




2013

# Comment: The Case of Two Biological Intended Mothers: Illustrating the Need to Statutorily Define Maternity in Maryland

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## Recommended Citation

Villareale, Catherine (2013) "Comment: The Case of Two Biological Intended Mothers: Illustrating the Need to Statutorily Define Maternity in Maryland," *University of Baltimore Law Review*: Vol. 42: Iss. 2, Article 7.  
Available at: <http://scholarworks.law.ubalt.edu/ublr/vol42/iss2/7>

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THE CASE OF TWO BIOLOGICAL INTENDED MOTHERS:  
ILLUSTRATING THE NEED TO STATUTORILY DEFINE  
MATERNITY IN MARYLAND

*Sam was born a happy and healthy baby boy, much to the delight of his mothers, Sarah and Jen. Although Jen gave birth to Sam, Jen has no genetic connection to her son. Biologically, Sarah is Sam's "ova mother"<sup>1</sup> because Sam was conceived through assisted reproductive technology using Sarah's ovum that was fertilized in vitro by an anonymous sperm donor and implanted in Jen. Both Sarah and Jen share a biological connection to Sam, Sarah through DNA and Jen through carrying him for nine months and giving birth. Consequently, Sam has two biological mothers. Yet, in Maryland, at the time of Sam's birth only Jen is legally recognized as his mother.*

I. INTRODUCTION

Maryland law fails to adequately protect the parental rights of an ova mother who provides ova to her lesbian partner so that they can conceive a child together through assisted reproductive technology (ART).<sup>2</sup> Maryland needs a maternity statute declaring that at birth an ova mother, like Sarah, is the legal mother of a child conceived through ART.<sup>3</sup> The objective of this comment is to demonstrate how statutorily defining the ova mother's role as a natural parent at birth is necessary to protect her parental rights. Without such a statute, an ova mother faces the risk of being treated by the law as an ova donor and never having her parental rights to her own child recognized.<sup>4</sup>

Part II of this comment begins with a discussion of how ova mothers in Sarah's situation in Maryland currently establish their parental rights and the inherent flaws in that system. Currently, ova mothers must depend on the consent of the birth mother and judicial determinations made in equity to establish their parental rights

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1. For purposes of this comment, I will use the terms "birth mother" and "ova mother" to differentiate between the two mothers. I define ova mother as the woman who provides an ovum to her partner to conceive a child with the intent that they both serve as mothers. The birth mother is a gestational carrier who carries and gives birth to the child with intent to also be the child's mother.
  2. See *infra* Part II. *Black's Law Dictionary* defines "assisted reproductive technology" as "[a]ny medical means of aiding human reproduction, esp. through laboratory procedures." BLACK'S LAW DICTIONARY 139 (9th ed. 2009).
  3. See *infra* Part II.
  4. See *infra* Part II.

because there is no law that recognizes their maternity.<sup>5</sup> Should the couple breakup, a court resolving a dispute between the ova mother and the birth mother would have no statutory law to rely on in making its decision as to the legal parentage of the child.<sup>6</sup>

In Part III, I will discuss legal precedents in other states, established through case law involving disputes between an ova mother and a birth mother. While judges in these cases ultimately concluded that the birth mother and the ova mother had coequal parental rights, these decisions relied on equity and construction of law, thereby leaving room for judicial discretion and the possibility of varying outcomes in future cases.<sup>7</sup> While legally sound, such decisions are subject to challenge and do not provide future litigants with the certainty appropriate for issues of parenthood and family.<sup>8</sup>

In Part IV, I will examine how parentage statutes adopted in other states handle issues of disputed maternity for children born as a result of ART. Because many states that have statutes establishing parental rights have adopted either the 1973 or the 2000 version of the Uniform Parentage Act (UPA or the Act),<sup>9</sup> my analysis will focus on the implications of both versions of the Act and how they define maternity.<sup>10</sup> I will also examine and critique the American Bar Association Model Act Governing Assisted Reproductive Technology's (ABA Model Act) determination of maternity.<sup>11</sup>

In Part V, I will discuss my proposal for a statute in Maryland that would define the ova mother in this situation as a legal and natural mother of the child at birth. My proposed statute defining maternity

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5. See *infra* Part II.

6. See *infra* Part II.

7. See *infra* Part III.

8. See *infra* Parts II–IV.

9. See UNIF. PARENTAGE ACT, Prefatory Note 1 (2000) (amended 2002). The Uniform Parentage Act (UPA or Act) provides a set of uniform rules for establishing parental rights, which may be adopted by state legislatures. Originally approved by the National Conference of Commissioners on Uniform State Laws in 1973, the Act was revised in 2000 and amended in 2002. This revision incorporated provisions from both the *Uniform Putative and Unknown Fathers Act* (UPUFA) and the *Uniform Status of Children of Assisted Conception Act* (USCACA). Both the 1973 and the 2000 versions of the UPA are most noted for promulgating the presumption of a parent–child relationship between children and their unmarried parents. The amended 2000 Act features significant changes based upon scientific advancements in the area of assisted reproductive technology beyond just artificial insemination. Compare UNIF. PARENTAGE ACT § 3, 5 (1973), available at <http://www.uniformlaws.org/shared/docs/parentage/upa73.pdf>, with UNIF. PARENTAGE ACT § 201, 701 (2000) (amended 2002), available at [http://www.uniformlaws.org/shared/docs/parentage/upa\\_final\\_2002.pdf](http://www.uniformlaws.org/shared/docs/parentage/upa_final_2002.pdf).

10. See *infra* Part IV.A–B.

11. See *infra* Part IV.C.

borrowed from the concepts in both versions of the UPA and the ABA Model Act, and expands upon them to specifically address a scenario where the birth mother and the ova mother are a lesbian couple who collaborate to conceive a child with the shared intention of being coequal parents.<sup>12</sup>

## II. CURRENT STATE OF MARYLAND LAW FOR OVA MOTHERS

While Maryland law delineates how to establish paternity for a child,<sup>13</sup> there is no statutory definition of maternity.<sup>14</sup> The law apparently presumes that the woman who gives birth is the child's mother.<sup>15</sup> Consequently, when a lesbian couple in Maryland has a child through ART, whereby one partner carries the child and the other partner provides the ovum that was fertilized to conceive the child, only the birth mother is automatically recognized as a legal parent.<sup>16</sup> Without additional legal action, the child's ova mother will remain a legal stranger to her own biological child. The implications of this are wide-ranging.<sup>17</sup>

With the recent passage of same sex marriage in Maryland,<sup>18</sup> two married women who conceive a child together could argue they are both legal mothers because a "child born or conceived during a marriage is presumed to be the legitimate child of both spouses."<sup>19</sup> Relying on the marital presumption, however, might not provide adequate protection of parental rights absent a statutory definition of maternity.<sup>20</sup> In *In re Adoption of Sebastian*, an ova mother who was married to her child's birth mother petitioned the Surrogate Court of New York County for adoption of the child.<sup>21</sup> The court noted that the child had a recognized and protected parent-child relationship

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12. See *infra* Part V.

13. MD. CODE ANN., FAM. LAW § 5-306 (LexisNexis 2006).

14. See FAM. LAW § 5-301(f) (defining parent as an individual who meets the criteria to qualify for paternity under section 5-306 or "is the mother"). The statute includes no further definition of mother. *Id.*

15. See *id.*

16. See *id.* The statute provides no vehicle for recognizing the maternity rights of a genetic mother who is not the birth mother. See *id.*

17. See *infra* notes 32–37 and accompanying text.

18. MD. CODE ANN., FAM. LAW § 2-201 (LexisNexis 2012) (effective Jan. 1, 2013); Civil Marriage Protection Act, ch. 2, 2012 Md. Laws 9.

19. MD. CODE ANN., EST. & TRUSTS § 1-206 (LexisNexis 2012).

20. See *In re Adoption of Sebastian*, 879 N.Y.S.2d 677, 681, 692–93 (Sur. Ct. 2009) (holding that absent a maternity statute in New York adoption was the sole means for an ova mother to establish legal parentage that would be recognized across the states to the child of her wife the birth mother).

21. *Id.* at 679.

with both mothers in New York because New York recognized the marriage between the two women as valid, but found that a judicial determination of parentage was necessary because most states in the country would not recognize the marriage.<sup>22</sup> Because the New York statutory code had no provision for judicially establishing maternity for an ova mother, the court held that adoption would be necessary to provide certainty that the parent-child relationship would be recognized and protected across the states.<sup>23</sup> While there is currently a split among the United States Circuit Courts of Appeal regarding whether the public policy exception to the Full Faith and Credit Clause permits a state to not recognize a judicial decree of parentage such as adoption,<sup>24</sup> a judicial determination of parentage remains the strongest measure to ensure that the parent-child relationship is recognized as states are not bound to recognize same-sex marriages formed in other states.<sup>25</sup>

Parenthood is a constitutionally protected fundamental right that grants parents the right to “make decisions concerning the care, custody, and control of their children.”<sup>26</sup> Parenthood also implicates the constitutional right to privacy that grants fit parents the autonomy to make parenting decisions without state intervention.<sup>27</sup> Yet if the law does not recognize the ova mother’s parental status, she would be treated as a third party with no right to custody or visitation of the child except as permitted by the child’s legal parent, the birth

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22. *Id.* at 682–83, 692–93. Same sex marriage is only permitted in nine states including Maryland. See CONN. GEN. STAT. § 46b–20 (2012); ME. REV. STAT. tit. 19, § 650 (2012); MD. CODE ANN., FAM. LAW § 2-201 (LexisNexis 2012); N.H. REV. STAT. ANN. § 457:1-a (2012); N.Y. DOM. REL. LAW § 10-a (McKinney 2012); VT. STAT. ANN. tit. 15, § 8 (2012); WASH. REV. CODE § 26.04.010 (2012); Varnum v. Brien, 763 N.W.2d 862, 872 (Iowa 2009) (holding that state statute limiting civil marriage to a union between a man and a women violates the equal protection clause of the Iowa Constitution); Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003) (holding that pursuant to the Massachusetts Constitution the state may not deny the protections of civil marriage to same sex couples). Even though a same-sex marriage may be legally formed in some states, courts across the country have held that the Full Faith and Credit Clause of the United States Constitution does not require recognition of the marriage because it is against the state’s public policy. See, e.g., Wilson v. Ake, 354 F. Supp. 2d 1298, 1309 (M.D. Fla. 2005); *In re Marriage of J.B. and H.B.*, 326 S.W.3d 654, 659 (Tex. App. 2010).
  23. *In re Adoption of Sebastian*, 879 N.Y.S.2d at 691–92.
  24. Compare *Finstuen v. Crutcher*, 496 F.3d 1139, 1141–42 (10th Cir. 2007) (holding that the Full Faith and Credit Clause required Oklahoma to recognize adoptions by same-sex couple validly decreed in other states), with *Adar v. Smith*, 639 F.3d 146, 149 (5th Cir. 2011) (holding that Louisiana was not required to recognize an adoption by a same-sex couple validly decreed in another state).
  25. See *supra* note 22.
  26. *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000) (plurality opinion) (citing *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)).
  27. *Id.* at 77–79 (Souter, J., concurring).

mother.<sup>28</sup> If the couple was unmarried and broke up, the ova mother would have no standing to file for custody, or even visitation.<sup>29</sup> Moreover, even if the couple was married, but they moved to a state that does not recognize their marriage, the ova mother's parental rights might not be protected.<sup>30</sup> This lack of legal protection is not only harmful to the ova mother, but is also harmful to the child.<sup>31</sup> Without a recognized parent-child relationship with the ova mother, the child is denied rights of support from the non-legally recognized mother,<sup>32</sup> rights of inheritance,<sup>33</sup> social security benefits,<sup>34</sup> and the emotional benefits of having two parents.

### A. Orders of Parentage

In the absence of a statute that establishes maternity, a lesbian who provides ova to her partner who gives birth to their child may have three options for establishing her parental rights in Maryland.<sup>35</sup> None of these options have any statutory basis in Maryland law, rather they rely on judicial determinations made in equity and construction of law.<sup>36</sup> First an ova mother may petition for a pre-birth or post-birth order from the court declaring that she and the child's birth mother are the child's legal parents.<sup>37</sup> In the petition for a pre-birth order, the ova mother and the birth mother clearly state their relationship to each other and that they are both the intended legal parents to the

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28. See *Koshko v. Haining*, 398 Md. 404, 443, 921 A.2d 171, 194 (2007) (holding that the parental unfitness and exceptional circumstances threshold applied to third party custody disputes also determines third party visitation); *McDermott v. Dougherty*, 385 Md. 320, 418–19, 869 A.2d 751, 808–09 (2005) (holding that absent extraordinary circumstances granting custody to a third party infringes on a fit parent's constitutional right to parenthood).
  29. See *Koshko*, 398 Md. at 443, 921 A.2d at 194; *McDermott*, 385 Md. at 418–19, 869 A.2d at 808–09.
  30. See *supra* notes 18–25 and accompanying text.
  31. See *infra* notes 32–34 and accompanying text; *supra* notes 27–29 and accompanying text.
  32. MD. CODE ANN., FAM. LAW § 5-203(b) (LexisNexis 2006).
  33. See MD. CODE ANN., EST. & TRUSTS § 1-209 (LexisNexis 2011) (defining issue). Absent a determination of parentage, the child would not be considered the issue of his genetic mother. *Id.* Consequently, he would not be able to inherit under Maryland's laws of intestacy. *Id.* § 1-210.
  34. See 42 U.S.C. § 402(d)(1) (2006).
  35. Telephone Interview with Margaret Swain, R.N., J.D., Law Office of Margaret Swain (Nov. 9, 2011); see also *supra* notes 37, 44–45, 59 and accompanying text.
  36. See *infra* Part II.A–B.
  37. Telephone Interview with Margaret Swain, *supra* note 35.

child.<sup>38</sup> They also include affidavits from the reproductive endocrinologist who performed the procedure, to support that both the ova mother and the birth mother clearly expressed their intent to be parents to the child.<sup>39</sup> Practitioners in this area of law recommend that the mothers create an ART contract, before any medical procedures are performed, that establishes that the ova mother is providing her ova to the birth mother without relinquishing her maternity rights to the resulting child.<sup>40</sup> Under this contract, the birth mother and ova mother agree that they are both the intended legal parents of the child.<sup>41</sup> This contract is also included with the petition for a pre-birth or post-birth order.<sup>42</sup>

If the judge finds the evidence in the petition sufficient, he or she might issue an order of parentage before the child is born, establishing that both women are the child's legal parents.<sup>43</sup> Judges may be unwilling, however, to grant an order declaring parentage before the child is born.<sup>44</sup> The parties may have to wait until the child is born and get a post-birth order of parentage.<sup>45</sup> Post-birth orders declaring parentage, if issued, may be granted based on the same evidence as pre-birth orders and have the same legal effect: both women are judicially recognized as parents.<sup>46</sup>

The problem in relying on a court order declaring parentage is that the legal authority of these orders has not been established because there are no reported cases in Maryland wherein a party has challenged such an order.<sup>47</sup> Consequently, the Maryland Court of Appeals has not had the opportunity to opine on their legality.<sup>48</sup> In declaring that both mothers are legal parents to the child, the court uses its equitable powers to confer judicial recognition on the intent of the mothers in creating the child and construes existing statutory

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38. *Id.* See also CHARLES P. KINDREGAN, JR. & MAUREEN MCBRIEN, ASSISTED REPRODUCTIVE TECHNOLOGY: A LAWYER'S GUIDE TO EMERGING LAW AND SCIENCE 359-60 (2d ed. 2011).

39. Telephone Interview with Margaret Swain, *supra* note 35.

40. KINDREGAN & MCBRIEN, *supra* note 38, at 334-39.

41. *Id.*

42. *Id.* at 333-39; Telephone Interview with Margaret Swain, *supra* note 35.

43. KINDREGAN & MCBRIEN, *supra* note 38, at 356-64; Telephone Interview with Margaret Swain, *supra* note 35.

44. Telephone Interview with Margaret Swain, *supra* note 35.

45. KINDREGAN & MCBRIEN, *supra* note 38, at 357-64; Telephone Interview with Margaret Swain, *supra* note 35.

46. Telephone Interview with Margaret Swain, *supra* note 35.

47. *Id.*

48. See *id.*

law to infer the power to adjudicate maternity.<sup>49</sup> However, the Maryland Code does not statutorily provide for judicial determinations of maternity, as it does for paternity outside of the context of adoption proceedings.<sup>50</sup> This is presumably because the legislature did not foresee maternity requiring judicial determination in the same way that paternity can.<sup>51</sup> Consequently, in deciding whether or not to grant the order, judges make their decisions based in equity and construction of law.<sup>52</sup>

Without a statutory basis for these decisions, there is a degree of uncertainty about whether the orders would survive a challenge. Imagine a scenario where a couple who was granted a pre-birth order declaring both the ova mother and the birth mother-to-be the legal parents of child breaks up before the child is born or shortly thereafter. The mother carrying the child might decide she no longer wants to be connected with the ova mother and seek to disestablish the ova mother's maternity by petitioning the court to invalidate the order. The birth mother could reasonably argue that, in law, she is the only legally recognized mother of the child,<sup>53</sup> and that the order of parentage cannot and should not be enforceable because it infringes on her fundamental right to parenthood.<sup>54</sup> While the birth mother consented to the order and expressed her intent that both she and the ova mother were the intended parents, the birth mother may not be estopped from challenging it if a court finds no permissible legal basis for the order.<sup>55</sup> The lack of statutory basis for the order<sup>56</sup> combined with a lack of prior case law in Maryland recognizing intent as a factor in determining parentage<sup>57</sup> could lead a court to invalidate the order. As a result of such a decision, the ova mother would be divested of her parental rights.<sup>58</sup> This hypothetical scenario

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49. MD. CODE ANN., FAM. LAW § 5-1032 (LexisNexis 2006) (outlining the process whereby the court has the power to pass an order declaring paternity); Telephone Interview with Margaret Swain, *supra* note 35.
  50. FAM. LAW § 5-1032; *see also In re Roberto d.B.*, 399 Md. 267, 279–80, 923 A.2d 115, 122–23 (2007).
  51. *In re Roberto d.B.*, 399 Md. at 279, 923 A.2d at 122 (“[T]he legislature did not contemplate anything outside of traditional childbirth.”).
  52. *See* FAM. LAW § 5-1032; *supra* notes 46–50 and accompanying text.
  53. *See supra* notes 16, 47–51 and accompanying text.
  54. *See Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion).
  55. *See supra* notes 47–48 and accompanying text.
  56. *See supra* text accompanying notes 47–51.
  57. *See In re Roberto d.B.*, 399 Md. 267, 284–85 n.15, 923 A.2d 115, 125 n.15 (2007) (asserting that the court was not creating an “intent” test for women).
  58. *See supra* notes 28–33 and accompanying text.



illustrates the risk ova mothers are forced to take in relying on these judicial decisions made in equity.

### *B. Stepparent or Second Parent Adoption*

In the event that the couple cannot obtain an order of parentage either pre-birth or post-birth, their final option for gaining recognition of dual parentage is for the ova mother to adopt the child.<sup>59</sup> In fact, some Maryland practitioners recommend clients pursue adoption rather than an order of parentage because adoption is less liable to attack since it is based in law.<sup>60</sup> The couple may petition the court for a stepparent adoption if they are married or a second parent adoption if they are not.<sup>61</sup> In the stepparent and second parent adoption processes, the birth mother who is considered the child's only legal parent consents to the adoption without terminating her parental rights.<sup>62</sup> The ova mother becomes legally recognized as the child's second parent with "all rights and obligations of a natural parent."<sup>63</sup>

There are several problems with the stepparent or second parent adoption solution. The primary purpose of adoption is "to create a legal connection between an adoptive parent and child who are not biologically related, thereby conferring on each legal rights and obligations that did not previously exist between them."<sup>64</sup> In *Green v. Sollenberger*, the Maryland Court of Appeals held that natural parents are not permitted to adopt their own children because these legal rights and obligations between parent and child already exist.<sup>65</sup> The legality of an ova mother adopting her own child depends on the definition of natural mother. Where a woman becomes pregnant

59. Telephone Interview with Margaret Swain, *supra* note 35.

60. See MD. CODE ANN., FAM. LAW §§ 5-3B-20 to -21 (LexisNexis 2006); Telephone Interview with Michele Zavos, Esq., Zavos Juncker Law Grp. PLLC (July 17, 2012). Zavos is also a member of the American Academy of Adoption Attorneys and the American Academy of Assisted Reproductive Technology Attorneys. *About Michele Zavos*, ZAVOS JUNCKER LAW GROUP, PLLC, <http://www.zavoslawgroup.com/about.html> (last visited Jan. 11, 2013). There is also a financial incentive for pursuing adoption over an order of parentage because many families who adopt children can take advantage of a federal tax credit to recoup their legal expenses. See I.R.C. § 23 (2006) amended by American Taxpayer Relief Act of 2012, Pub. L. 112-240, 126 Stat 2313 (2013).

61. See FAM. LAW §§ 5-3B-20 to -21.

62. FAM. LAW §§ 5-3B-20 to -21; see also MD. R. FAM. LAW ACTIONS FORM 9-102.5 (LexisNexis 2012). This form allows a parent to consent to an independent adoption without termination of parental rights. *Id.*

63. MD. CODE ANN., FAM. LAW § 5-3B-25(b)(1) (LexisNexis 2006); *Beckman v. Boggs*, 337 Md. 688, 692, 655 A.2d 901, 903 (1995), *overruled on other grounds by* *Koshko v. Haining*, 398 Md. 404, 921 A.2d 171 (2007).

64. *Green v. Sollenberger*, 338 Md. 118, 127-30, 656 A.2d 773, 777-79 (1995).

65. *Id.*

through in vitro fertilization using a donated egg and is the intended mother of the child rather than a gestational surrogate, the law would recognize her as a “natural parent.”<sup>66</sup> However, if the birth mother were a gestational surrogate who was not the intended mother of the child she might not be considered a natural parent.<sup>67</sup> In *In re Roberto d.B.*, the Maryland Court of Appeals held that a woman in this position could disestablish her maternity in the same manner as a man can disestablish paternity.<sup>68</sup> Here, the court used an equal protection analysis to interpret Maryland’s parentage statutes as affording women the same opportunity to deny parentage as men.<sup>69</sup>

If equal protection affords women the same opportunity to deny parentage as men, by inference women should also have the same opportunity as men to establish parentage.<sup>70</sup> If the intended parent of the child carried by a gestational surrogate were the child’s ova mother instead of the genetic father, would she be considered a “natural parent” in the same way that a man would? She shares a genetic connection to the child just as a biological father does. Here the ova mother might be able to obtain a court order establishing her as the natural parent as opposed to the surrogate.<sup>71</sup>

In cases where the gestational carrier is not a surrogate but an intended mother and lesbian partner of the ova mother, the ova mother who provided ova with the intent to also become a parent seems to lose her status as a natural mother.<sup>72</sup> The gestational carrier’s choice of whether to be a surrogate or a mother determines the rights of the ova mother.<sup>73</sup> If the court is willing to hold that an ova mother could be the natural mother of a child born to a gestational surrogate,<sup>74</sup> a stepparent or second parent adoption in cases where the ova mother adopts her genetic child carried by her partner seems contrary to the court’s prior holdings that adoption by a natural parent is not appropriate.<sup>75</sup> This scenario illustrates the need for a statutory definition of maternity that allows for recognition of

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66. See *In re Roberto d.B.*, 399 Md. 267, 284 & n.15, 285, 294–96, 923 A.2d 115 n.15, 126–27, 131–33 (2007). By allowing the birth mother to disestablish her maternity, the court tacitly accepted that she will be the mother unless she does so. See *id.*

67. See *id.*

68. *Id.* at 284 & n.15, 285, 923 A.2d at 125 & n.15, 126.

69. *Id.* at 279–80, 923 A.2d at 122–23.

70. See *id.* at 274–77, 279, 284–85, 923 A.2d at 120–21, 124–26.

71. See *supra* Part II.A.

72. See *infra* Parts II.C., III.A–B.

73. See *infra* Parts II.C., III.A–B; *supra* Part II.A.

74. See *supra* Part II.A. This happens when the court issues an order of parentage declaring the genetic mother the natural mother. See *supra* Part II.A.

75. See *Green v. Sollenberger*, 338 Md. 118, 127–29, 656 A.2d 773, 777–79 (1995).

the parental status of both the ova and birth mothers when they are in a lesbian relationship and created the child with the intent to be equal parents. As Professor Nancy D. Polikoff put it, “a mother should not have to adopt her own child.”<sup>76</sup> That is exactly what happens when an ova mother has to adopt her biological child carried by her lesbian partner or wife.<sup>77</sup>

If the couple is not married and chooses to petition for a second parent adoption to establish parental rights, they may face additional challenges, as second parent adoption is a legal gray area in Maryland.<sup>78</sup> Because adoption exists only by statutory creation, adoptions must strictly comply with the provisions in the adoption statute.<sup>79</sup> The adoption statute in Maryland is silent on whether unmarried couples can adopt a child together; therefore, it is not clear if these second parent adoptions comply with the statute.<sup>80</sup> Unmarried couples petitioning for second parent adoptions make the argument that second parent adoption is analogous to stepparent adoption, which is referenced in the Maryland Code.<sup>81</sup> The unmarried couple has to argue that their relationship is sufficiently analogous to a marriage—that the partner of the prospective adoptee’s parent is like a spouse.<sup>82</sup>

Circuit Courts in Maryland remain split;<sup>83</sup> some have granted second parent adoptions to unmarried gay couples while other courts have denied them because the statute is silent on whether members of an unmarried couple can adopt a child together in Maryland.<sup>84</sup> As the law in Maryland currently stands, whether a second parent adoption

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76. Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. C.R. & C.L. 201, 201–203 (2009).

77. See *supra* text accompanying notes 59–71.

78. See Steve Kilar, *Same-sex Couples Find an Adoption Haven in City’s Circuit Court*, BALT. SUN, Nov. 13, 2011, at 1 (discussing the disagreement among Maryland Circuit Courts regarding the legality of second parent adoptions by unmarried couples); Carolyn Thaler, *Second Parent Adoption—Is it Legal in Maryland?*, FAM. L. NEWSL. (Md. State Bar Ass’n, Balt., Md.), Apr. 2010, at 16, 16–17 (arguing that second parent adoption is not legal in Maryland because it is not provided for in the adoption statute).

79. *Green*, 338 Md. at 120–121, 656 A.2d at 774 (citing Bd. of Educ. of Montgomery Cnty v. Browning, 333 Md. 281, 286, 635 A.2d 373, 376 (1994)).

80. See MD. CODE ANN., FAM. LAW § 5-3B (LexisNexis 2006).

81. See FAM. LAW §§ 5-3B-13, -21 (referring to “an adoption by a spouse of the prospective adoptee’s parent”).

82. See Thaler, *supra* note 78.

83. See Kilar, *supra* note 78.

84. See FAM. LAW § 5-3B; Kilar, *supra* note 78.

will be granted depends to a great extent on the judge and the venue where a couple files.<sup>85</sup>

Given the issue of whether adoption is appropriate in cases involving an ova mother and a birth mother in a lesbian relationship, it is clear that adoption is an inadequate measure for establishing parental rights for the ova mother.<sup>86</sup> Furthermore, requiring the ova mother to pursue adoption in order to establish parentage imposes upon her the added and unfair expense of all the court costs incurred in the adoption process on top of the already high cost of conceiving the child through ART.<sup>87</sup> Because most families who adopt can recoup their expenses through a federal tax credit, the tax payers end up footing the bill for this inadequate solution.<sup>88</sup> Additionally, the process wastes judicial resources and is time consuming.

### C. Current Remedies Require Consent

While orders of parentage and adoption are inherently flawed measures for establishing parentage because they rely on a construction of laws that never conceived of situations where a child has two biological intended mothers, their biggest weakness lies in the fact that they require the consent of the birth mother in order for the ova mother to have any parental rights.<sup>89</sup> Domestic discord is not limited to heterosexual couples and it is possible that the couple could break up before legal parenthood for the ova mother is established. The ova mother would then be left in the tenuous position of having to depend on the magnanimity of her ex-partner to consent to the establishment of her parental rights.<sup>90</sup> Unlike the birth mother, whose rights are automatically recognized, the ova mother's rights are contingent on consent that she might not receive.<sup>91</sup>

If the birth mother fails to consent, the ova mother would be treated as a third party and not as a parent.<sup>92</sup> Because parenthood is a

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85. *Id.*

86. *See supra* notes 63–89 and accompanying text.

87. *See Donor Eggs*, AM. PREGNANCY ASS'N, <http://www.americanpregnancy.org/infertility/donoreggs.html> (last visited Jan. 11, 2013) (estimating the cost of each in vitro fertilization cycle involving donor eggs to be between \$15,000 and \$20,000). While most families may be able to recoup their adoption expenses through the adoption tax credit, they have to be able to pay those legal fees initially. *See supra* note 60 (explaining the tax credit for families who adopt under I.R.C. § 23 (2006)).

88. *See supra* note 60 (explaining that families who adopt children can claim a tax credit to recoup their legal expenses under I.R.C. § 23 (2006)).

89. *See supra* Part II.A–B.

90. *See supra* Part II.A–B.

91. *See supra* Part II.A–B.

92. *See supra* notes 17–34 and accompanying text.

fundamental right and the court presumes that a fit parent acts in the best interest of the child,<sup>93</sup> the ova mother would face significant legal hurdles to establish any custody or visitation rights to the child if she is viewed as a third party rather than a legal parent.<sup>94</sup> To have any rights to visitation or custody as a third party in Maryland, the ova mother would have to prove that the birth mother was unfit or that there were “extraordinary circumstances” that make not awarding custody detrimental to the child and that granting her custody is in the best interest of the child.<sup>95</sup> The fact that the ova mother has been acting as the child’s parent does not in and of itself constitute extraordinary circumstances.<sup>96</sup> Furthermore, the couple could break up before the child is even born.

Without a statute that recognizes her parental status from the time the child is conceived, the ova mother faces an uphill battle to establish her parentage that depends on judicial determinations and the consent of her partner.<sup>97</sup> Whether a Maryland court would hold that an ova mother providing her egg to her lesbian partner with the intent that they would both serve as biological mothers to the child constitutes “extraordinary circumstances” is hard to predict.<sup>98</sup> It would be a case of first impression for the state, and the Maryland Code provides little guidance.<sup>99</sup> Maryland courts would likely look to other jurisdictions across the country to see how they have handled similar situations.

### III. PRIOR CASE LAW FROM OTHER JURISDICTIONS INVOLVING DISPUTES BETWEEN AN OVA MOTHER AND A BIRTH MOTHER IN A LESBIAN RELATIONSHIP

There is surprisingly little case law regarding disputes between couples where both female partners shared a biological connection to the child they conceived through ART. In fact, there are only two cases that are directly analogous to the issue at hand.<sup>100</sup>

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93. See *Troxel v. Granville*, 530 U.S. 57, 68 (2000) (plurality opinion).

94. *McDermott v. Dougherty*, 385 Md. 320, 418–19, 869 A.2d 751, 807–09 (2005).

95. *Id.*

96. *Janice M. v. Margaret K.*, 404 Md. 661, 695, 948 A.2d 73, 93 (2008) (holding that a de facto parent relationship with a child “is a factor in finding exceptional circumstances” but it is not determinative).

97. See *supra* Part II.A–B.

98. See *McDermott*, 385 Md. at 417–19, 869 A.2d at 808–09.

99. See *supra* Part II.A–B.

100. See *infra* Part III.A–B.

*A. K.M. v. E.G.*

In *K.M. v. E.G.*, the Supreme Court of California held that a child could have two natural mothers.<sup>101</sup> The parties in *K.M.* were an estranged lesbian couple.<sup>102</sup> One partner gave birth to twins after being impregnated through in vitro fertilization using her partner's egg.<sup>103</sup> The ova mother never adopted the twins and the birth mother was the sole parent listed on the birth certificate.<sup>104</sup>

A central issue in the case was whether California's statute governing sperm donation, which held that a man is not the father if he supplies semen to inseminate a woman who is not his wife,<sup>105</sup> applied in this scenario.<sup>106</sup> In arguing that the ova mother was not the girls' natural mother and had no parental rights to the children, the birth mother asserted that the ova mother was akin to a sperm donor.<sup>107</sup> Under this interpretation, the ova mother waived any parental rights she had as the genetic mother of the child by donating her ova.<sup>108</sup> However, the court held that this statute did not apply because the ova mother "supplied her ova to impregnate her lesbian partner in order to produce children who would be raised in their joint home."<sup>109</sup> The ova mother was not a donor because she provided the ova with the intent to be a mother to the child.<sup>110</sup>

In rendering its decision that both women were natural mothers to the twins, the *K.M.* court applied California's UPA, which contains two key provisions regarding the determination of maternity.<sup>111</sup> The first provision provides that a parent-child relationship may be established between a child and the natural mother "by proof of her having given birth to the child."<sup>112</sup> The California UPA, however, also recognizes that the birth mother is not necessarily the natural

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101. *K.M. v. E.G.*, 117 P.3d 673, 675 (Cal. 2005).

102. *Id.*

103. *Id.*

104. *Id.* at 676-77.

105. CAL. FAM. CODE § 7613(b) (West 2012). This section is substantially similar to Section 5 of the 1973 Uniform Parentage Act. *Compare id.*, with UNIF. PARENTAGE ACT § 5 (1973).

106. *K.M.*, 117 P.3d at 676-77.

107. *Id.*

108. *Id.* at 677.

109. *Id.* at 678.

110. *Id.* at 682.

111. CAL. FAM. CODE § 7610(a) (West 2012) (codifying UNIF. PARENTAGE ACT § 3 (1973) into California state law); CAL. FAM. CODE § 7650(a) (West 2012) (codifying UNIF. PARENTAGE ACT § 21 (1973) into California state law).

112. FAM. CODE § 7610(a).

mother and that maternity could be disputed.<sup>113</sup> In the event of a dispute regarding maternity, the statute states that “[a]ny interested person may bring an action to determine the existence or nonexistence of a mother and child relationship. Insofar as practicable, the provisions of this part applicable to the father and child relationship apply.”<sup>114</sup>

The court in *K.M.* relied on the precedent set out in *Johnson v. Calvert*, another case involving disputed parentage between a gestational surrogate and the child’s genetic parents.<sup>115</sup> In *Johnson*, a gestational surrogate, impregnated via in vitro fertilization using gametes from the married couple who was the child’s intended parents, sued to be declared the child’s mother.<sup>116</sup> The court held that the child’s genetic parents were the child’s natural and legal parents.<sup>117</sup> Both women in the case presented proof per the requirements of California’s parentage statute that they were the child’s natural mother: a genetic connection for the ova mother and proof of giving birth for the surrogate.<sup>118</sup> Looking at the intent of the parties as expressed in the surrogacy agreement, the court concluded that where the ova mother and the birth mother are not the same; “she who intended to bring about the birth of a child that she intended to raise as her own—is the natural mother.”<sup>119</sup> Based on the surrogacy agreement, the birth mother was never the intended parent of the resulting child; rather the genetic mother and father were the intended parents.<sup>120</sup>

Where the parentage claims in *Johnson* were mutually exclusive, the ova mother in *K.M.* acknowledged that the birth mother was also the twins’ mother.<sup>121</sup> Her maternity claim was in addition to the birth mother’s.<sup>122</sup> In *Johnson* the court used an intent test to break a tie between two competing claims for parentage, but the *K.M.* court held that where there was no surrogacy agreement extinguishing parental rights, a child could have two natural mothers under California’s parentage statute.<sup>123</sup> There was a question of fact regarding whether the ova mother waived her parental rights when she signed the donor

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113. *Id.* § 7650(a).

114. *Id.*

115. *K.M.*, 117 P.3d at 678–79 (citing *Johnson v. Calvert*, 851 P.2d 776 (1993)).

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

117. *Id.*

118. *Id.* at 780–81 (citing CAL. EVID. CODE §§ 890–97 (repealed 1994)).

119. *Id.* at 782.

120. *Id.*

121. *K.M. v. E.G.*, 117 P.3d 673, 680–81 (Cal. 2005).

122. *Id.* at 681.

123. *Id.*

agreement at the fertility clinic.<sup>124</sup> However, the court in *K.M.* found her intent to raise the child in a joint home with the birth mother dispositive noting that:

A woman who supplies ova to be used to impregnate her lesbian partner, with the understanding that the resulting child will be raised in their joint home, cannot waive her responsibility to support that child. Nor can such a purported waiver effectively cause that woman to relinquish her parental rights.<sup>125</sup>

The ova mother's claim to parenthood was "equal to, and arose at the same time" as the birth mother's claim.<sup>126</sup>

*B. T.M.H. v. D.M.T.*

Where the California courts in *K.M.* and *Johnson* had a statutory framework in the form of California's UPA in which they assessed the disputed maternity of the parties,<sup>127</sup> Maryland has no such statutory framework because the Maryland Code does not define maternity.<sup>128</sup> Similar to Maryland, Florida has no statutory framework for determining disputed maternity.<sup>129</sup> But in *T.M.H. v. D.M.T.*, the Florida District Court of Appeal had to resolve whether an ova mother and a birth mother could share parental rights.<sup>130</sup> Florida currently has a statute regarding gamete donation holding that "[t]he donor of any egg, sperm or pre-embryo, other than the commissioning couple or a father who has executed a preplanned adoption agreement . . . shall relinquish all maternal or paternal rights and obligations with respect to the donation or the resulting children."<sup>131</sup> The trial court held that the ova mother was a donor under the meaning of the statute and that she waived all maternal rights when she transferred the ovum to her partner.<sup>132</sup> The appellate court reversed, holding that the trial court's interpretation of the

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124. *Id.* at 676–78.

125. *Id.* at 682.

126. *Id.*

127. *See supra* Part III.A.

128. *See supra* notes 13–16 and accompanying text.

129. *See T.M.H. v. D.M.T.*, 79 So.3d 787, 803–04 (Fla. Dist. Ct. App. 2011) (Monaco, J., concurring); *supra* notes 13–16 and accompanying text.

130. *T.M.H.*, 79 So.3d at 788.

131. FLA. STAT. § 742.14 (2012).

132. *T.M.H.*, 79 So.3d at 788, 790–91.



statute was unconstitutional, and recognizing that both the ova mother and the birth mother had parental rights to the child.<sup>133</sup>

The case centered on interpreting the term donor, which the statute does not define.<sup>134</sup> The dissent interpreted donor to include any individual who transfers gametes and does not fall within certain narrow exceptions.<sup>135</sup> Thus, a lesbian transferring her ova to her partner is a mere donor regardless of intent.<sup>136</sup>

The majority concluded that the dissent's interpretation of donor eliminated a lesbian's right "to procreate and parent a child of her own by transferring her ova to her lesbian partner."<sup>137</sup> The majority concluded that the dissent's interpretation of the statute violated the ova mother's rights to equal protection and privacy, and so was not a permissible interpretation.<sup>138</sup>

In this case, the ova mother shared not only a biological connection to the child as her genetic parent but also a parent-child relationship for the first several years of the child's life.<sup>139</sup> Ultimately, the court found that both the ova mother and the birth mother had constitutional rights as parents meriting equal protection.<sup>140</sup> At the same time, the court left the issue of whether the ova mother's rights were constitutionally protected open to appeal when it certified the following question to the Florida Supreme Court:

Does application of section 742.14 to deprive parental rights to a lesbian woman who provided her ova to her lesbian

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133. *Id.* at 800, 803.

134. *Id.* at 790-91.

135. *Id.* at 809 (Lawson, J., dissenting).

136. *Id.* at 809-15 (finding that the majority's interpretation of the term donor "render[ed] the statutory exceptions meaningless" and "defeat[ed] the clear purpose of the statute").

137. *Id.* at 792 (majority opinion).

138. *Id.* at 792-800. The fundamental right to privacy includes autonomy to make personal decisions regarding procreation and child rearing, and "persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do." *Id.* at 793 (quoting *Lawrence v. Texas*, 539 U.S. 558, 574 (2003)). The majority reasoned that if the statute were to automatically categorize the ova mother as a donor, it effectively denies her right to personal autonomy to make these decisions by forcing her to relinquish her maternal rights. *Id.* at 793, 798-800.

139. *Id.* at 789-90.

140. *Id.* at 802-03. The court framed the issue of whether the ova mother had constitutionally protected parental rights within the line of prior cases involving parental rights for unwed fathers. *Id.* at 797 (citing *Lehr v. Robertson* 463 U.S. 248, 261 (1983); *Caban v. Mohammed*, 441 U.S. 380, 392 (1979)). In that line of cases, the Supreme Court held that a biological connection plus an established parent child relationship is necessary before parental rights merit constitutional protection. See *Lehr*, 463 U.S. at 261; *Caban*, 441 U.S. at 392.

partner so both women could have a child to raise together as equal parental partners and who did parent the child for several years after its birth render the statute unconstitutional under the Equal Protection and Privacy clauses of the Federal and State Constitutions?<sup>141</sup>

By certifying the question for review by the Florida Supreme Court, the District Court of Appeal failed to unequivocally determine that the ova mother's parental rights are protected.<sup>142</sup>

### *C. Possible Implications of Other Jurisdictional Case Law for Maryland Courts*

Since *K.M.* and *T.M.H.* are only persuasive authority, a Maryland court would not have to rely on their precedents. Whether a Maryland court would recognize the ova mother's parental rights in the event of a dispute between a birth mother and an ova mother remains unclear.<sup>143</sup> While the court in *K.M.* recognized the parental rights of both the birth mother and the ova mother, the California court was working within the statutory framework of the UPA of 1973 that provides for resolving disputed maternity.<sup>144</sup> Maryland has no analogous parentage statute that defines maternity.<sup>145</sup> Consequently, a Maryland court could conclude that *K.M.* is unpersuasive.

The precedent from *T.M.H.* would likely be more persuasive to a Maryland court because Florida, like Maryland, lacks a definition of maternity.<sup>146</sup> If faced with the question of whether an ova mother has parental rights when the birth mother disputes them, a Maryland court would have to engage in an analysis similar to the court's analysis in *T.M.H.*<sup>147</sup> While the majority in *T.M.H.* concluded that the ova mother was indeed a legal mother with constitutionally protected rights,<sup>148</sup> the court also equivocated in its conclusion by certifying the constitutional question for the Florida Supreme Court.<sup>149</sup> The Florida Supreme Court has yet to answer that question. A Maryland court could agree with the majority opinion in *T.M.H.*

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141. *T.M.H.*, 79 So.3d at 803.

142. *See id.*

143. *See supra* Part III.A–B.

144. *See supra* Part III.A.

145. *See supra* notes 13–17 and accompanying text.

146. *See supra* Part III.B; *supra* notes 13–17 and accompanying text.

147. *See supra* Part III.B; *supra* notes 13–16 and accompanying text.

148. *See supra* note 140 and accompanying text.

149. *See supra* notes 141–42 and accompanying text.

that not recognizing the ova mother's parental rights infringes on her fundamental rights and denies her equal protection.<sup>150</sup> A Maryland court, however, might also reasonably side with the dissent in *T.M.H.* and find that the ova mother is not a mother with constitutionally protected fundamental rights.<sup>151</sup> The precedent from *T.M.H.* is not binding on a Maryland court.

Prior case law serves to further illustrate the need to define maternity so that the ova mother and birth mother can establish their roles as coequal parents from the beginning.<sup>152</sup> As Judge Sawaya noted in his concurrence in *T.M.H.*, "this unexplored legal terrain begs for legislation."<sup>153</sup> Without legislation recognizing her legal parenthood, the ova mother faces the risk of being treated as a legal stranger with no parental rights to her child.<sup>154</sup>

#### IV. ANALYSIS OF EXISTING PARENTAGE STATUTES

Maryland needs a statutory definition of maternity that would recognize the maternity of both the ova mother and the birth mother when they are in a lesbian relationship and create a child together with the intent of being coequal parents.<sup>155</sup> An effective statute that protects the rights of both mothers would recognize their coequal parental relationships with the child before the child is born. In drafting legislation to define maternity, the Maryland legislature could look to the 1973 and 2000 versions of the UPA<sup>156</sup> and the ABA Model Act<sup>157</sup> for guidance. While these statutory models do not explicitly cover the situation of an ova mother and a birth mother who are both intended parents,<sup>158</sup> they are a helpful starting point, especially since Maryland lacks any statutory framework for handling this situation.<sup>159</sup>

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150. *See supra* notes 138–40 and accompanying text.

151. *See supra* notes 135–36 and accompanying text.

152. *See supra* Part III.A–B.

153. *T.M.H. v. D.M.T.*, 79 So.3d 787, 804 (Fla. Dist. Ct. App. 2011).

154. *See supra* Part II.

155. *See supra* Part II.

156. UNIF. PARENTAGE ACT § 3 (1973) (defining how parent and child relationship is established); UNIF. PARENTAGE ACT § 106 (2000) (amended 2002) (defining how maternity is determined).

157. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 603 (2008) (defining parentage of child of assisted reproduction) *available at* <http://apps.americanbar.org/family/committees/artmodelact.pdf>.

158. *See infra* Part IV.A–C.

159. *See supra* notes 13–17 and accompanying text.

*A. Uniform Parentage Act of 1973*

The UPA was originally passed in 1973 and was updated in 2000.<sup>160</sup> The 1973 version of the UPA has been adopted and codified by eleven states.<sup>161</sup> The Act holds that “[t]he parent and child relationship between a child . . . and the natural mother may be established by proof of her having given birth to the child, or under this Act.”<sup>162</sup> The Act later notes that “provisions of this Act applicable to the father and child relationship apply” to the determination of maternity.<sup>163</sup> Thus, an ova mother who is not the birth mother would have to rely on the Act’s provisions for determining paternity to establish her maternity.<sup>164</sup>

Among the provisions for determining paternity in the Act is the rebuttable presumption of paternity where the alleged father received the child into his home and openly held the child out as his.<sup>165</sup> Applying this presumption to the determination of maternity could help an ova mother who had a parental relationship with the child carried by her lesbian partner establish her maternity.<sup>166</sup> However, this presumption does not help the ova mother whose lesbian relationship with the birth mother ends before she has the opportunity to receive the child into her home and hold him out as her own.<sup>167</sup> The statute also includes a presumption that a child born of a valid marriage is the natural child of the mother’s husband.<sup>168</sup> The other method for determining paternity described in the Act that would be applicable to establish maternity is the use of a blood test to

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160. UNIF. PARENTAGE ACT § 3 (1973); UNIF. PARENTAGE ACT § 106 (2000) (amended 2002).

161. See CAL. FAM. CODE §§ 7600–7730 (West 2012); COLO. REV. STAT. ANN. §§ 19–4–101 to –130 (West 2011); HAW. REV. STAT. ANN. §§ 584–1 to –26 (LexisNexis 2011); 750 ILL. COMP. STAT. ANN. 45/1 to 45/28 (West 2012); KAN. STAT. ANN. §§ 38–1110 to –1138 (2011); MINN. STAT. ANN. §§ 257.51–75 (West 2011); MO. ANN. STAT. §§ 210.817–854 (2011); MONT. CODE ANN. §§ 40–6–101 to –135 (2011); NEV. REV. STAT. ANN. §§ 126.011 to –371 (LexisNexis 2012); N.J. STAT. ANN. §§ 9:17–38 to –59 (West 2012); OHIO REV. CODE ANN. §§ 3111.01 to –19 (LexisNexis 2012). As previously noted, this version of the UPA adopted in California provided the basis for the decisions in *K.M. v. E.G.* and *Johnson v. Calvert*. See *supra* Part III.A.

162. UNIF. PARENTAGE ACT § 3 (1973).

163. *Id.* § 21.

164. *Id.*

165. *Id.* § 4.

166. See *K.M. v. E.G.*, 117 P.3d 673, 682 (Cal. 2005). The court relied in part on this presumption when it held that the ova mother was a legal and natural mother. See *id.* The fact that the ova mother intended to raise the child in her joint home with the birth mother was a determinative factor in the court’s decision. See *id.*

167. See UNIF. PARENTAGE ACT § 4 (1973).

168. See *id.*

establishing a genetic connection.<sup>169</sup> Using a blood test, an ova mother would be able to establish a genetic connection to her child in the same way as an alleged father's paternity is determined.<sup>170</sup>

Courts working within the statutory framework of the 1973 version of the Act have concluded that an ova mother and a birth mother can be coequal natural mothers.<sup>171</sup> However, analysis of the Act does not clearly and explicitly lead to this conclusion because the Act's limited coverage of assisted reproductive technology only deals with artificial insemination.<sup>172</sup> This provision holds that a husband who consents to the artificial insemination of his wife with donated semen is the natural father and the semen donor is not treated as a parent in law.<sup>173</sup> To establish her maternity, an ova mother has to prove she is not akin to a sperm donor described in the Act.<sup>174</sup> Courts struggling with interpretation of this provision developed intent tests to determine parentage where a child is born as a result of ART in order to reach an equitable solution that a literal interpretation of the Act would not provide.<sup>175</sup> The Act itself is silent on the issue of intent in this context.<sup>176</sup>

### *B. Uniform Parentage Act of 2000*

In 2000, the UPA was revised<sup>177</sup> and has since been adopted and codified in eight states.<sup>178</sup> With regard to the determination of maternity, the Act was amended to state that “[p]rovisions of this [Act] relating to the determination of paternity apply to determinations of maternity.”<sup>179</sup> While the language in the new act is updated, the implication of the language's meaning is substantially

169. UNIF. PARENTAGE ACT § 12 (1973).

170. *See id.* Even if the couple were legally married, this marital presumption might not provide adequate protection of parental rights. *See supra* notes 18–25 and accompanying text.

171. *See K.M.*, 117 P.3d at 682.

172. *See* UNIF. PARENTAGE ACT § 5 (1973). The Act does not even contemplate ovum donation. *See id.*

173. *See id.*

174. *See K.M.*, 117 P.3d at 675.

175. *See id.* at 677–79.

176. *See* UNIF. PARENTAGE ACT § 5 (1973).

177. *See* UNIF. PARENTAGE ACT (2000) (amended 2002). The UPA was amended in part to address the legal issues created by assisted reproduction. *See* UNIF. PARENTAGE ACT Art. 7 introductory cmt. (2000) (amended 2002).

178. ALA. CODE § 26–17–101 (Supp. 2011); DEL. CODE ANN. tit. 13, § 8–101 (Supp. 2010); N.D. CENT. CODE §§ 14–20–01 (Supp. 2011); N.M. STAT. ANN. §§ 40–11A–101 to –903 (Supp. 2011); OKLA. STAT. ANN. tit. 10, § 7700–101 (Supp. 2012); TEX. FAM. CODE ANN. § 160.001 (West Supp. 2012); WASH. REV. CODE ANN. § 26.26.011 (West Supp. 2012); WYO. STAT. ANN. §§ 14–2–401 to –907 (2011).

179. UNIF. PARENTAGE ACT § 106 (2000) (amended 2002).

similar to the 1973 version.<sup>180</sup> The Act was updated significantly to address many of the issues stemming from ART and consequently would be more useful to the Maryland legislature drafting a statute that defines maternity to recognize the parental rights of both an ova mother and a birth mother than the 1973 version.<sup>181</sup> Yet the UPA of 2000 still has shortcomings in its failure to specifically address issues related to dual maternity.<sup>182</sup>

Where the 1973 version only addressed parentage in the context of ART with regard to artificial insemination,<sup>183</sup> the updated Act of 2000 provides a broader statutory framework that addresses some of the more complex parentage issues that are now possible through ART.<sup>184</sup> The current Act shields egg and sperm donors from parentage of children conceived through ART.<sup>185</sup> It also differentiates between individuals who are true donors, those who donate gametes without the intent of becoming legal parents, and those who provide gametes with the intent to become parents.<sup>186</sup> Specifically, the Act covers paternity of children conceived through ART and recognizes intent to establish paternity stating that “[a] man who provides sperm for, or consents to, assisted reproduction by a woman . . . with the intent to be the parent of her child, is a parent of the resulting child.”<sup>187</sup> The Act does not differentiate between whether or not the man has to be married to the woman in order to be the parent of the resulting child,<sup>188</sup> but it does require written consent from both intended parents.<sup>189</sup>

There is no equivalent of this provision holding that a woman who provides ova with the intent to be a parent is a parent to the resulting child.<sup>190</sup> However, because the determination of maternity provision holds that “[p]rovisions of this [Act] relating to determination of paternity apply to determinations of maternity,” the provision could be used to establish maternity.<sup>191</sup> Under this Act, an ova mother who

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180. Compare *id.* with UNIF. PARENTAGE ACT § 21 (1973).

181. UNIF. PARENTAGE ACT Art. 7 cmt. (2000) (amended 2002).

182. See *infra* notes 183–99 and accompanying text.

183. See UNIF. PARENTAGE ACT § 5 (1973).

184. UNIF. PARENTAGE ACT Art. 7 introductory cmt. (2000) (amended 2002).

185. *Id.* § 702.

186. *Id.* § 703.

187. *Id.* Section 704 of the 2000 version of the UPA requires the intent to be a parent to be expressed in writing. *Id.* § 704.

188. *Id.* § 704.

189. *Id.*

190. See *id.*

191. *Id.* § 106.

provided her egg to her partner with the intent that they would both be parents to the child would have parental rights.<sup>192</sup>

While the UPA of 2000 is an improvement over the 1973 Act in its coverage of ART,<sup>193</sup> there are still ambiguities regarding maternity that could be more effectively resolved.<sup>194</sup> The Act fails to explicitly cover the unique issues of maternity involving lesbian partners who have a child together through ART whereby one partner is the ova mother and the other is the birth mother.<sup>195</sup> In each of the provisions of the Act discussing intentional parenthood by two parents, the Act's language refers to a man and woman.<sup>196</sup> In order to establish herself as a parent, the ova mother has to argue that these provisions for establishing paternity are applicable to her.<sup>197</sup> To prove she is a mother, she has to argue that she is like a father to her child.<sup>198</sup> The Act can be interpreted to allow for recognition of two natural mothers, but a mother should not have to argue that she is like a father to establish her parentage.<sup>199</sup> An ova mother is a mother, not a father, to her child. Effective legislation that protects the coequal maternity rights of an ova mother and a birth mother would explicitly recognize both women as parents without forcing the ova mother to analogize herself to a father.

### *C. American Bar Association Model Act Governing Assisted Reproductive Technology*

The Maryland legislature could also turn to the ABA Model Act for guidance in drafting legislation that would define maternity.<sup>200</sup> The ABA Model Act takes the issues of maternity and paternity addressed

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192. *See id.* § 702.

193. *See supra* notes 177–81 and accompanying text.

194. *See infra* notes 195–99 and accompanying text.

195. *See* UNIF. PARENTAGE ACT §§ 701–801 (2000) (amended 2002).

196. *Id.* §§ 703, 704, 801.

197. *Id.* §§ 106, 703.

198. *See id.* § 106, 703. While an ova mother is similar to a father who provided sperm with the intent of being a parent in that both are the genetic parents of the resulting child, providing ova and sperm are different processes. *See* Charles P. Kindregan, Jr., *Collaborative Reproduction and Rethinking Parentage*, 21 J. AM. ACAD. MATRIM. LAW. 43, 49 (2008) (discussing how harvesting ova is a far more invasive procedure and process than collecting sperm).

199. *See* K.M. v. E.G., 117 P.3d 674, 681–82 (Cal. 2005).

200. *See* MODEL ACT GOVERNING ASSISTED REPROD. TECH. (2008). The Model Act was approved in 2008 by the Section Council of the American Bar Association Section of Family Law's Committee on Reproductive and Genetic Technology. MODEL ACT GOVERNING ASSISTED REPROD. TECH. prefatory note (2008). The drafters wrote this model piece of legislation in recognition of the need for comprehensive legislation dealing with the complex issues and controversies that result from gaps between current law and the realities of ART. *See id.*

in the UPA of 2000 in the context of ART one step further by referring to parentage of the children of assisted reproduction without specific reference to maternity or paternity.<sup>201</sup> With regard to parentage of a child of assisted reproduction, the ABA Model Act holds that “[a]n individual who provides gametes for, or consents to, assisted reproduction by a woman . . . with the intent to be a parent of her child is a parent of the resulting child.”<sup>202</sup> Instead of holding that provisions for determining paternity apply to determining maternity, the ABA Model Act simply addresses determining parentage.<sup>203</sup> It does not differentiate between whether a genetic parent provided sperm or ova and instead uses the term gametes, which includes both sperm and ova.<sup>204</sup>

While the language in the ABA Model Act is gender neutral, the implications are the same as those of the UPA in that they both recognize intended parenthood.<sup>205</sup> The legislative note preceding article 6 of the ABA Model Act states, “It is not the intent of this act to conflict with or supersede provisions of the Uniform Parentage Act.”<sup>206</sup> Under the ABA Model Act, the ova mother is not forced to argue that she is like a man who provides sperm with the intention of being a father.<sup>207</sup> However, the ABA Model Act’s gender neutral language falls short of explicitly recognizing that a child can have two legal mothers who share a biological connection with him.<sup>208</sup> The language helps resolve disputes between intended parents and surrogates, whether they are traditional or gestational surrogates, but does little to recognize the unique situation of a lesbian couple who conceives a child together with the intent of being co-parents whereby one partner is the birth mother and the other is the ova mother.<sup>209</sup> This is not a gender neutral situation. An effective statute

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201. Compare UNIF. PARENTAGE ACT § 703 (2000) (amended 2002) (referring to a man who provides sperm with intent to be the parent of the resulting child), with MODEL ACT GOVERNING ASSISTED REPROD. TECH. §§ 602–04 (2008) (referring to an individual who provides gametes with the intent to be a parent to the resulting child).

202. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 603 (2008). Section 604 of the ABA Model Act requires written consent. *Id.* § 604.

203. *Id.* § 603.

204. *Id.*

205. See *id.*; *supra* note 190 and accompanying text.

206. MODEL ACT GOVERNING ASSISTED REPROD. TECH. Art. 6, legislative note.

207. Compare *id.* § 603 (using gender neutral language to refer to the individual who provides gametes and intends to be the parent), with UNIF. PARENTAGE ACT §§ 106, 703 (2000) (amended 2002) (referring exclusively to the man who provides sperm and intends to be the parent).

208. MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 603.

209. See Charles P. Kindregan, Jr., *Considering Mom: Maternity and the Model Act Governing Assisted Reproductive Technology*, 17 AM. U. J. GENDER SOC. POL’Y & L.



defining maternity that protects the parental rights of both the ova mother and the birth mother would draw on the recognition of intent provided for in the ABA Model Act and the UPA and explicitly hold that both women are legal mothers at birth.<sup>210</sup>

## V. PROPOSED STATUTE

Maryland needs a maternity statute that explicitly allows for recognition of dual maternity in cases where the birth mother and the ova mother are a lesbian couple who created the child together with the shared intention of being of coequal parents.<sup>211</sup> Borrowing from the written consent requirements in the UPA of 2000 and the ABA Model Act,<sup>212</sup> this law would require the birth mother and the ova mother to express their intention of being coequal mothers in writing in order for their dual maternity to be recognized. The law would also require an affidavit from the reproductive endocrinologist who performed the procedure supporting that the ova mother is indeed the child's genetic mother and that both parties clearly expressed their intent be parents prior to the procedure. If the mothers can prove they have met these requirements included in the statute, they would be able to obtain a pre-birth order of parentage that recognizes them both as legal parents.

Under this proposed statute, which would explicitly recognize her parentage rights, the ova mother would not have to argue that she is like an intended father who provides sperm for insemination as she would under the UPA.<sup>213</sup> Rather than relying on provisions for establishing paternity in the hope that the court finds those provisions applicable to the determination of her maternity,<sup>214</sup> the statute would provide a framework that specifically allows for an ova mother to establish her maternity.

Maryland judges already grant these pre-birth orders of parentage to lesbian couples who fulfill these requirements.<sup>215</sup> The maternity statute I propose would provide a statutory basis for these orders so they are not based entirely in equity and construction of law.<sup>216</sup> Judges reviewing petitions for a judgment declaring parentage would

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601, 615–16 (2009) (discussing how the ABA Model Act provides a framework for resolving maternity disputes in the context of surrogacy).

210. See MODEL ACT GOVERNING ASSISTED REPROD. TECH. § 603; UNIF. PARENTAGE ACT §§ 106, 703; *infra* Part V.

211. See *supra* Part II.

212. See *supra* notes 187–189, 202 and accompanying text.

213. See *supra* notes 191–99 and accompanying text.

214. See *supra* notes 191–99 and accompanying text.

215. See *supra* Part II.A.

216. See *supra* Part II.A.

determine if the parties satisfied the statutory requirements for obtaining the order. Having a statutory basis for granting the order would make it less liable to challenge in the event that the birth mother later changed her mind.<sup>217</sup> This would provide more protection for the parental rights of the ova mother and more stability in the family relationship for the child.<sup>218</sup>

## VI. CONCLUSION

Orders of parentage and second parent adoptions have been sufficient so far to protect parental rights in Maryland where a child is born through ART with both an ova mother and a birth mother to the extent that they have never been challenged.<sup>219</sup> But a case will undoubtedly come in the future where these measures are challenged by a couple in dispute. Based upon the precedents from case law in other jurisdictions, a Maryland court might conceivably hold that both the ova mother and the birth mother are the natural mother when they conceived the child through ART with the intent that they both serve as parents.<sup>220</sup> But that outcome is not entirely certain and neither Maryland law nor precedents from other jurisdictions address the issue entirely.<sup>221</sup> This is an issue of serious importance to public policy that should not be decided by a judge legislating from the bench.

Furthermore, a statute providing a framework for establishing dual maternity would lead to a reliable system of justice across the entire state.<sup>222</sup> Whether an ova mother can obtain judicial recognition of her parental rights should not depend on where she files a petition because only some judges are willing to construe the law in a way that grants her rights.<sup>223</sup> A statute that provides a legal mechanism for obtaining judicial recognition of dual maternity would remove this private system of justice because judges across Maryland would be making decisions in the context of the same statutory framework.<sup>224</sup> Ova mothers would be able to consistently obtain an

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217. *See supra* text accompanying notes 53–58.

218. *See supra* notes 25–34 and accompanying text.

219. *See supra* Part II.A–B. Maryland’s same-sex marriage law went into effect so recently that stepparent adoptions for same-sex couples have yet to be granted as of publication of this comment.

220. *See supra* Part III.

221. *See supra* Part III.C.

222. *See supra* notes 55–58, 84–86 and accompanying text.

223. *See supra* Part II.A–B.

224. *See supra* Part II.A–B.

order of parentage if they met the statutory requirements no matter which judge reviewed the petition.

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\* J.D. Candidate, University of Baltimore School of Law, 2013. This comment would not have been possible without the guidance of my advisor and mentor, Professor Leigh Goodmark. I also would like to thank my family and friends for their constant support and encouragement.