the Idaho Artificial Insemination Act (AIA) was the controlling law and that the couple's AI agreement did not comply with the AIA.<sup>3</sup> The majority did not decide if the nonbirth spouse could have completed a "voluntary acknowledgement of paternity" to become a parent or had standing to seek a childcare order as a nonparent.<sup>4</sup> It did rule out the common law presumption of spousal

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<sup>2</sup> *Gatsby v. Gatsby*, 495 P.3d 996, 1000 (Idaho 2021) [hereinafter *Gatsby*].

<sup>3</sup> *Gatsby*, 495 P.3d at 1001-1004.

<sup>4</sup> *Gatsby*, 495 P.3d at 1007 and 1010.

parentage.<sup>5</sup> On the facts, the nonbirth spouse was found to have no custodial rights as it “would not be in the child’s best interest.”<sup>6</sup>

The couple in *Gatsby* did not consult with an attorney and did not use a physician.<sup>7</sup> The nonbirth spouse was foreclosed from parenthood because the agreement, “found online,” suffered from “severe inadequacies.”<sup>8</sup> Specifically, the court found the women “did not use a licensed physician . . . nor did they file the required consent”<sup>9</sup> as required by the AIA. In opining that the majority “exalts form over substance” and “turns a blind eye to Idaho’s policy favoring legitimacy,” the dissenter concluded that the “unintended consequences” of the decision “are hard to quantify, but . . . they will be myriad.”<sup>10</sup>

The *Gatsby* ruling is troublesome on several fronts. Its problems highlight the difficulties facing intended childcare parents employing AI in the United States,<sup>11</sup> especially for those without significant financial resources<sup>12</sup> and women, coupled or single. This paper explores the

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<sup>5</sup> *Gatsby*, 495 P.3d at 1000.

<sup>6</sup> *Gatsby*, 495 P.3d at 1009.

<sup>7</sup> *Gatsby*, 495 P.3d at 999.

<sup>8</sup> *Gatsby*, 495 P.3d at 999 and 1003.

<sup>9</sup> *Gatsby*, 495 P.3d at 1016.

<sup>10</sup> *Gatsby*, 495 P.3d at 999.

<sup>11</sup> Childcare parents here are those with interests in child custody, child visitation, or parental allocation responsibilities. Parentage may operate similarly or differently in other contexts, like child support, tort, and probate. See, e.g., 2019 Uniform Probate Code, at 1-201(32) (parent is “an individual who has established a parent-child relationship” under the Uniform Parentage Act). Compare *In re Scarlett Z.D.*, 28 N.E.3d 776, 792 (Ill. 2015) (“the doctrine of equitable adoption . . . is a probate concept to determine inheritance and does not apply to proceedings for parentage, custody and visitation”).

<sup>12</sup> On the costs of gestational surrogacy (and the growing industry), an alternative to intended parentage for those seeking childcare parentage via AI without themselves bearing children, see,

problems arising with the parentage laws on DIY AI births.<sup>13</sup> Exploration follows a review of the Gatsby ruling and of current laws that do or could cover AI births.

## II. The Not-So-Great Gatsby Ruling

In Gatsby, two women, Linsay and Kylee, were married in June 2015.<sup>14</sup> Deciding to have a child through the artificial insemination of Kylee "using semen donated by a mutual friend," the women proceeded "without using the services of a physician" and "without consulting an attorney."<sup>15</sup> With the friend the couple did sign "an artificial insemination agreement Linsay found online, listing the friend as 'donor' and both Linsay and Kylee as the 'recipient'.<sup>16</sup> The pact said the donor "would not have parental rights or obligations to the child."<sup>17</sup>

Linsay performed the insemination of Kylee in the couple's home.<sup>18</sup> Kylee gave birth on October 29, 2016.<sup>19</sup> The birth certificate listed both Linsay and Kylee as "mother."<sup>20</sup> The child

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e.g., Ayesha Rasheed, "Confronting Problematic Legal Fictions in Gestational Surrogacy," 24 J. Health Care Law and Policy 179, 183-186 (2021) (average costs run between \$60,000 and \$150,000).

<sup>13</sup> The paper does not review assisted reproduction laws beyond AI, as with introduction of a fertilized egg into a woman.

<sup>14</sup> Gatsby, 495 P.3d at 999.

<sup>15</sup> Gatsby, 495 P.3d at 999.

<sup>16</sup> Gatsby, 495 P.3d at 999.

<sup>17</sup> Gatsby, 495 P.3d at 999.

<sup>18</sup> Gatsby, 495 P.3d at 999.

<sup>19</sup> Gatsby, 495 P.3d at 999.

<sup>20</sup> Gatsby, 495 P.3d at 999.

lived with the women "who held themselves out as the child's parents" until the Summer of 2017 when the women physically fought, leading to a domestic battery conviction for Kylee and a July 2017 no contact order "which prohibited Kylee from seeing her child except at daycare."<sup>21</sup>

Linsay filed for divorce in August 2017. Thereupon, Kylee asserted Linsay had no legal claim to child custody or visitation.<sup>22</sup>

Linsay had sole custody of the child from July 3 to December 27, 2017, at which time a court order of "equal custody" was entered.<sup>23</sup> Custody was shared until November 2018 when a magistrate court granted Kylee "sole custody," finding that "Linsay was not the child's legal parent," that Linsay "had established no third-party rights," and it was not in the child's best interests for Linsay to have any custody or visitation.<sup>24</sup>

While Linsay was deemed a presumptive spousal parent due to her marriage to Kylee at the time of birth, the magistrate found the presumption "overcome by clear and convincing evidence," seemingly only involving the established fact that Linsay "is not [the child's] biological parent."<sup>25</sup> The magistrate found Linsay could have attained legal parenthood via "a voluntary acknowledgement of paternity affidavit" (VAP), but did not do so.<sup>26</sup> The magistrate

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<sup>21</sup> Gatsby, 495 P.3d at 999-1000.

<sup>22</sup> Gatsby, 495 P.3d at 1000.

<sup>23</sup> Gatsby, 495 P.3d at 1000.

<sup>24</sup> Gatsby, 495 P.3d at 1000.

<sup>25</sup> Gatsby, 495 P.3d at 1000.

<sup>26</sup> Gatsby, 495 P.3d at 1000 (Idaho Code 7-1106 (1), within Paternity Act). VAPs that are later discussed herein encompass all forms of voluntary parentage acknowledgements, however denominated and whoever may be explicitly recognized as VAP signatories, including those without alleged or actual biological ties, as with Linsay. See, e.g., 15C Vermont Stat. 301

also found Linsay did not adopt the child and "did not comply with the Artificial Insemination Act (AIA)."<sup>27</sup> Upon affirmance by a district court, an appeal went to the Idaho Supreme Court.

The high court did not address the lower court conclusion that Linsay could have completed a VAP.<sup>28</sup> Yet it strongly hinted that such a VAP was unavailable to Linsay for the AIA was "controlling" due to the use of assisted reproduction.<sup>29</sup> Further, the Idaho "common law marital presumption of paternity" was deemed inapplicable as the AIA controlled; this was not because the presumption only applied to men.<sup>30</sup> The court also did not address the issue of "third-party standing" regarding nonparental childcare for Linsay.<sup>31</sup> The court agreed with the lower courts that Linsay could have avoided the case outcome by adopting the child.<sup>32</sup> The court affirmed the lower court conclusions that it was in "the child's best interest for Kylee to be

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(signing of an "acknowledgement of parentage" by the person who gave birth and "an intended parent").

<sup>27</sup> Gatsby, 495 P.3d at 1000.

<sup>28</sup> Gatsby, 495 P.3d at 1007.

<sup>29</sup> Gatsby, 495 P.3d at 1002 (AIA "is controlling" as it is a "more specific statute" than the Paternity Act, Idaho Code 7-1101 et seq., which contains the VAP norms, at 7-1106) and 1007.

<sup>30</sup> Gatsby, 495 P.3d at 1002. Such a presumption has been found, per *Obergefell v. Hodges*, 576 U.S. 644 (2015) (same-sex marriages protected) [hereinafter *Obergefell*], to be unconstitutional. *McLaughlin v. Jones*, 401 P.3d 492, 498 (Ariz. 2017).

<sup>31</sup> Gatsby, 495 P.3d at 1010 ("any error in the . . . third party standing analysis was cured because the magistrate court nevertheless addressed whether giving Linsay custody rights would be in the child's best interest"). Third party standing had been sought under *Stockwell v. Stockwell*, 775 P.2d 611, 613 (Idaho 1989) (common law guidelines on a nonparent (there a stepparent) overcoming a natural parent's custodial rights) [hereinafter *Stockwell*]. Gatsby, 495 P.3d at 1010. On third party statutory standing of a nonparent to seek child visitation, see, e.g., Idaho Code 32-1703 ("de facto custodian" who must be "related to a child within the third degree of consanguinity"); Idaho Code 32-717(3) (grandparents); Idaho Code 32-719 (grandparents and great grandparents); and Idaho Code 15-5-204 (guardianship proceeding).

<sup>32</sup> Gatsby, 495 P.3d at 1007.

awarded sole custody."<sup>33</sup> Though unnecessary to its ruling, the court also affirmed the "holding that Linsay could not obtain parental rights . . . under the AIA because she did not comply with all the requirements of the law."<sup>34</sup>

### **III. Parentage Laws Governing Assisted Reproduction Births**

#### **A. Introduction**

With AI births, there can be laws covering expecting legal parents of later born children. Such laws often distinguish between nonsurrogacy and surrogacy settings. There can also be laws covering existing legal parents following AI births. Again, laws often distinguish between nonsurrogacy and surrogacy settings. In surrogacy settings for both expecting and existing legal parents, laws also sometimes distinguish between gestational and genetic surrogacy births.<sup>35</sup>

Where there are explicit statutory AI birth laws, other avenues to parentage generally can be closed (i.e., upon a finding, as in *Gatsby*, that the laws are exclusive). But even where there are explicit statutes and where AI is known to have prompted births, sometimes other laws can address AI parentage. Here, nonAI laws can be employed by varying state actors (like judges or administrative agencies such as a vital records office) to establish parentage of an AI child.

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<sup>33</sup> *Gatsby*, 495 P.3d at 1007.

<sup>34</sup> *Gatsby*, 495 P.3d at 1004. The AIA bar to Linsay, the natural mother's spouse, was foreshadowed in *Doe v. Doe*, 395 P.3d 1287, 1291 (Idaho 2017) (AIA bar applied to natural mother's former female partner) [hereinafter *Doe*].

<sup>35</sup> Sometimes state laws recognize both gestational and genetic surrogacy, but generally apply comparable norms to each. See, e.g., Washington Code 26.26A.700,705,710,715, and 725. Sometimes state laws only recognize gestational surrogacy. See, e.g., 19-A Maine Rev. Stat. 1933 ("gestational carrier agreement") and 750 Illinois Comp. Stat. 47/25 ("gestational surrogacy contract"). Sometimes neither form of surrogacy assisted reproduction is recognized. See, e.g., Michigan Comp. Laws 722.855 ("a surrogate contract is void and unenforceable as contrary to public policy").



The following sections first review the common forms of express AI parentage laws. The final section reviews how parentage laws not explicitly addressing AI births can be used in determining AI parentage.<sup>36</sup>

### **B. Laws on Expecting Nonsurrogacy AI Parentage**

Children to be born of nonsurrogacy assisted reproduction often have two expecting parents, sometimes recognized preconception and sometimes recognized only during a pregnancy. Certain conduct after live births can bar parentage for some who were expecting legal parents.

In nonsurrogacy settings, the 1973 Uniform Parentage Act (UPA) only recognizes an assisted reproduction birth undertaken by a married, opposite sex couple who employed "a licensed physician" and "semen donated by a man" other than the husband.<sup>37</sup> The donor here is always "treated in law as if he were not the natural father."<sup>38</sup> The husband is only "treated in law as if he were the natural father" if insemination occurred "under the supervision of a licensed physician and with the consent" of the husband.<sup>39</sup> The pregnant wife and her consenting

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<sup>36</sup> Where relevant, substantive constitutional (usually "liberty" interest) procreational rights involving AI births will be noted. Such rights, however, are scarce, at best, even in states with explicit state constitutional privacy interests. See, e.g., California Const. Art. 1, § 1 ("privacy") and Washington Const. Art. 1, § 7 ("private affairs"). Constitutional equality interests do arise frequently when courts apply state parentage laws, in and outside of AI settings, as will be illustrated by the Gatsby ruling review.

<sup>37</sup> 1973 UPA, at §5(a).

<sup>38</sup> 1973 UPA, at §5(b).

<sup>39</sup> 1973 UPA, at §5(a).

husband are expecting legal parents. The 1973 UPA generally is followed in some states,<sup>40</sup> though some of its provisions are subject to significant constitutional challenges.<sup>41</sup>

The 2000 UPA expands parentage opportunities for nonspousal donors who provide sperm,<sup>42</sup> as well as for nondonor men who consent to nonsurrogacy assisted reproduction "with the intent to be the parent."<sup>43</sup> Such donors and consenting nondonor men are expecting legal parents whose parentage arises when children are born.<sup>44</sup> The "husband" of a "wife" who gives birth via assisted reproduction has limited opportunities to "challenge his paternity"<sup>45</sup> in settings where there is no resulting parentage at birth for a nonspousal sperm donor or for a nondonor man who consented to assisted reproduction with "the intent to be the parent."<sup>46</sup> The 2000 UPA is generally followed in some states.<sup>47</sup> Again, some of its proposed laws are subject to significant challenges.<sup>48</sup>

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<sup>40</sup> See, e.g., Colorado Rev. Stat. 19-4-106 (1); Montana Code 40-6-106; Minnesota Stat. 257.56; and Idaho Code 39-5403(1).

<sup>41</sup> See, e.g., *Gatsby*, 495 P.3d at 1002 (under *Obergefell v. Hodges*, 576 U.S. 644 (2015), the Idaho AIA, within Idaho Code 39-5403 (1), "must be read in a gender-neutral manner" as to married couples).

<sup>42</sup> 2000 UPA, at §703

<sup>43</sup> 2000 UPA, at §§703-704 (consent "must be in a record" that is signed).

<sup>44</sup> 2000 UPA, at §703 ("a parent of the resulting child").

<sup>45</sup> 2000 UPA, at §705. One opportunity involves a lack of consent, "before or after birth of the child," shown in a proceeding brought "within two years after learning of the birth." 2000 UPA, at §705(a). Another opportunity involves a challenge at any time where there was either no sperm donation or no consent; no cohabitation "since the probable time of assisted reproduction;" and no open hold out of the child as one's own. 2000 UPA, at §705(b).

<sup>46</sup> 2000 UPA, at §703.

<sup>47</sup> See, e.g., 13 Delaware Code 8-703 (a) and Wyoming Stat 14-2-903.

<sup>48</sup> See, e.g., Douglas NeJaime, "The Nature of Parenthood", 126 *Yale Law J.* 2260 (2017).

The 2017 UPA further expands parentage opportunities in nonsurrogacy assisted reproduction settings. That act is "substantially similar" to the 2000 UPA, though it is updated so as to apply "equally to same-sex couples."<sup>49</sup> Thus, an "individual" who consents to assisted reproduction by a woman with the intent to be a parent of a child conceived by the assisted reproduction is a parent of the child.<sup>50</sup> The consenting individual is an expecting legal parent during the pregnancy. Where there is a nonsurrogacy assisted reproduction birth having no such person who consented with the intent to be a parent, the spouse of the person giving birth has limited opportunities to challenge the spouse's parentage.<sup>51</sup> The 2017 UPA is generally followed in some states.<sup>52</sup>

### **C. Laws on Expecting Surrogacy AI Parentage**

The 1973 UPA "does not deal with many complex and serious legal problems raised by the practice of artificial insemination" outside of the practice employed by a consenting "husband" and "wife" who act "under the supervision of a licensed physician."<sup>53</sup> Thus, surrogacy pacts that led to births would have legal parenthood guided by general parentage norms. In 1973, assisted reproduction techniques had not been significantly developed, or been made widely available where developed, so that surrogacy pacts would likely involve consensual sex.

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<sup>49</sup> Comment preceding Article 7 of the 2017 UPA.

<sup>50</sup> 2017 UPA, at §703.

<sup>51</sup> 2017 UPA, at §705(a) (spouse "at the time of the child's birth").

<sup>52</sup> See, e.g., 15 Vermont Stat. 704 (a)(1) ("person who intends to be a parent of a child born of assisted reproduction"); California Family Code 7613 (a)(1) ("consent of another intended parent"); and Maine Stat. 1924 ("consent by a person who intends to be a parent of a child born through assisted reproduction").

<sup>53</sup> 1970 UPA, at Comment to §5 and at §5(a).

The 2000 UPA recognizes a "prospective gestational mother" may agree with "intended parents," who are a "man" and a "woman," that "the intended parents become parents of the child."<sup>54</sup> An agreement must be validated by a court in a proceeding commenced by "the intended parents and the prospective gestational mother."<sup>55</sup> Such an agreement must contemplate pregnancy "by means of assisted reproduction."<sup>56</sup> While there is yet no pregnancy, a validated agreement may be terminated by the prospective gestational mother, her husband, or either of the intended parents.<sup>57</sup> After pregnancy, a "court for good cause shown may terminate the gestational agreement."<sup>58</sup> During pregnancy the, the married, opposite sex couple are expecting legal parents. Upon the birth of a child pursuant to a validated gestational agreement, a court will issue an order "confirming that the intended parents are the parents of the child."<sup>59</sup>

A gestational agreement "that is not judicially validated is not enforceable."<sup>60</sup> An unvalidated gestational agreement involving AI prompts expecting legal parentage, inter alia, in the prospective birth mother and at least one intended parent (man or woman), who looks to a later judicial determination of a child-parent relationship arising from a voluntary parentage

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<sup>54</sup> 2000 UPA, at §801(a) (signatories also include the "husband" of the prospective gestational mother and "a donor or the donors").

<sup>55</sup> 2000 UPA, at §802(a) and 809. The proceeding contemplated should occur before insemination. See, e.g., 2000 UPA, at §806(a) ("after issuance of order," but before pregnancy by means of assisted reproduction, gestational agreement may be terminated).

<sup>56</sup> 2000 UPA, at §801(a)(1).

<sup>57</sup> 2000 UPA, at §806(a).

<sup>58</sup> 2000 UPA, at §806(b) (cause is left undefined, per Comment to §806).

<sup>59</sup> 2000 UPA, at §807(a) (notice filed with court by the intended parents) and §807(c) (notice filed with court by the gestational mother or the appropriate state agency).

<sup>60</sup> 2000 UPA, at §809(a).

acknowledgment,<sup>61</sup> or an anticipated residency with the mother and child in the child's first two years while holding out the child as one's own.<sup>62</sup> Should a prospective gestational mother deliver a child not conceived through assisted reproduction, "genetic testing" is used to "determine the parentage of the child."<sup>63</sup> The 2000 UPA is generally followed in some states.<sup>64</sup>

While the 2000 UPA treats comparably gestational agreements where the "prospective gestational mother" utilized one or two donors,<sup>65</sup> the 2017 UPA distinguishes the requirements for gestational (i.e., two donors)<sup>66</sup> and genetic (i.e., one donor)<sup>67</sup> surrogacy agreements. Though some requirements on enforceable pacts are comparable,<sup>68</sup> others differ, with genetic surrogacy

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<sup>61</sup> 2000 UPA, at §809(b) (nonvalidated gestational agreement has parent-child relationship determined under Article 2); §201(b)(2) ("an effective acknowledgment of paternity" under Article 3); and §106 (provisions of UPA on paternity apply to maternity). Here, acknowledgments may be limited under state laws that require actual or alleged genetic ties in the acknowledger. Compare 2000 UPA, at 302(a)(4) (no requirement of genetic testing).

<sup>62</sup> 2000 UPA, at §809(b) (nonvalidated gestational agreement has parent-child relationship determined under Article 2); §204(a)(5) (man is presumed parent of a child if "he resided in the same household with the child and openly held out the child as his own"); and §106 (provisions of UPA on paternity apply to maternity).

<sup>63</sup> 2000 UPA, at §807(b).

<sup>64</sup> See, e.g., 10 Oklahoma Stat. 557.8 (unvalidated gestational agreement is unenforceable except regarding payment/reimbursement for "any medical, legal or travel expenses"); Utah Code 78B-15-809 (unvalidated gestational agreement is not enforceable except as to support liability for intended parents); and Texas Family Code 160.756 (a) ("A gestational agreement must be validated").

<sup>65</sup> 2000 UPA, at §801(a) (written agreement including "a donor or the donors").

<sup>66</sup> 2017 UPA, at §801(2) (woman using "gametes that are not her own").

<sup>67</sup> 2017 UPA, at §801(1) (woman using "her own gamete").

<sup>68</sup> See, e.g., 2017 UPA, at §§802(a)(1-5) (21 years old, previously gave birth, and independent legal representation) and 803 (process for executing an agreement).

pacts having more stringent requirements.<sup>69</sup> The 2017 UPA distinctions are now followed in a few states.<sup>70</sup>

The 2017 UPA does not require, as does the 2000 UPA,<sup>71</sup> that all surrogacy agreements be validated by a court in a proceeding containing all the relevant parties.<sup>72</sup> Rather, a surrogacy agreement, gestational or genetic, "must be in a record signed by each party."<sup>73</sup> But, a genetic surrogacy agreement is usually only enforceable when validated by a court "before assisted reproduction."<sup>74</sup> With such validations there are recognized expecting legal parents.

The 2017 UPA is somewhat progressive. For example, it authorizes genetic and gestational surrogacy agreements involving "one or more intended parents,"<sup>75</sup> as compared to 2000 UPA agreements that encompass "intended parents," who are a man and a woman.<sup>76</sup>

Significant, as well, is the effective characterization in the 2017 UPA of an intended parent or intended parents in a genetic surrogacy setting as expecting legal parents for 3 days

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<sup>69</sup> Compare, e.g., 2017 UPA, at § 814(a)(2) (genetic surrogate may withdraw consent any time before 72 hours after the birth) to 2017 UPA, at §808(a) (termination of agreement "any time before an embryo transfer").

<sup>70</sup> Washington Code 26.26A. 700 *et seq.* and Connecticut Stat. 7-36(16) (gestational and genetic surrogates; eff. Jan 1, 2022).

<sup>71</sup> 2000 UPA, at § 802(a).

<sup>72</sup> The relevant parties include each intended parent, the surrogate and the surrogate's spouse, if there is one. 2017 UPA, at § 803(3).

<sup>73</sup> 2017 UPA, at § 803(3).

<sup>74</sup> 2017 UPA, at §§ 816(a) and 813(a). Exceptions include when all parties agree to validation after assisted reproduction has occurred. 2017 UPA, at § 816(a). See also 2017 UPA, at §§ 816(d) and 818.

<sup>75</sup> 2017 UPA, at §801(3).

<sup>76</sup> 2000 UPA, at §801(a).

following the surrogate giving birth, since the surrogate has 72 hours to withdraw consent to the surrogacy agreement.<sup>77</sup> Upon the genetic surrogate's withdrawal of consent within the 3 day period, the surrogate establishes a "parent-child relationship" since the surrogate is "the individual" who gave birth to the child.<sup>78</sup>

Nevertheless, at least some intended parents may also be able to establish a "parent-child relationship" even upon such withdrawals. Thus, an intended parent who is a sperm provider can be an expecting legal parent who becomes a legal parent upon birth if the provider, with the genetic surrogate, sign a parentage acknowledgment before birth and the VAP remains unrescinded and unchallenged.<sup>79</sup>

The 2017 UPA treats differently than the 2000 UPA agreements on intended parentage that fail to comply with the general, gestational, and/or genetic surrogacy pact requirements. Thus, for a "child conceived by assisted reproduction under a gestational surrogacy agreement" failing to meet the UPA requirements, a court must "determine the rights and duties of the parties to the agreement consistent with the intent of the parties to the agreement at the time of execution of the agreement."<sup>80</sup> By comparison, the breach of "a genetic surrogacy agreement"

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<sup>77</sup> 2017 UPA, at §814(a)(2).

<sup>78</sup> 2017 UPA, at §§ 815(c) (upon withdrawal, "parentage of the child" is determined under Articles 1-6) and 201(1) (parent-child relationship for individual who gives birth).

<sup>79</sup> 2017 UPA, at §§ 815(c) (upon withdrawal, "parentage of the child" is determined upon Articles 1-6), 201(5) (parent-child relationship for individual who acknowledges parentage), 301 (woman giving birth and "alleged genetic father may sign acknowledgment), 304(b) and (c) (acknowledgment signed before birth becomes effective at birth), and 308-309 (procedures for rescission and challenge).

<sup>80</sup> 2017 UPA, at §812(b).

that is not validated can prompt certain “remedies available at law or in equity.”<sup>81</sup> Thus, intended parents beyond birth mothers via DIY surrogacy pacts that do not conform to the UPA requirements can still be deemed expecting parents who might achieve legal parenthood after birth.

#### **D. Laws on Existing Nonsurrogacy AI Parentage**

The 1973 UPA does not deal with the "many complex and serious problems raised by the practice of artificial insemination."<sup>82</sup> It does, however, address "one fact situation that occurs frequently,"<sup>83</sup> a "consent" by a husband to the artificial insemination of his wife with "semen donated by a man not her husband." Here, the husband is to be "treated in law as if he were the natural father" at birth where the consent was in writing and "signed by him and his wife," with certification undertaken and then filed by the supervising "licensed physician" with state governmental officials.<sup>84</sup> The husband is a nonpresumptive spousal parent. The semen donor who is not the husband is to "be treated in law as if he were not the natural father."<sup>85</sup>

In response to the increasing numbers of children born of assisted reproduction, both the 2000 and the 2017 UPA contain distinct articles on nonsurrogacy and surrogacy births. In nonsurrogacy settings, the 2017 UPA “is substantially similar” to the 2000 UPA, with the

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<sup>81</sup> 2017 UPA, at §§816(a) and 818(a). Available remedies do not include court orders “that the surrogate be impregnated, terminate or not terminate a pregnancy, or submit to medical procedures.” 2017 UPA, at §818(b).

<sup>82</sup> 1973 UPA, at §5 at Comment.

<sup>83</sup> 1973 UPA, at §5 at Comment.

<sup>84</sup> 1973 UPA, at §5(a) (all papers and records pertaining to the insemination are to be kept confidential, though subject to inspection pursuant to a court order "for good cause shown").

<sup>85</sup> 1973 UPA, at §5(b).



“primary changes... intended to update the article so that it applies equally to same-sex couples.”

<sup>86</sup> The 2017 UPA recognizes that a sperm donor is not always a parent of a child conceived by assisted reproduction. <sup>87</sup> For there to be two legal parents, a consent to parentage must be signed by the person giving birth and "an individual who intends to be a parent," though the "record" need not be certified by a physician.<sup>88</sup> Seemingly, "consent in a record" can be undertaken "before, on, or after birth of the child."<sup>89</sup> The lack of this form of consent does not foreclose childcare parentage for an intended parent where there is clear-and-convincing evidence of an "express agreement" between the individual and the person giving birth "entered before conception."<sup>90</sup> As well, the lack of such consent or agreement does not foreclose an individual's parentage where the child was held out as the individual's own in the child's first two years.<sup>91</sup> The nonparental status of one married to a person giving birth to a child born by assisted reproduction, even if a gamete donor, may be established by a showing of a lack of consent, of

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<sup>86</sup> 2017 UPA, at Comment preceding §701.

<sup>87</sup>2017 UPA, at §§702-704.

<sup>88</sup> 2017 UPA, at §704(a).

<sup>89</sup> 2017 UPA, at §704(b).

<sup>90</sup> 2017 UPA, at §704(b)(1). It is clear why an “express agreement” undertaken postconception does not prompt comparable childcare parentage. Here, there is much greater certainty that a child will be born so that an agreement is far less speculative. Perhaps instead of a postconception agreement, the 2017 UPA contemplated a prebirth VAP, as it recognizes an "intended parent" can sign a VAP. Yet, an "intended parent" under the 2017 UPA in many states has no prebirth VAP access as the states follow the 1973 UPA or 2000 UPA which only authorize postbirth (paternity) VAPs. 1973 UPA, at §4(b) ("paternity" acknowledgment "of the child" in a "writing filed with" the state, which is not disputed by "the mother") and 2000 UPA, at §301 ("man claiming to be the genetic father of the child" signs together with the "mother of a child").

<sup>91</sup> 2017 UPA, at §704(b)(2).

any agreement, and of holding out of the child as one's own.<sup>92</sup>

The nonsurrogacy parentage norms in the UPAs are now reflected in some U.S. state statutes<sup>93</sup> and in precedents untethered to statutes,<sup>94</sup> with significant interstate variations.<sup>95</sup> The 2017 UPA provisions have been enacted in a few states.<sup>96</sup>

Childcare parentage for those giving birth and intended parents in nonsurrogacy settings

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<sup>92</sup> 2017 UPA, at §705.

<sup>93</sup> American state statutes include Texas Family Code 160.7031 (fatherhood for unwed man, intending to be father, who provides sperm to licensed physician and consents to the use of that sperm for assisted reproduction by an unwed woman, where consent is in a record signed by man and woman and kept by the physician); N.H. Rev. Stat. 5-C:30(I)(b)(unwed mother has sperm donor “identified on birth record” where “an affidavit of paternity” has been executed); 13 Delaware Code 8-704(a)(“Consent by a woman and a man who intends to be a parent of a child born to the woman by assisted reproduction must be in a record signed by the woman and the man.”); Wyoming Stat. 14-2-904(a)(like Delaware); and New Mexico Stat. 40-11A-703(“A person who provides eggs, sperm, or embryos for or consents to assisted reproduction as provided in Section 704 [“record signed . . . before the placement”] . . . with the intent to be the parent of a child is a parent of the resulting child”).

<sup>94</sup> Precedents include *Shineovich v. Shineovich*, 214 P.3d 29 (Or. App. 2009) (to avoid constitutional infirmity, assisted reproduction statute as written solely for married opposite sex couple applied to same sex domestic partners); *Jason P. v. Danielle S.*, 171 Cal. Rptr. 3d 789 (Cal. App. 2d 2014)(though the statute (both pre 2011 and post 2011) indicated explicitly a lack of paternity for this particular semen donor when his unwed partner delivered a child conceived via assisted reproduction, the statute on presumed parentage for one (either male or female) who receives a child into the home and openly holds out the child as one's own natural child can support – in certain circumstances – legal paternity for the semen donor); *Ramey v. Sutton*, 362 P.3d 217 (Okla. 2015) (unwritten preconception agreement prompts in loco parentis childcare status for former lesbian partner of birth mother, though she contributed no genetic material); and *In re Brooke S.B. v. Elizabeth A.C.C.*, 61 N.E. 3d 488 (N.Y. 2016) (agreement between lesbian partners can prompt parentage in non-birth mother) [hereinafter *Brooke S.B.*].

<sup>95</sup> The laws are reviewed and critiqued, in Deborah H. Forman, “Exploring the Boundaries of Families Created with Known Sperm Donors: Who's In and Who's Out?”, 19 *Univ. of Pennsylvania J. of Law and Social Change* 41 (2016).

<sup>96</sup> The 2017 UPA suggested assisted reproduction statutes involving no surrogates, appearing in 2017 UPA, at §§ 701-708, are followed in Washington Rev. Stat. 26.26A.610 and 15C Vermont Stat. 701.

often involve express consents. There could be, but there generally are no, state-required forms guiding such consents. In California, however, in nonsurrogacy settings there are statutorily-recommended consent forms that may be used, but are not required.<sup>97</sup> Regardless of the nonsurrogacy parentage norms, state-formulated consent forms should be made available as informed consent would be better assured and there would be greater certainty regarding party intentions.<sup>98</sup> Such forms would be comparable to the required forms for VAPs.<sup>99</sup>

### **E. Laws on Existing Surrogacy AI Parentage**

As to surrogacy, the 1973 UPA is silent.<sup>100</sup> The 2017 UPA, like the 2000 UPA, distinguishes between genetic (“traditional”) and gestational surrogacy.<sup>101</sup> Their surrogacy

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<sup>97</sup> California Family Code 7613.5(d) (forms on assisted reproduction pacts by two married or by two unmarried people, where signatories may or may not have used their own genetic material to prompt a pregnancy).

<sup>98</sup> I urged that such forms be created in "Formal Declarations of Intended Childcare Parentage," 92 Notre Dame L. Rev. Online Supplement 87 (March 30, 2017) [hereinafter Formal Declarations].

<sup>99</sup> See, e.g., 15C Vermont Stat. 310 (Health Department shall develop a VAP form for execution of parentage). See also Jeffrey A. Parness and Zach Townsend, “For Those Not John Edwards: More and Better Paternity Acknowledgments at Birth,” 40 Univ. of Baltimore L. Rev. 53, 63-87 (2010) (reviewing similarities and differences in state-generated VAP forms). At times, some written parentage acknowledgments operate though state-generated forms were not utilized. See, e.g., District of Columbia Code 16-909(a)(4) (presumption that a man is the father of a child if he “has acknowledged paternity in writing”); New Mexico Stat. 40-11A-204(A)(4)(c) (a man is presumed to be the father of a child that “he promised in a record to support... as his own” if he married the birth mother after the child’s birth); and Kansas Stat. 23-2208(a)(4) (a man is presumed to be the father of a child if he “notoriously or in writing recognizes paternity of the child,” including but not limited to acts in accordance with the voluntary acknowledgement statutes).

<sup>100</sup> 1973 UPA, at §5 at Comment (while addressing husband-wife pacts on assisted reproduction where the wife bears the child and intends to parent, the Act "does not deal with many complex and serious legal problems raised by the practice of artificial insemination").

<sup>101</sup> 2017 UPA, at Comment preceding §801.

provisions are limited to instances of assisted reproduction births.<sup>102</sup> Unlike the 2000 UPA, the 2017 UPA does not propose that all surrogacy agreements to be validated by a court order prior to any medical procedures.<sup>103</sup> The 2017 UPA imposes differing requirements for the two surrogacy forms, however, with “additional safeguards or requirements on genetic surrogacy agreements,”<sup>104</sup> as only they involve a woman giving birth while “using her own gamete.”<sup>105</sup> The 2017 UPA recognizes there can be "one or more intended parents"<sup>106</sup> in surrogacy settings.

The common requirements for the two forms of surrogacy pacts include signatures in a record, "attested by a notarial officer or witnesses;" independent legal counsel for all signatories; and execution before implantation.<sup>107</sup> Special provisions for gestational surrogacy pacts include an opportunity for "party" termination "before an embryo transfer" and opportunity for a prebirth

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<sup>102</sup> 2000 UPA, at § 801(a)(i) ("agrees to pregnancy by means of assisted reproduction") and 2017 UPA, at § 801(3) (surrogacy agreement on pregnancy "through assisted reproduction"). This is not to say there are no instances of surrogacy undertaken through consensual sex. See, e.g., *K.B. v. M.S.B.*, 2021 BCSC 1283 (British Columbia Sup. Ct.) (parentage action by person who gave birth against sperm provider and spouse).

<sup>103</sup> 2017 UPA, at Comment preceding §808.

<sup>104</sup> *Id.* at Comment preceding § 801. The common safeguards or requirements for all surrogacy pacts are found in *id.* at §§ 802-807. See also 2017 UPA, at §§ 808-812 (special requirements for gestational surrogacy agreements) and 813-818 (special requirements for genetic surrogacy agreements).

<sup>105</sup> *Id.* at § 801(1). Gestational surrogacy covers births to a woman who uses “gametes that are not her own.” *Id.* at § 801(2). The special rules for gestational surrogacy pacts are found in *id.* at §§ 808-812, while the special rules for genetic surrogacy pacts are found in *id.* at §§ 813-818.

<sup>106</sup> 2017 UPA, at §801(3).

<sup>107</sup> 2017 UPA, at §803(6), (7) and (9). Thus, by definition, a person who may become pregnant through sex cannot agree to be a surrogate, as cannot a person who is pregnant and only agrees to surrogacy postpregnancy. 2017 UPA, at § 801(1) and (2) (each surrogacy form applies only to a person "who agrees to become pregnant through assisted reproduction").

court order declaring parentage vesting at birth.<sup>108</sup> Special provisions for genetic surrogacy pacts include the general requirement that "to be enforceable," an agreement must be judicially validated "before assisted reproduction" upon a finding that "all parties entered into the agreement voluntarily" and understood its terms;<sup>109</sup> that a genetic surrogate may withdraw consent "in a record" at any time before 72 hours after the birth;<sup>110</sup> and that a genetic surrogate cannot be ordered by a court to "be impregnated, terminate or not terminate a pregnancy, or submit to medical procedures."<sup>111</sup> So, existing legal parentage arises later for expecting legal parents in genetic surrogacy settings than in gestational surrogacy settings.

UPA surrogacy parentage norms are now reflected both in state statutes<sup>112</sup> and precedents untethered to statutes.<sup>113</sup> Certain provisions of the 2017 UPA have been enacted in a few

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<sup>108</sup> 2017 UPA, at §§808(a) and 811(a).

<sup>109</sup> 2017 UPA, at §813(a) and (b).

<sup>110</sup> 2017 UPA, at §814(a)(2). Genetic and gestational surrogates have both been recognized, however, as having federal constitutional parental opportunity interests under *Lehr, v. Robertson*, 463 U.S. 248, 261-262 (1983) [hereinafter *Lehr*]. See, e.g., *Matter of Schnitzer*, 493 P.3d 1071 (Or. App. 2021).

<sup>111</sup> 2017 UPA, at §818(b).

<sup>112</sup> In New Hampshire, before insemination pursuant to a surrogacy contract that will be deemed "lawful," N.H. Rev. Stat. 168-B:16(I), a court "shall" be petitioned for "judicial preauthorization," N.H. Rev. Stat. 168-B:21(I). Requirements include that the "intended mother" is "psychologically unable to bear a child without risk to her health or to the child's health;" the "intended father" "provided a gamete;" and either the intended mother or surrogate provided the ovum. Authorization is permitted only where the "surrogacy contract is in the best interest of the intended child." N.H. Rev. Stat. 168-B:23(III)(d).

<sup>113</sup> Precedents recognizing judicial discretion to enforce surrogacy arrangements include *In re Paternity of F.T.R.*, 833 N.W. 2d 634, at ¶73 (Wis. 2013) (enforcing surrogacy pact between two couples as long as child's best interests were served, while urging the legislature to "consider enacting legislation regarding surrogacy" to insure "the courts and the parties understand the expectations and limitations under Wisconsin law"); *In re Baby*, 447 S.W.3d 807 (Tenn. 2014) ("traditional surrogacy contracts do not violate public policy as a general rule" where surrogate

states.<sup>114</sup> Elsewhere, there operate major sections of the 2000 UPA on surrogacy.<sup>115</sup>

### F. General Parentage Laws and AI Births

In *Gatsby*, the court found that when there is a relevant (and then designated comprehensive) AI statute, there the AIA, the statute is "controlling"<sup>116</sup> so that other avenues to parentage, like a VAP<sup>117</sup> or a spousal parent presumption,<sup>118</sup> but not a formal adoption,<sup>119</sup> are closed. The AIA was said to "specifically address issues that are unique to artificial

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artificially inseminated with sperm of intended father, who was not married to intended mother); *In re Amadi*, 2015 WL 1956247 (Tenn. App. 2015) (gestational surrogate for married couple is placed on birth certificate, as said to be required by statute where intended father's/husband's sperm used with egg from unknown donor and intended mother/wife was recognized by all parties as legal mother; reiterates plea from *In re Baby*, *infra*, that the legislature should enact a comprehensive statutory scheme); and *Raftopol v. Ramey*, 12 A. 3d 783 (Conn. 2011) (biological father's male domestic partner can also be intended parent of a child born to a gestational surrogate). Beyond enforcing a surrogacy pact in the absence of statute, an intended parent (also the sperm donor) who employed a gestational surrogate was allowed in one case to adopt formally his genetic offspring. *Matter of John*, 103 N.Y. S. 3d 541 (N.Y. App. 2d 2019).

<sup>114</sup> See, e.g., Washington Rev. Stat. 26.26.A.715 (gestational or genetic surrogacy agreement); 15C Vermont Stat. 801 (gestational carrier agreements); and Rhode Island Gen. Laws 15-8.1-801 (gestational carrier agreements).

<sup>115</sup> See, e.g., Utah Code Ann. 78B-15-801 (similar to 2000 UPA).

<sup>116</sup> *Gatsby*, 495 P.3d at 1001, 1001, and 1002. It was deemed controlling as it was "the more recent" and it was "specifically applicable." *Gatsby*, 495 P.3d at 1002 (citing *Eller v. Idaho State Police*, 443 P.3d 161, 168 (Idaho 2019)).

<sup>117</sup> *Gatsby*, 495 P.3d at 1007. The court correctly noted that no VAP was filed by Linsay. *Gatsby*, 495 P.3d at 1007. But its suggestion that no VAP was available to Linsay since the AIA was "controlling" is a bit troublesome because the court also observed "that Linsay could have avoided this outcome by adopting the child," an "option" she did not pursue. *Gatsby*, 495 P.3d at 1007. Why would an adoption, but not a VAP, be an "option" for Linsay? Put another way, why was an adoption not foreclosed by the "controlling" statute? Both VAPs and adoptions permit parentage arising from postbirth joint conduct of intended and actual parents.

<sup>118</sup> *Gatsby*, 495 P.3d at 1001-1002.

<sup>119</sup> *Gatsby*, 495 P.3d at 1007.

insemination."<sup>120</sup> Among these unique issues were the requirements on consents by a "woman" and "her husband;" the nonparental status of a sperm donor; the performance of artificial insemination by licensed physicians and "persons under their supervision;" and the filing of the consents with the state registrar of vital statistics.<sup>121</sup> Further, as noted by the court, AIA compliance failures could prompt misdemeanor charges, though the court did not indicate there was state action against Kylee, Linsay or the donor.<sup>122</sup> While the Idaho AIA is said to apply "to all persons conceived as a result of artificial insemination," it does not explicitly foreclose parentage for an AIA child under other parentage laws.<sup>123</sup>

Outside of Idaho, AI parentage can arise from conduct outside the ambits of an assisted reproduction statute. Elsewhere, assisted reproduction statutes sometimes specifically reference the possible applications of general parentage laws, often operative for conduct occurring postbirth, to determine legal parentage arising from AI births.<sup>124</sup> Those other laws can include

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<sup>120</sup> Gatsby, 495 P.3d at 1001.

<sup>121</sup> Gatsby, 495 P.3d at 1004-1005 (citing the AIA, at Idaho Code 39-5403 and 39-5405). While the Gatsby case was under advisement, the AIA requirement that the consents be filed with the state registrar were eliminated. Gatsby, 495 P.3d at 1006.

<sup>122</sup> Gatsby, 495 P.3d at 1005 (citing Idaho Code 39-5407), which authorizes a "penalty" against a person who "violates the provisions" of the AIA).

<sup>123</sup> Idaho Code 39-5406.

<sup>124</sup> See, e.g., 2017 UPA, at § 704(b) (where the statutory "consent" in a "record" on assisted reproduction parentage is not undertaken, a court may also find "consent to parentage" if there is "clear-and-convincing evidence" of "an express agreement" on intended parentage entered prebirth, or a court may find residency/hold out parentage established through parental-like acts during "the first two years of the child's life"), generally followed in 19-A Maine Stat. 1924(2). Compare 2000 UPA, at § 704(b) (failure to consent in a record to assisted reproduction does not preclude paternity if the "woman and man, during the first two years of the child's life resided together in the same household with the child and openly held out the child as their own") and at § 106 (provisions on paternity apply to determination of maternity) and Texas Family Code 160.704(b) (failure by a husband to consent properly does not preclude him from fatherhood if he and his wife "openly treated the child as their own").

residency/hold out parentage, de facto parentage, spousal parentage, or voluntary acknowledgment parentage.<sup>125</sup>

For example, the 1973 UPA "does not deal with many complex and serious legal problems raised by the practice of artificial insemination,"<sup>126</sup> though it does address such insemination undertaken by a "husband" and "wife."<sup>127</sup> The 1973 UPA does authorize, however, "any interested person" to bring "an action to determine the existence or nonexistence of a mother and child relationship," wherein, "insofar as practicable," the Act's provisions on "the father and child relationship" would "apply."<sup>128</sup> One such provision involves residency/hold out parentage for a man who "receives" a child into his home and "openly holds out the child as his natural child."<sup>129</sup>

The 2017 UPA is more explicit in its recognition of possible AI parenthood arising without any written "consent" to assisted reproduction. Thus, the 2017 UPA declares that "failure to consent in a record" as set out in the Act "does not preclude the court from finding consent to parentage" by an individual who either expressly agreed before conception with a woman that they "both would be parents of the child" or "resided in the same household with the child" and birth mother where "both openly held out the child as the individual's child."<sup>130</sup>

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<sup>125</sup> State laws and Uniform Parentage Act proposals on these norms are surveyed in Jeffrey A. Parness, "Unconstitutional Parenthood," 104 *Marquette L. Rev.* 183, 190-205 (2020) [hereinafter *Unconstitutional Parenthood*].

<sup>126</sup> 1973 UPA, at Comment following § 5, followed in Montana Code 40-6-106.

<sup>127</sup> 1973, UPA, at § 5, followed in Montana Code 40-6-106.

<sup>128</sup> 1973 UPA, at § 21, followed in Montana Code 40-6-121.

<sup>129</sup> 1973 UPA, at § 4(a)(4), followed in Montana Code 40-6-105(d).

<sup>130</sup> 2017 UPA, at §703(b).



## IV. The Gatsby Problems

### A. Introduction

The Gatsby ruling illustrates the difficult parentage issues that can arise from DIY AI births for at least some intended parents in the United States, particularly would-be parents without financial resources for lawyers and doctors, as well as would-be parents with interests in maintaining privacy regarding their procreational and childcare pursuits,<sup>131</sup> and would-be single or unwed coupled parents.

The difficulties confronting DIYers employing AI to achieve intended parentage, illustrated in the Gatsby ruling, should be mitigated. Both legislators and judges should assure that laws on childbearing by DIYers allow intended parents greater opportunities for parenthood while protecting the interest of later-born children.<sup>132</sup> Such assurances will also protect the constitutional guarantees of intended parents, including their rights to privacy, to procreate, and to be treated equally and rationally. Current American state parentage laws on AI can be improved by incorporating certain 2017 UPA provisions.

### B. Controlling AI Statutes

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<sup>131</sup> While Gatsby was "under advisement," the AIA was amended so that there was no longer "a duty on the physician . . . to file the consent form with the state registrar" and no longer a requirement "for the State Board of Health and Welfare to promulgate rules regarding recordkeeping." Gatsby, 495 P.3d at 1006 (amended Idaho Code 59-5403).

<sup>132</sup> The paper focuses on DIY AI parentage. It assumes the continuation of the current constitutional and nonconstitutional norms on "superior" parental childcare rights, wherein parentage is significantly defined by state laws which vary greatly. See, e.g., Jeffrey A. Parness, "Federal Constitutional Childcare Parents," 90 St. John's L. Rev. 965 (2016) (explaining, and criticizing, the deference by federal lawmakers to state lawmaking on who are childcare parents). DIY AI parentage norms would differ if state laws supported "childrens' independent interests and agency," authorizing "a less strict level of scrutiny for governmental action that intrudes upon parental authority." Anne C. Dailey and Laura A. Rosenbury, "The New Parental Rights," 71 Duke L.J. 75, 75 (2021).

The Gatsby ruling several times characterizes the Idaho Artificial Insemination Act as “controlling.”<sup>133</sup> While the Act was deemed “controlling,” it clearly does not encompass all AI births. The AIA is applicable “to all persons conceived as a result of artificial insemination as defined herein,”<sup>134</sup> with the definition of artificial insemination encompassing the “introduction of semen of a donor, into a woman’s vagina, cervical canal or uterus through the use of instruments or other artificial means.”<sup>135</sup> Thus, similar introduction of a fertilized egg is not covered. Further limits arise under the statutory definition of donor, which “refers to a man who is not the husband of the woman upon whom the artificial insemination is performed.”<sup>136</sup> Thus, the Act does not contemplate AI usage by donor husbands or by women who seek to be single parents. Further, the Act only applies to married couples.<sup>137</sup> The Act did apply to the semen “introduction” into Kylee, as she was then married to Linsay.<sup>138</sup>

Because the AIA was “controlling” and was not followed by Kylee, Linsay and the donor, the Gatsby majority effectively determined the circumstances surrounding Kylee’s insemination, including Linsay’s intentions, the semen donor’s nonparental intentions, and Kylee’s parental intentions regarding Linsay, would not be considered under parentage laws

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<sup>133</sup> Gatsby, 495 P.3d at 1001, 1002, 1007 and 1010.

<sup>134</sup> Idaho Code 39-5406.

<sup>135</sup> Idaho Code 39-5401 (1).

<sup>136</sup> Idaho Code 39-5401 (2).

<sup>137</sup> Idaho Code 39-5403(1) (“Artificial insemination shall not be performed upon a woman without her prior written request and consent and the prior written request and consent of her husband.”).

<sup>138</sup> The high court (wisely) read the statutory reference to a husband in a gender-neutral way so as to include a “spouse” of one who undertakes AI.

outside the AIA.<sup>139</sup> The court rejected any use of presumptive spousal parentage for Linsay<sup>140</sup> and strongly hinted that any VAP parentage for Linsay was unavailable.<sup>141</sup> It did not address other possible parentage avenues for Linsay, like residency/hold out or de facto parenthood.<sup>142</sup> The court did say Linsay could have adopted,<sup>143</sup> leaving open whether the AIA would be wholly preemptive in AI birth cases where parentage is founded on other postbirth parental-like acts. The court did not consider any common law (i.e., nonstatutory) parentage avenue, saying that it would “properly leave it to the legislature to address the important public policy and societal

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<sup>139</sup> Compare Virginia Code 20-164 (assisted conception statute, only “when applicable,” governs parentage), read in *L.F. v. Breit*, 736 S.E.2d 711, 718 (Va. 2013) (unwed sperm donor can pursue childcare under certain circumstances outside statutory norms) [hereinafter *L.F.*].

<sup>140</sup> *Gatsby*, 495 P.3d at 1001-1002 (the marital spouse presumption in Idaho arguably arises under both an earlier common law ruling in *Alber v. Alber*, 472 P.2d 321, 326-327 (Idaho 1970) [hereinafter *Alber*] and a 1969 Idaho Code provision, 7-1119). Linsay seemingly could not rely on this presumption if Kaylee objected as Linsay lacked genetic ties. See, e.g., Idaho Code 7-1119(1) (presumption overcome by “genetic tests”).

<sup>141</sup> *Gatsby*, 495 P.3d at 1002 (Paternity Act, which includes VAPs under Idaho code 7-1106, is found to be preempted by the AIA). Linsay seemingly could have used a VAP if the AIA applicability was not known (i.e., method of conception not known) as it would have been subject to challenge by Kaylee more than 60 days after the child's birth only on certain grounds, including “fraud, duress, and mistake of fact,” that do not clearly appear in the *Gatsby* court record. Idaho Code 7-1106(2).

<sup>142</sup> See, e.g., 2017 UPA, at §§204(a)(2) (presumed residency/hold out parentage) and 609 (de facto parentage).

<sup>143</sup> *Gatsby*, 495 P.3d at 1007 (no adoption was ever sought). Linsay may have been unable to adopt had she tried sometime after birth, given certain language in the Idaho adoption statutes. As to the statutes on adoption of a child, one set of laws requires consent in writing, Idaho Code 16-1506(3), by both parents of “an adoptee who was conceived or born within a marriage,” Idaho Code 16-1504(1). Kylee’s consent seemingly would have been given around the time of birth in October, 2016, as she must have agreed to Linsay’s name on the birth certificate. *Gatsby*, 495 P.3d at 999. But Kylee’s consent after July, 2017, seems uncertain, as she and Linsay physically fought leading to a July, 2017 no contact order and as Linsay filed for divorce in August, 2017. *Gatsby*, 495 P.3d at 999-1000.

implications concerning the AIA that have been raised by the dissent.”<sup>144</sup> Given the absence in Idaho of residency/hold out, de facto, or similar parentage laws, which would require consideration of the parental intentions and the parental-like actions of people like Linsay who are not married to AI birth mothers, seemingly there were few parentage avenues for the likes of a Linsay beyond formal adoption, even where the best interests of a child born to the likes of a Kylee would be served. Outside of Idaho, AI statutes do recognize expressly the opportunity for conduct occurring only after birth, not including a formal adoption, to secure parentage for those who act in parental-like ways.<sup>145</sup>

While the formal adoption avenue was open to Linsay under the Gatsby ruling, there was no explanation of why it would not be foreclosed due to the "controlling" nature of the AIA, as with the apparent preemption of VAP parentage. In each setting, seemingly there are postbirth parental-like acts. Yet in only one setting could acts trigger possible parentage. Both VAPs and formal adoptions are state-controlled avenues to parentage based upon postbirth conduct by would-be parents.

As well, the Gatsby court did not address why there was a common law precedent on third party (i.e., nonparent) standing to seek a childcare order, but no possible common law

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<sup>144</sup> Gatsby, 495 P.3d at 1007. This judicial reluctance was foreshadowed in *In the Matter of the Declaration of Parentage of Doe*, 372 P.3d 1106, 1108 (Idaho 2016) (“Unless and until the legislature chooses to enact legislation specifically addressing surrogacy, Intended Parents must proceed within the legal avenues available to them to establish legal parenthood.”).

<sup>145</sup> See, e.g., New York Family Court Act 581-304(b) and (c) (where assisted reproduction birth mother is not wed to a second intended parent, the "consent must be in a record;" without such a record, consent can be determined by "clear and convincing evidence that at the time of the assisted reproduction the intended parents agreed to conceive and parent the child together"). Comparable is A.B.A. Model Act Governing Assisted Reproduction (2019), at § 604(2)(b) [hereinafter 2019 A.B.A. Model Act]. See also *Pueblo v. Haas*, 2021 WL 6130700 (Mich. App. 2021) (nonstatutory “equitable parent” doctrine can be used by an intended parent who was married to the birth mother).

precedent on parental standing to seek a childcare order. In earlier rulings, the Idaho Supreme Court found a nonparent could pursue a childcare order where the nonparent “has had custody of a child for an appreciable period of time” without the need to show “abandonment or patent unfitness” by a natural parent.<sup>146</sup>

The Gatsby ruling on the controlling effect of the AIA has other troubling consequences. For example, it seemingly does not allow an opposite sex wed couple to undertake a DIY AI birth with the use of semen provided by one who is not a spouse. Same sex and opposite sex wed couples are comparably treated, but many married couples without significant economic resources are left with legal parentage problems should the couples, the one-time intended parents per DIY AI pacts, split. Problems also appear for unwed couples and single women who desire to parent through DIY AI.<sup>147</sup>

A major lesson from Gatsby is that state legislators need to more comprehensively address childcare parentage in AI births. Statutes should address all who may undertake AI, however they do it, and provide clearer guidelines on consents to intended parentage. As well, AI laws should speak to whether or not other forms of expecting or existing legal parentage beyond AI pacts may be pursued by intended parents in AI settings, with expecting parentage possibly arising postconception but prebirth as with VAPs and existing parentage possibly arising postbirth as with VAPs, residency/hold out parentage, or de facto parentage. In

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<sup>146</sup> *In re Ewing*, 529 P.2d 1296, 1298 (Idaho 1974) (pursuit could only be successful if nonparent childcare served the child’s best interest), as read in *Stockwell*, 775 P.2d at 614.

<sup>147</sup> Without AIA protection, it is imaginable that one who supplies sperm may seek legal parentage only after birth, urging genetic ties entitle him to pursue a parental opportunity interest. *Lehr*, 463 U.S. at 261-262.

addressing these other forms of AI parentage, statutes should expressly recognize any judicial role(s) in commonlawmaking to supplement statutory provisions.

### C. Unconstitutional AI Statutes

The aforescribed public policy problems with recognizing the controlling (or exclusive) nature of an AI statute are compounded when the constitutional demands of Due Process and Equal Protection are considered. Of course, compelling governmental interests are needed for the state to infringe upon fundamental rights<sup>148</sup> or to mistreat suspect classes of people.<sup>149</sup> Rationality must still support AI laws which do not infringe upon fundamental rights or harm suspect classes, but nevertheless cause life, liberty or property denials.<sup>150</sup> These constitutional demands cannot be eliminated even if statutes, like the AIA, were read to be the exclusive avenue to parentage in AI births.<sup>151</sup> The prospect of such statutory invalidation should lead courts to read AI statutes to be nonexclusive.<sup>152</sup>

Serious federal constitutional issues arise under the AIA. For example, the act bars medical personnel from performing assisted reproduction “upon a woman without . . . the prior written request and consent of her husband.”<sup>153</sup> The Gatsby court recognized the problems with

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<sup>148</sup> See, e.g., *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361, 2371 (2018).

<sup>149</sup> See, e.g., *Romer v. Evans*, 517 U.S. 620, 631 (1996).

<sup>150</sup> See, e.g., *Heller v. Doe by Doe*, 509 U.S. 312, 319-320 (1993).

<sup>151</sup> See, e.g., Virginia Code 20-157 (assisted conception statute “shall control, without any exception”), read as not controlling in *L.F.*, 736 S.E.2d at 180 (statute not applied literally as it would yield constitutional violations).

<sup>152</sup> See, e.g., *In Interest of R.C.*, 775 P.2d 27, 35 (Colorado 1989) (avoiding such invalidation “on statutory interpretation grounds”) [hereinafter *R.C.*]

<sup>153</sup> Idaho Code 39-5403(1), quoted in *Gatsby*, 495 P.3d at 1002.

omitting spouses like Linsay and thus “read the AIA” to include for Linsay an avenue to “secure parental rights.”<sup>154</sup> Yet the court (properly) did not address (as the issue was not presented) the statutory difficulties<sup>155</sup> with excluding an AIA avenue to “secure parental rights” for others, like an unmarried couple<sup>156</sup> outside the surrogacy context;<sup>157</sup> like a husband who is a sperm provider to his wife;<sup>158</sup> and, like a single woman who is artificially inseminated with the aid of an anonymous sperm donor.<sup>159</sup> All three UPAs recognize parentage in the “natural mother” who gave birth,<sup>160</sup> while the latter two UPAs recognize parentage by consent in nonsurrogacy AI

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<sup>154</sup> Gatsby, 495 P.3d at 1003 (relying upon Obergefell, 576 U.S. at 644, which recognized state responsibilities regarding recognitions of same sex marriages).

<sup>155</sup> These difficulties were recognized by Justice Stegner, in dissent. Gatsby, 495 P.3d at 1012 n.2.

<sup>156</sup> See, e.g., Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (“If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”) [hereinafter Eisenstadt]. The AIA seemingly would not bar a single woman from becoming a birth parent via assisted reproduction. Idaho Code 16-2002(11)(a) (“parent” means the “birth mother”). The AIA bar to an unmarried couple was recognized in Doe, 395 P.3d at 1291. The differing treatment of wed and unwed couples in the Idaho AIA was not addressed in Doe as only the differential treatment of marital and nonmarital children was urged, which the Doe court found that the natural mother’s former partner had no standing to raise. Doe, 395 P.3d at 1292. But see L.F., 736 S.E.2d at 724 (AI statute distinguishing between wed and unwed couples who are biological parents runs contrary to state’s articulated goals and federal Due Process).

<sup>157</sup> Idaho has no surrogacy statutes and its courts do not assume judicial authority in this area (presumably except when constitutional rights require validation). See, e.g., Matter of Doe, 372 P.3d 1106 (Idaho 2016).

<sup>158</sup> Idaho Code 39-5401(2) (donor is a “man who is not the husband of the woman upon whom the artificial insemination is performed”).

<sup>159</sup> Idaho Code 39-5403(1) (no AI upon a woman without the “prior written request and consent of her husband”).

<sup>160</sup> 1973 UPA, at § 3(1); 2000 UPA, at § 201(a)(1) (except in surrogacy settings); and 2017 UPA, at § 201(1) (except in surrogacy settings).

settings by one who may not be married to the person giving birth.<sup>161</sup> The 2019 ABA Model Act Governing Assisted Reproduction also recognizes “intended” parenthood arising from a preconception “express agreement” that need not reflect a “consent” within “a Record.”<sup>162</sup>

The shortcomings of the Idaho AIA,<sup>163</sup> and statutes like it,<sup>164</sup> are clear given that the U.S. Supreme Court has recognized that if “the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion, into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”<sup>165</sup> The shortcomings of current American state AI statutes have been well described in commentaries,

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<sup>161</sup> 2000 UPA, at § 704(a) (“man consents”) and 2017 UPA, at § 703 (“individual” consents).

<sup>162</sup> 2019 A.B.A. Model Act, at § 604(1) and (2)(a).

<sup>163</sup> The Idaho AIA follows somewhat the 1973 UPA. See §5(a). Yet, unlike the AIA, Idaho Code 39-5404(1) (“donor has no right, obligation or interest”), the 1973 UPA indicates that “semen donor” who is the husband of the woman inseminated will be “treated in law as if he were” the “natural father of a child thereby conceived.” 1973 UPA, at §5(b).

<sup>164</sup> See, e.g., supra note 40.

<sup>165</sup> *Eisenstadt v. Baird*, 405 U.S. at 453 (contraception access case with no majority opinion). The *Eisenstadt* declaration was later deemed to teach “that the Constitution protects individual decisions in matters of childrearing from unjustified intrusions by the State.” *Carey v. Population Services International*, 431 U.S. 678, 687 (1987).



including critiques focusing on the problems facing same-sex female couples,<sup>166</sup> unwed couples,<sup>167</sup> and single women.<sup>168</sup>

The shortcomings in some states are less severe. Thus in Texas, there are separate AI provisions for opposite sex married couples<sup>169</sup> and opposite sex unmarried couples,<sup>170</sup> but no explicit provisions for single women or same sex female couples, wed or unwed. In Texas, as well, a statute, unlike the Idaho AIA, recognizes a husband's own sperm donation in assisted reproduction settings.<sup>171</sup>

#### **D. Dicta Driving New AI Precedents**

The Gatsby court recognized that each of the two lower courts "undertook a custody analysis to determine the best interests of the child"<sup>172</sup> even though each court had also found

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<sup>166</sup> See, e.g., Leslie Joan Harris, "Voluntary Acknowledgments of Parentage for Same-Sex Couples," 20 *Journal of Gender, Social Policy & the Law* 467, 482-488 (2012) (argues that denying VAP opportunities to unwed same-sex couples constitutes gender and sexual orientation discrimination). New laws could be modeled on Washington Code 26.26A.200 (woman who gave birth and an "individual" who consented to an AI birth, per 26.26A.610) or 15c Vermont Stat. 301(a)(3) (similar), each based on 2017 UPA, at §302(a)(1).

<sup>167</sup> See, e.g., Michael J. Higdon, "Constitutional Parenthood," 103 *Iowa L. Rev.* 1483, 1534, (2018) ("what the Court has said about the subject of parental identity makes clear that intentional parenthood is required in order to achieve the underlying objectives of constitutional parenthood"). New laws could be modeled on Washington and Vermont laws, each based on the 2017 UPA. *Id.* Precedents include of R.C., 775 P.2d at 35.

<sup>168</sup> See, e.g., Note, Patricia A. Kern and Kathleen M. Ridolfi, "The Fourteenth Amendment's Protection of a Woman's Right to be a Single Parent Through Artificial Insemination by Donor," 7 *Women's Rights L. Rptr.* 251 (1982). See also Washington Stat. 26.26A.605 (semen donor in AI birth is "not a parent" if no consent with the intent to be a parent, per 26.26A.610) and 26.26A.610 (no requirement for any individual beyond birth mother to consent to AI parentage).

<sup>169</sup> Texas Family Code 160.704.

<sup>170</sup> Texas Family Code 160.7031.

<sup>171</sup> Texas Family Code 160.703.

<sup>172</sup> Gatsby, 495 P.3d at 1007.

"Linsay's lack of status to the child," that is, a lack of either parental or third party standing to seek custody.<sup>173</sup> Instead of foregoing a custody analysis review as unnecessary, given the affirmance of Linsay's lack of standing, the Supreme Court found that it was not in the child's best interest for Kylee to be awarded custody.<sup>174</sup> The "myriad" of "unintended consequences" of this ruling on childcare parentage and third party childcare standing, noted by the dissent,<sup>175</sup> could have been avoided by simply affirming the best interest analysis, as Linsay's parental status or third party standing would become irrelevant.

Unfortunately, those consequences were not well-described by the dissent. The dissent only asked about a Leonard rather than a Linsay seeking custody, speculating that a nonbiologically-tied male spouse of a birth mother would be treated differently than a nonbiologically-tied female spouse.<sup>176</sup> Further, the dissent suggested that any attempt by Kylee to collect child support from Leonard, or from Linsay, unfortunately would be futile since neither was a childcare parent.<sup>177</sup> Yet, such support is clearly permissible elsewhere. That is, one can be accountable for child support though one cannot be a custodial parent.<sup>178</sup>

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<sup>173</sup> Gatsby, 495 P.3d at 1000.

<sup>174</sup> Gatsby, 495 P.3d at 1009.

<sup>175</sup> Gatsby, 495 P.3d at 1016 (J. Stegner, dissenting).

<sup>176</sup> Gatsby, 495 P.3d at 1016 (J. Stegner, dissenting).

<sup>177</sup> Gatsby, 495 P.3d at 1016 (J. Stegner, dissenting) (no analysis of how a child support parent need not also be a childcare parent). But see *In re Parentage of M.J.* 787 N.E.2d 144 (Ill. 2003) (woman could sue former intimate male partner for child support of AI children on theories of oral contract or promissory estoppel even though the Parentage Act spoke of written consent of husband).

<sup>178</sup> See, e.g., *N.E.v. Hedges*, 391 F.3d 832, 836 (6th Cir. 2004) and *In re Stephen Tyler R.*, 584 S.E.2d 581 (W. Va. 2003).

The unnecessary rulings in *Gatsby* on AI birth consents to childcare parentage, in and outside of the AIA, leave women like Linsay and men like Leonard, as well as unwed women, unwed couples, and men seeking parenthood through assisted reproduction births by their partners, needing statutory amendments or constitutional precedents favoring broader procreational rights. Bad precedents will follow the apparent dicta of this hard case, given the "toxicity and animosity in Linsay and Kylee's relationship;"<sup>179</sup> the fact that "Linsay had not spent much time as the primary caregiver and failed to act in the child's best interests during the period when she temporarily had sole custody;"<sup>180</sup> Kylee's "healthier relationship with the child;"<sup>181</sup> Linsay's conduct in creating "conflict in the child's community;"<sup>182</sup> the instability in the earlier joint custody schedule;<sup>183</sup> and Linsay's lies to the court and her "reputation for dishonesty."<sup>184</sup> While Linsay may not be a sympathetic would-be parent to some, not all do-it-yourselfers are similarly unsympathetic. Further, most all children would not be well served by losing their intended and loving parents simply due to scarce financial resources that preclude employing doctor and lawyer services in undertaking DIY AI.

The *Gatsby* court's overreach on legal issues should be avoided by other courts, particularly as the *Gatsby* court recognized - but did not strongly urge - the need for new General Assembly guidance on parentage (and nonparental childcare) norms, given the increasing use of

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<sup>179</sup> *Gatsby*, 495 P.3d at 1008.

<sup>180</sup> *Gatsby*, 495 P.3d at 1008.

<sup>181</sup> *Gatsby*, 495 P.3d at 1008.

<sup>182</sup> *Gatsby*, 495 P.3d at 1008.

<sup>183</sup> *Gatsby*, 495 P.3d at 1008.

<sup>184</sup> *Gatsby*, 495 P.3d at 1009-1010.

AI (and the increasing parental-like actions of nonparents, in and outside of AI settings, whose continuing actions would serve the best interests of children).

### **E. DIY AI and Informal Adoptions**

Nonsurrogacy DIY AI births sometimes prompt parentage in those who did not consent to AI and did not formally adopt a child born of AI. Here, parentage can arise from varying forms of informal adoptions of AI children, that is, adoptions that are not founded on court decrees on parentage following state inquiries into, *inter alia*, the suitability of the proposed adopters. As noted in *Gatsby*, an informal adoption can prompt parentage from a state-registered voluntary acknowledgment. An informal prompting parentage can also arise due to earlier wholly private actions, not registered with the state, like residing with and holding out a child as one's own or establishing a parental-like relationship with a child, accompanied by the consent or earlier acquiescence of one or two existing legal parents (*de facto*, equitable or equitable adoption parent).<sup>185</sup> Here, parentage arises from parental-like acts occurring at no specific point in time. The following analyses demonstrate the *Gatsby* court's error in refusing generally to recognize that such informal adoption forms can apply to DIY AI births. Outside of Idaho, such forms sometimes protect Linsays (and Leonards) as parents, as well as their children who love and need them.

#### **i. Voluntary Acknowledgment and Spousal Parentage**

The *Gatsby* ruling seems inconsistent when it hints the AIA preempted a VAP and when it finds the AIA preempted any spousal parentage, but declares that the AIA does not foreclose a

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<sup>185</sup> While the 2017 UPA requires for *de facto* parentage the acquiescence or consent of "another parent," 2017 UPA, at 609(d)(6) ("another parent . . . fostered or supported" the developing parental-like relationship), two state high courts require supportive action by each existing legal parent. *E.N. v. T.R.*, 255 A.3d 1, 32 (Md. 2021) and *Martin v. MacMahan*, 264 A.3d 1224, 1235 (Maine 2022).

formal adoption by Linsay. All these avenues to parentage can involve postbirth actions by intended parents.<sup>186</sup> There would be no inconsistency if only a formal adoption, and not a VAP or a birth during marriage, allowed intended parentage for one not biologically-tied to the child. This approach to VAPs is suggested by the Gatsby court's finding a lack of presumptive spousal parentage in Linsay, as she had no biological ties, with the absence of such ties making the presumption rebuttable.<sup>187</sup>

Yet not all VAP signors with no biological ties can be challenged in Idaho, as fraud, duress or material mistake of fact must be shown if a challenge comes after sixty days. Here there was no fraud, duress or material mistake of fact.<sup>188</sup> And not all spousal parent presumptions are rebutted in Idaho though there are no biological ties; some spousal parents have no biological ties. Had Kylee, with Linsay's support, become pregnant via sex with a now unidentifiable man, the court suggests that Linsay would have been a presumptive spousal parent even though there could be no biological ties.<sup>189</sup> Idaho precedents recognize, as well, that rebuttal of the spousal presumption is sometimes foreclosed (as by estoppel) where there was an

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<sup>186</sup> In some states VAPs can be signed before birth. See, e.g., 2017 UPA, at §304(b) and (c) (VAP takes effect at birth) and Texas Family Code 160.304 (paternity acknowledgment may be signed before the birth of a child).

<sup>187</sup> Alber, 472 P.2d at 327 (spousal parent presumption is rebuttable with proof of "nonaccess during the period of conception").

<sup>188</sup> Idaho Code 7-1106(2). While the statute speaks of "paternity" acknowledgments, it should be read, as was the AIA was read in Gatsby, to include female spouses of those giving birth. Gatsby, 495 P.3d at 1002-1003.

<sup>189</sup> The high court found that the "common law marital presumption of paternity in Idaho" was inapplicable only because it was preempted by the AIA, and not because the presumption only applied to male spouses. Gatsby, 495 P.3d at 1001-1002. The magistrate court had earlier found the presumption was applicable, but had been "overcome" by evidence of nonbiological ties in Linsay. Gatsby, 495 P.3d at 1000. See Idaho Code 7-1119 ("genetic tests" overcome spousal parent presumption).

earlier court finding of legal parentage in the presumed spouse.<sup>190</sup> In fact, Linsay was seemingly found to be a parent pursuant to a July 5, 2017 no contact order, "which prohibited Kylee from seeing the child except at daycare;" about a month and a half later, the Gatsby divorce suit was filed wherein Linsay asserted the spousal parentage presumption.<sup>191</sup> Yet Kylee was not estopped from denying Linsay's spousal parentage as the child was said to be subject to the AIA. Estoppel principles should not depend on how children are conceived. As with spousal parentage, a VAP should survive at times notwithstanding the AIA, as where a parent like Kylee is estopped from challenging the VAP after 60 days where a child's best interest would be served.

VAPs and marital spousal presumptions are but two forms of informal adoption, that is, an accrual of childcare parentage through earlier parental-like acts, not biological ties, where the governmental inquiries into, and statutory criteria on, fitness are not undertaken. Outside Idaho, these other avenues to informal adoptions do apply at times to DIY AI births. Such other avenues include residency/hold out parentage and de facto parentage.<sup>192</sup> These avenues (like VAPs and spousal parentage in Idaho) would be unavailable if AI statutes were "controlling." Unavailability thwarts parental intentions and childrens' best interests.

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<sup>190</sup> *Waller v. State of Idaho*, 192 P.3d 1058, 1062 (Idaho 2008) (former husband estopped) and *Miller v. Miller*, 523 P.2d 827, 830 (Idaho 1974) (former wife estopped).

<sup>191</sup> *Gatsby*, 495 P.3d at 1000.

<sup>192</sup> The nomenclature, but not the essentials of these parentage avenues, differ in some states. Thus, there is sometimes recognized parentage by estoppel, equitable adoption parentage, or an equitable-parent doctrine. See, e.g., *In re Marriage of K.E.V.*, 883 P.2d 1246, 1253 (Mont. 1994) (wife equitably estopped from denying husband's presumptive parentage) and *Johnson v. Johnson*, 617 N.W.2d 97, 104 (N.D. 2000) (equitable adoption leads to child support order); and *Pueblo v. Haas*, 2021 WL 6130700 (Mich. App. 2021) (reviewing Michigan equitable-parent doctrine applicable to spouses of birth mothers).

### **i. Hold Out/Residency Parentage**

All UPAs recognize childcare parentage in some who have resided with living children whom they held out as their own. To date, no UPA (and no state law) recognizes hold out/residency future childcare parentage based on prebirth common residency with, and support of, expecting legal parents (including those pregnant or those awaiting formal adoption approval).

The 1973 UPA is quite different than the later UPAs. The 1973 Uniform Parentage Act has this parentage presumption:

- (a) A man is presumed to be the natural father of the child if...
- (4) while the child is under the age of majority, he receives the child into his home and openly holds out the child as his natural child.<sup>193</sup>

The 2000 Uniform Parentage Act altered the presumption. It says:

- (a) A man is presumed to be the father of a child if: ...
- (5) for the first two years of the child's life, he resided in the same household with the child and openly held out the child as his own.<sup>194</sup>

The 2017 Uniform Parentage Act altered again the presumption. It says:

- (a) An individual is presumed to be a parent of a child if: ...
- (2) the individual resided in the same household with the child for the first two years of the life of the child, including periods of temporary absence, and openly held out the child as the individual's child.<sup>195</sup>

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<sup>193</sup> 1973 UPA, at §4(a)(4).

<sup>194</sup> 2000 UPA, at §204(a)(5).

<sup>195</sup> 2017 UPA, at §204(a)(2).

The 2000 American Law Institute Principles of the Law of Family Dissolution (ALI Principles) also recognize hold out/residency parentage. Like the 2000 UPA and the 2017 UPAs, the ALI Principles recognize “a parent by estoppel,” described as one who “lived with the child since the child’s birth” while holding out and accepting full and permanent responsibilities as parent as part of a prior co-parenting agreement with the child’s legal parent (or, if there are two legal parents, both parents) to raise a child together each with full parental rights and responsibilities.<sup>196</sup>

Many current state laws reflect the policies of these proposed laws. Where state laws have expressly extended beyond opposite sex couples,<sup>197</sup> hold out/residency parentage is generally available to a female partner of one giving birth due to equality demands.<sup>198</sup> Hold out/residency parentage is generally unavailable to a partner of a male who is a parent at birth

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<sup>196</sup> ALI Principles, at §2.03(1)(b)(iii) (further requiring a finding of the need to serve the child’s best interests).

<sup>197</sup> But see, e.g., 15C Vermont Stat. 401(a)(4) (“person,” not man) and Washington Rev. Stat. 26.26A.115(1)(b) (“individual,” not man). On the need to treat equally all people involved in hold out/residency settings, see Jeffrey A. Parness, “Marriage Equality: Parentage (In)Equality,” 32 Wisconsin J. of Law, Gender & Society 179, 189 (2017).

<sup>198</sup> See, e.g., *Elisa B. v. Superior Court*, 117 P.3d 660, 670 (Cal. 2005) (finding former unwed lesbian partner a child support parent under California statutory law on presumed natural hold out fathers) [hereinafter *Elisa B.*] and *Miller-Jenkins v. Miller-Jenkins*, 912 A.2d 951, 972 (Vt. 2006) (upon dissolution of civil union of lesbian couple, both women are custodial parents as statute making husband the presumed “natural parent” of a child born to his wife was applicable via a second statute saying that civil union and married couples shall have the “same” rights, 15 Vt. Stat. 308(4) and 1204(f)). Similar equality mandates operate when there is common law, rather than statutory, hold out parentage. See, e.g., *Wendy G-M. v. Erin G-M.*, 985 N.Y.S. 2d 845 (N.Y. Sup. Monroe Cty., 2014). See also Nancy D. Polikoff, “From Third Parties to Parents: The Case of Lesbian Couples and Their Children,” 77 *Law and Contemporary Problems* 195, 212-219 (2014) (even where statutes only explicitly recognize hold out/residency parentage for men, women are sometimes deemed parents under the statutes).



where the person giving birth remains a legal parent and where state laws disallow three custodial parents.<sup>199</sup>

There are varying state laws reflecting the distinct UPA approaches to hold out/residency parentage.<sup>200</sup> In California, following the 1973 UPA, a man is “presumed to be the natural father of a child” if he “received the child into his home and openly holds out the child as his natural child.”<sup>201</sup> There is no explicit requirement that one who holds out a child as “his natural child” must have beliefs about actual biological ties. California cases have recognized presumed parents, including women,<sup>202</sup> who knew there were no biological ties, but who acted in the

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<sup>199</sup> In California, though, there can be three legal parents, including the birth mother, her spouse, and a hold out/residency parent. See California Family Code 7612(c) (three parents where recognition of only two parents “would be detrimental to the child”). Compare *C.G. v. J.R.* 130 So.3d 776, 782 (Fla. App. 2d 2014) (Florida law does not support enforcement of an agreement on sharing child custody which was entered into by the married birth mother, her spouse, and the biological father of a child born of sex).

<sup>200</sup> As well, there are doctrines that effectively recognize hold out/residency parentage, though with different terms and some different norms. See, e.g., *J.S.B. v. S.R.V.*, 2021 WL 4487638, 630 S.W.3d 693 (Kty. 2021) (noting the relevance of a birth mother's "parental waiver" of parental rights to allow parentage in a person who could not formally adopt children, but who held children out as one's own while residing with them for some time).

<sup>201</sup> Cal. Family Code 7611(d). Similar is Montana Code 40-6-105(d)(1). The presumption in California has been sustained when challenged on the ground of interfering with federal constitutional childcare interests. See, e.g., *R.M. v. T.A.*, 233 Cal. App. 4th 760 (Cal. App. 4th 2015) (preponderance of evidence norm used to establish presumption). As to what constitutes receipt into the home, see, e.g., *In re Jesusa V.*, 85 P.3d 2, 15 (Cal. 2004) [hereinafter *Jesusa V.*] and *In re N.V.*, 2014 Cal. App. Unpub. LEXIS 8870 (Cal. App. 1st Div. 4) (reviewing cases). How long an alleged hold out/residency parent must so act is determined on a case-by-case basis. See, e.g., *In re J.B.*, 2019 WL 1451304 (Cal. App. 2d 2019) (two day hold out is insufficient for presumed parent status).

<sup>202</sup> See, e.g., *Charisma R. v. Kristina S.*, 96 Cal. Rptr. 361, 365 (Cal. App. 1st 2009) (domestic partners and AI birth) and *Elisa B.*, 117 P.3d at 670 (former lesbian partner of birth mother via AI was residency/hold out parent responsible for child support).

community as if there were.<sup>203</sup> Elsewhere, state laws recognize hold out/residency parentage only for those who raise children from birth and for at least two years,<sup>204</sup> following the 2017 UPA. Again, seemingly here there need be no biological ties.<sup>205</sup> In the two settings, DIY AI births should be able to prompt hold out/residency parentage, assuming no special controlling statutes.<sup>206</sup>

### iii. De Facto Parentage

Another form of informal adoption is de facto parentage. The 2017 UPA, but neither of its UPA predecessors, expressly recognizes "de facto" parenthood in some without biological or formal adoption ties.<sup>207</sup> Parenthood here is dependent upon meeting far more explicit norms than

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<sup>203</sup> How long an alleged hold out/residency parent must so act is determined on a case-by-case basis. See, e.g., *In re J.B.*, 2019 WL 1451304 (Cal. App. 2d 2019) (two day hold out is insufficient for presumed parent status).

<sup>204</sup> See, e.g., Texas Code 160.204(a)(5) (man is a presumed father if “during the first two years of the child’s life, he continuously resided in the household in which the child resided and he represented to others that the child was his own”) and Wash. Code 26.26.116(2) (similar). Compare Montana Code 40-6-105(d)(1) (person is presumed the natural father if “while the child was under the age of majority,” the person “receives the child into the person’s home and openly represents the child to be the person’s natural child”).

<sup>205</sup> While the 1973 UPA references a hold out/residency parent for a “natural child,” 1973 UPA, at § 4(a)(4), the 2017 UPA references a child held out as the “individual’s child,” 2017 UPA, at § 204(a)(2).

<sup>206</sup> See, e.g., *Partanen v. Gallagher*, 59 N.E.3d 1133, 1139 (Mass. 2016) and *Elisa B.*, 117 P.3d at 667.

<sup>207</sup> The term "de facto" parent did not originate in the 2017 UPA. The Comment to the Act indicates its de facto parentage standard was modeled on Maine and Delaware statutes. 2017 UPA, at Comment to §609. The term was also employed in the ALI Principles. ALI Principles, at § 203(1). See also September 8, 2021 ALI Restatement of the Law: Children and the Law, Tentative Draft, at 251, Appendix B (§1.72 on de facto parentage is one of the "black letter" sections approved by membership) [hereinafter ALI Restatement Draft].

the norms underlying hold out/residency parentage.<sup>208</sup> For de facto parentage, an existing legal parent must have "fostered or supported" a "bonded and dependent relationship" between a child and a nonparent which is "parental in nature;"<sup>209</sup> the nonparent must have held out the child as the nonparent's own child and undertaken "full and permanent" parental responsibilities;<sup>210</sup> and the nonparent must have "resided with the child as a regular member of the child's household for a significant period of time."<sup>211</sup>

Of particular note is the 2017 UPA limit on who can commence a proceeding to establish de facto parentage. Commencement may only be undertaken by an "individual" who is "alive" and who "claims to be a de facto parent of the child."<sup>212</sup>

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<sup>208</sup> Expecting legal parents are foreclosed under the 2017 UPA from being bound to any agreements on de facto parentage for children to be born of sex later, as the model law requires, e.g., "a bonded and dependent relationship with the child." 2017 UPA, at §609(d)(5). Thus, there is not recognized a possible "bonded and dependent relationship" with a fetus, a fertilized egg, or some child of sex yet unconceived.

<sup>209</sup> 2017 UPA, at §609(d)(5) and (6).

<sup>210</sup> 2017 UPA, at §609(d)(4) and (3).

<sup>211</sup> 2017 UPA, at §609(d)(1).

<sup>212</sup> 2017 UPA, at §609(a).

The ALI Principles,<sup>213</sup> and an ALI Draft of a Restatement of the Law: Children and the Law,<sup>214</sup> also recognize forms of "de facto" parentage for those without biological or formal adoption ties. Each form requires both residence and consent by an existing legal "parent."

The ALI Principles recognize as a "de facto parent" one who is "other than a legal parent or a parent by estoppel" and who lived with and cared for the child for at least two years under an "agreement of a legal parent to form a parent-child relationship."<sup>215</sup> A de facto parent, unlike a legal parent or a parent by estoppel, has no presumptive right to "an allocation of decisionmaking responsibility for the child."<sup>216</sup> Further, a de facto parent has no presumptive right of "access to the child's school and health-care records to which legal parents have access by

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<sup>213</sup> ALI Principles, at §§2.03(1)(c) and 3.02(1)(c) (requirements include residence with the child, as well as "the agreement of a legal parent to form a parent-child relationship" unless the legal parent completely fails, or is unable, to perform caretaking functions").

<sup>214</sup> ALI Restatement Draft, at §1.72(a) (requirements include residence with the child, as well as establishing that "a parent consented to and fostered the formation of the parent-child relationship").

<sup>215</sup> ALI Principles, at §2.03(1)(c). Alternatively, a de facto parent is one who is other than a legal parent or a parent by estoppel and who lived with and cared for the child for at least two years "as a result of a complete failure or inability of any legal parent to perform caretaking functions." *Id.*

Precedents predating the 2000 ALI Principles recognize the concept of de facto parentage in different settings. See, e.g., *In re Kieshia E.*, 859 P.2d 1290, 1296 (Cal. 1993) (standing of a de facto parent in a juvenile delinquency proceeding); *In re Dependency of J.H.*, 815 P.2d 1380, 1384 (Wash. 1991) (in a delinquency case, permissive intervention, not intervention as of right, is available to some foster parents claiming de facto (or psychological) parent status); and *In re B.G.*, 523 P.2d 244, 254 n. 21 (Cal. 1974) (not resolving whether a de facto parent may have the same rights of notice, hearing or counsel as have natural parents in Juvenile Court Law proceedings under due process or equal protection principles). The Reporter's Notes to the 2000 ALI Principles observes the "law that most closely approximates the criteria for a 'de facto' parent relationship is that of Wisconsin" where visitation (but not custody) may be awarded "to an individual who has formed a 'parent-like relationship' with a child." §2.03, at Comment c.

<sup>216</sup> ALI Principles, at §209(2).

other law.”<sup>217</sup> A de facto parent has standing to pursue an action involving judicial allocation of custodial and decisionmaking responsibility.<sup>218</sup>

The ALI Restatement Draft describes a de facto parent as a third party who establishes that he/she "lived with the child for a significant period of time;" was "in a parental role" long enough that he/she established "a bond and dependent relationship . . . parental in nature;" he/she had no "expectation of financial compensation;" and "a parent" consented to third party's parental-like role.<sup>219</sup> So, the ALI Restatement Draft, but not the ALI Principles, invite a childcare parentage designation adversely impacting the childcare interests of an existing and nonconsenting parent.<sup>220</sup>

Before and since 2017, there exist state statutes and common law precedents on nonmarital, nonbiological, and nonadoptive childcare parentage similar to the suggested de facto parent norms. For example, before 2017 there were quite comparable Maine and Delaware statutes<sup>221</sup> and a less comparable Wisconsin Supreme Court precedent,<sup>222</sup> that were utilized by

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<sup>217</sup> ALI Principles, at §209(4).

<sup>218</sup> ALI Principles, at §2.04(1).

<sup>219</sup> ALI Restatement Draft, at § 1.72(a) (proof by clear and convincing evidence is required).

<sup>220</sup> The ALI Restatement Draft, like the 2017 UPA, on de facto parentage invites substantive Due Process violations of the childcare interests of existing and nonconsenting legal parents. See *Unconstitutional Parenthood*, at 203-205 and *E.N. v. T.R.*, 255 A.3d 1 (Md. 2021) (de facto parenthood requires consent by two existing legal parents, if there are two, or a finding of unfitness in a nonconsenting parent or a finding of "exceptional circumstances").

<sup>221</sup> Maine Rev. Stat. tit. 19-a, 1891 and Delaware Code tit. 13, 8-201(c).

<sup>222</sup> *In re Custody of H.S.H.-K.*, 533 N.W. 2d 419 (Wis. 1995) (parental-like relationship can prompt visitation rights when in child's best interests) [hereinafter *H.S.H.-K.*]. There are common law precedents elsewhere. In 2008 the South Carolina Supreme Court, adopting a Wisconsin high court analysis, determined that a nonparent was eligible for psychological parent status if a four-prong test was met. *Marquez v. Caudill*, 656 S.E.2d 737 (S.C. 2008) (following

the drafters of the 2017 UPA.<sup>223</sup> Since 2017, a few states have statutorily recognized 2017 UPA de facto parenthood.<sup>224</sup>

On occasion, statutes within a single state recognize both hold out/residency and de facto parents. Thus the Maine Parentage Act, effective in July, 2016, provides for presumed parents who resided since birth with a child for at least 2 years and “assumed personal, financial, or custodial responsibilities,”<sup>225</sup> as well as provides for de facto parents who, inter alia, resided with the child “for a significant period of time,” established with the child “a bonded and dependent relationship,” and “accepted full and permanent responsibilities as a parent . . . without

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H.S.H.-K., 533 N.W. at 435-436, which set out norms for nonparent child visitation orders). See also *Conover v. Conover*, 146 A.3d 433, 446-447 (Md. 2016) (using H.S.H.-K. in recognizing de facto parent doctrine). And in 2009, a federal appeals court noted that the Mississippi Supreme Court had long recognized that a person standing “in loco parentis,” meaning “one who has assumed the status and obligations of a parent without a formal adoption,” has the same “rights, duties and liabilities” as a natural parent. *First Colony Life Ins. Co. v. Sanford*, 555 F.3d 177 (5th Cir. 2009) (relying on, inter alia, *Favre v. Medders*, 128 So.2d 877, 879 (Miss. 1961)). By contrast, in some U.S. states where there are no de facto parent statutes, courts choose not to develop precedents because any new de facto parentage norms are the responsibility of state legislators. See, e.g., Jeffrey A. Parness, “State Lawmaking on Federal Constitutional Childcare Parents: More Principled Allocations of Powers and More Rational Distinctions,” 50 *Creighton L. Rev.* 479, 479 (2017). For a forceful argument on the need for continuing the common law “equitable parenthood doctrine” even where there are statutes, see Jessica Feinberg, “Whither the Functional Parent? Revisiting Equitable Parenthood Doctrines in Light of Same-Sex Parents’ Increased Access to Obtaining Formal Legal Parent Status,” 83 *Brooklyn L. Rev.* 55 (2017).

<sup>223</sup> 2017 UPA, at Comment to §609.

<sup>224</sup> See, e.g., Washington Rev. Stat. 26.26A.440 and 15C Vermont Stat. 501.

<sup>225</sup> 19-A Maine Rev. Stat. c. 61, 1881 (3) (eff. 7-1-16).

expectation of financial compensation.”<sup>226</sup> Similarly, there are both hold out/residency and de facto parents in Delaware,<sup>227</sup> Washington,<sup>228</sup> and Vermont.<sup>229</sup>

As with hold out/residency parentage, de facto parentage should be available in DIY AI births in the absence of a controlling statute. In some states, such parentage has already been recognized.<sup>230</sup>

## V. Conclusion

In *Gatsby v. Gatsby* in 2021, the Idaho Supreme Court determined legal parentage for a child born in October 2016 via a do-it-yourself AI to a married female couple who later divorced. In a 4-1 ruling, the court found that the Idaho AIA was the controlling law and that the couple's AI agreement failed to comply with the AIA.<sup>231</sup> The majority did not decide if the nonbirth spouse could have completed a "voluntary acknowledgement of paternity" to become a parent or had standing to seek a childcare order as a nonparent.<sup>232</sup> The nonbirth spouse was

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<sup>226</sup> 19-A Maine Rev. Stat. c. 61, 1891 (3) (eff. 7-1-16).

<sup>227</sup> Del. Code tit. 13, 8-204 (a) (5) (presumed hold out/residency parent) and Del. Code tit. 13, 8-201 (c) (de facto parent).

<sup>228</sup> Washington Rev. Stat. 26.26A.115(b) (presumed hold out/residency parent "for the first four years") and 26.26A.440 (de facto parent).

<sup>229</sup> 15C Vermont Stat. 401(a)(1) (presumed hold out/residency parent after the first two years) and 501(a) (de facto parent).

<sup>230</sup> See, e.g., *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000) (former female domestic partner of AI birth mother) and *In re Parentage of L.B.*, 122 P.3d 161, 176 (Wash. 2005) (nonstatutory de facto parentage available to former same sex partner for child born of AI).

<sup>231</sup> *Gatsby*, 495 P.3d at 1001-104.

<sup>232</sup> *Gatsby*, 495 P.3d at 1007 and 1010.

found not to "have parental rights to the child"<sup>233</sup> regardless of the harm to the child that would follow and regardless of any actual consents to shared parentage.

The couple in *Gatsby* did not consult with an attorney in agreeing to bring a child into the marriage and did not use the services of a physician.<sup>234</sup> The nonbirth spouse was foreclosed from parenthood because the agreement the couple used, "found online," suffered from "severe inadequacies."<sup>235</sup> A dissenter found the majority "exalts form over substance" and "turns a blind eye to Idaho's policy favoring legitimacy," concluding that the "unintended consequences" of the decision "are hard to quantify, but . . . they will be myriad."

The *Gatsby* ruling is troublesome on several fronts. Its problems highlight the difficulties facing intended parents employing AI, especially those without significant financial resources, female couples, and single women. The difficulties include deeming AI statutes "controlling" even where the best interests of children are stymied and intended parent pacts are disregarded entirely; constitutional concerns about equality mandates and about thwarting procreational rights, especially for those with no parentage alternatives to DIY AI; and, foreclosing informal adoptions in DIY AI settings though recognized in nonDIY settings, as with voluntary acknowledgment, residency/hold out and de facto parentage. American state statutes need to address comprehensively all those who undertake AI parentage, the ways in which preinsemination intentions can be expressed; the postinsemination acts that can prompt intended

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<sup>233</sup> *Gatsby*, 495 P.3d at 1001.

<sup>234</sup> *Gatsby*, 495 P.3d at 999.

<sup>235</sup> *Gatsby*, 495 P.3d at 999 and 1003.



AI parentage (as with VAPs, de facto parentage, and other forms of informal adoptions); and, the judicial commonlawmaking power on parentage for AI births.