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**SIEGLEIN v. SCHMIDT: SECURING THE LEGITIMACY  
OF ALL CHILDREN CREATED THROUGH ASSISTED  
REPRODUCTIVE TECHNOLOGY**

GABRIELLE C. PHILLIPS\*

Assisted Reproductive Technology (“ART”) is steadily becoming more popular in the United States; in nearly twenty years, the use of ARTs tripled.<sup>1</sup> ARTs are particularly popular in Maryland, where ART use exceeds the national average.<sup>2</sup> ARTs have even made their mark on the American media, for example, when the public learned about “Modern Family” star Sofia Vergara’s legal battle with her ex-husband over their frozen embryos.<sup>3</sup> Presumptively, lawsuits of this sort are becoming more prevalent because ART use is increasing, while statutes related to ARTs are limited and outdated.<sup>4</sup> Initially, these statutes were created to prevent the illegitimacy of children conceived through artificial insemination.<sup>5</sup> Today, however, there are many ARTs: in vitro fertilization (“IVF”), where an egg is “fertiliz[ed] outside of the body”; zygote intrafallopian transfer, where an egg fertilized outside of the body is placed in the fallopian tube; gamete intrafallopian transfer, where eggs and sperm are placed in the fallopian tube, causing fertilization to occur within the body; and intracytoplasmic sperm injection, where fertilization occurs outside of the body by injecting sperm into the egg.<sup>6</sup> Additionally, there are

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1. CTRS. FOR DISEASE CONTROL AND PREVENTION, ASSISTED REPRODUCTIVE TECHNOLOGY SURVEILLANCE—UNITED STATES, 2013, at 8 (Sonja A. Rasmussen et al. eds., 2015).

2. *Id.* at 6 (“Maryland . . . exceed[ed] 1.5 times the national rate.”).

3. Jaqueline Hurtado & Michael Martinez, *Sofia Vergara Reportedly Sued by Ex-Fiance Over Their Frozen Embryos*, CNN ENTERTAINMENT (Apr. 21, 2015, 6:42 PM), <http://www.cnn.com/2015/04/17/entertainment/sofia-vergara-frozen-embryos-lawsuit/>.

4. *See supra* text accompanying note 1 (asserting that ARTs are gaining in popularity); *infra* text accompanying notes 64, 204 (noting the limited nature of ART-related statutes).

5. *See infra* text accompanying notes 180–188 (discussing the purpose of Maryland’s artificial insemination statute).

6. *Reproductive Health*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/reproductivehealth/infertility/> (last updated Apr. 14, 2016).

artificial insemination<sup>7</sup> and gestational surrogacy.<sup>8</sup> Nonetheless, some ART statutes are written to apply to only one ART—artificial insemination—leaving other ARTs without statutory recognition.<sup>9</sup>

In *Sieglein v. Schmidt*,<sup>10</sup> the Court of Appeals of Maryland modernized Maryland's artificial insemination statute by determining that the statute encompasses more ARTs than artificial insemination alone.<sup>11</sup> This Note's analysis of the court's reasoning comprises three assertions: (1) the court correctly extended the application of Maryland's artificial insemination statute; (2) the court erred when it identified "artificial insemination" as ambiguous due to there being multiple methods of artificial insemination; and (3) the court erred when it resolved the ambiguity of "artificial insemination" by interpreting the term as encompassing all ARTs, beyond the different forms of artificial insemination.<sup>12</sup> The court should have reasoned that the term "artificial insemination" is ambiguous because giving the term its plain meaning would not effectuate the purpose of the artificial insemination statute—to minimize the illegitimacy of children.<sup>13</sup> Nevertheless, the shortcomings of Maryland's artificial insemination statute cannot be corrected by court holdings; the statute needs to be amended by the General Assembly of Maryland.<sup>14</sup>

## I. THE CASE

In April 2008, Laura Schmidt and Stephen Sieglein were married.<sup>15</sup> Prior to the marriage, Sieglein underwent a vasectomy and did not wish to have children.<sup>16</sup> After the marriage, however, Schmidt wanted a child.<sup>17</sup>

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7. For a description of artificial insemination, see *infra* text accompanying notes 152–155 and note 155.

8. For a description of the working parts of gestational surrogacy, see *infra* notes 139–140.

9. See, e.g., IDAHO CODE § 39-5405(3) (2011) (creating a presumption of paternity where a child is conceived through artificial insemination); MONT. CODE ANN. § 40-6-106 (2015) (same); OHIO REV. CODE ANN. § 3111.95 (LexisNexis 2015) (same); see also *infra* text accompanying note 63 (providing an example of a statute written to apply to only artificial insemination).

10. 447 Md. 647, 136 A.3d 751 (2016).

11. See *infra* text accompanying notes 157–161 (discussing the court's reasoning and conclusion that Maryland's artificial insemination statute encompasses all ARTs).

12. See *infra* Part IV.A (analyzing the court's reasoning).

13. See *infra* text accompanying notes 188–189 (noting the purpose of Maryland's artificial insemination statute and the effect of an inclusive interpretation of "artificial insemination").

14. See *infra* Part IV.B.2–3 (proposing a new ART statute and comparing the proposed statute to the current artificial insemination statute).

15. *Sieglein v. Schmidt*, 224 Md. App. 222, 228, 120 A.3d 790, 794 (2015), *aff'd*, 447 Md. 647, 136 A.3d 751 (2016).

16. *Id.*

17. *Id.*

Schmidt and Sieglein were unable to conceive, so they “sought assisted reproductive services . . . including . . . in vitro fertilization.”<sup>18</sup> Pursuant to their participation in assisted reproduction, both Schmidt and Sieglein signed a consent form, acknowledging that they “ha[d] been fully advised of the purpose, risks and benefits” of the services they were accepting, and that they were doing so “free from pressure and coercion.”<sup>19</sup> Through IVF, using a donated egg and donated sperm, Schmidt and Sieglein conceived a son, who was born on March 25, 2012.<sup>20</sup> Both Schmidt and Sieglein were listed as parents on the child’s birth certificate, and both cared for the child after its birth, until one month later when they separated.<sup>21</sup> After the separation, Schmidt filed a complaint for limited divorce and a petition for child support in the Circuit Court for Harford County.<sup>22</sup> Sieglein answered, denying paternity of the child, and later motioned for the circuit court to determine whether he was a parent under Maryland law, and therefore required to pay child support.<sup>23</sup> The circuit court relied on the Maryland’s Estates and Trusts Article Section 1-206(b)—Maryland’s artificial insemination statute—which prescribes that a child born to a married couple due to artificial insemination, with the husband’s consent, is the legitimate child of both parties.<sup>24</sup> Because Schmidt and Sieglein were married in 2008 and Sieglein consented to the IVF treatment, the circuit court concluded that Sieglein was the child’s father.<sup>25</sup> Sieglein appealed to the Court of Special Appeals of Maryland, arguing that paternity should not have been determined with reference to the Estates and Trusts Article.<sup>26</sup> Sieglein insisted that IVF is not encompassed by Maryland’s artificial insemination statute, because IVF is distinct from artificial insemination and was not a practice when the statute was codified.<sup>27</sup>

The Court of Special Appeals of Maryland affirmed the circuit court’s ruling.<sup>28</sup> The court noted that the Estates and Trusts Article is dispositive

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18. *Id.*

19. *Id.* at 228–29, 120 A.3d at 794.

20. *Id.* at 229, 120 A.3d at 794–95.

21. *Id.* at 229–30, 120 A.3d at 795.

22. *Id.* at 230, 120 A.3d at 795.

23. *Id.*

24. *Id.* at 231, 120 A.3d at 795–96; MD. CODE ANN., EST. & TRUSTS § 1-206(b) (LexisNexis 2011). Section 1-206(b) reads, “A child conceived by artificial insemination of a married woman with the consent of her husband is the legitimate child of both of them for all purposes. Consent of the husband is presumed.” EST. & TRUSTS § 1-206(b).

25. *Sieglein*, 224 Md. App. at 231, 120 A.3d at 796. The circuit court granted Schmidt sole physical and legal custody of the child, ordered Sieglein to pay child support, and granted the parties an absolute divorce. *Id.* at 232–33, 120 A.3d at 796–97.

26. *Id.* at 236–38, 120 A.3d at 798, 800.

27. *Id.* at 238, 120 A.3d at 800.

28. *Id.* at 252, 120 A.3d at 808.

where a child is born during a marriage.<sup>29</sup> Specifically, the artificial insemination statute of the Estates and Trusts Article governed in this case, because the child was born via an ART while Schmidt and Sieglein were married.<sup>30</sup> The court affirmed Sieglein's parental status because, in addition to the child being an issue of his marriage, Sieglein consented to the fertility services which resulted in the child's birth.<sup>31</sup> Further, the court concluded that Maryland's artificial insemination statute is meant to encompass all "medically assisted" reproduction because, "within the context of marriage, the precise physical procedure has no necessary impact on the relationship of the parties involved—mother, father, and child."<sup>32</sup> Sieglein appealed the decision to the Court of Appeals of Maryland, which granted the appeal to determine whether the term "artificial insemination" encompasses only artificial insemination, or includes other ARTs.<sup>33</sup>

## II. LEGAL BACKGROUND

Maryland's artificial insemination statute reflects the common law presumption of paternity.<sup>34</sup> The following discussion traces the progression from the common law presumption, to the codification of artificial insemination statutes, to the application of artificial insemination statutes to other ARTs, and ends with a discussion of uniform laws that address ARTs. Part II.A outlines the relationship between the common law and artificial insemination.<sup>35</sup> Part II.B previews the language of artificial insemination statutes.<sup>36</sup> Part II.C explores the interaction of artificial insemination statutes and other ARTs.<sup>37</sup> Part II.D explicates the ARTs provisions of the Uniform Parentage Act and Uniform Probate Code.<sup>38</sup>

### A. *Common Law*

The presumption of paternity is deeply rooted in the common law.<sup>39</sup> There was a point, early in English history, when the presumption was nearly irrebuttable; "[i]f a husband, not physically incapable, was within the four seas of England during the period of gestation, the court would not listen to

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29. *Id.* at 239, 120 A.3d at 800.

30. *Id.* at 243, 120 A.3d at 803.

31. *Id.*

32. *Id.* at 242–43, 120 A.3d at 802.

33. Sieglein v. Schmidt, 447 Md. 647, 652, 136 A.3d 751, 754 (2016).

34. Markov v. Markov, 360 Md. 296, 304–05, 758 A.2d 75, 79 (2000).

35. *See infra* Part II.A.

36. *See infra* Part II.B.

37. *See infra* Part II.C.

38. *See infra* Part II.D.

39. Michael H. v. Gerald D., 491 U.S. 110, 124 (1989).

evidence casting doubt upon his paternity.”<sup>40</sup> After the reign of the four seas rule came “Lord Mansfield’s Rule,” “a rule, founded in decency, morality, and policy that [a mother and father] shall not be permitted to say after marriage, that they have had no connection, and therefore that the offspring is spurious.”<sup>41</sup> The common law endorsed the presumption of paternity to minimize state responsibility for illegitimate children, protect families, and avoid limiting children’s rights.<sup>42</sup> Today, however, such conclusive rules have been rejected and the presumption of paternity is vulnerable to rebuttal by various kinds of evidence.<sup>43</sup> Nevertheless, the law still disfavors illegitimacy.<sup>44</sup>

Historically, a child who was not its mother’s husband’s child was deemed illegitimate.<sup>45</sup> An illegitimate child was believed to be the product of adultery and, therefore, unlawful offspring.<sup>46</sup> Typically, adultery is defined as “voluntary sexual intercourse between a married person and a partner other than the lawful husband or wife.”<sup>47</sup> This definition makes it possible to argue that artificial insemination amounts to adultery.<sup>48</sup> As the argument goes, when a woman engages in extramarital sexual intercourse, she has committed adultery because extramarital intercourse can yield a child, tainting her husband’s familial line with blood that is not his own.<sup>49</sup> Thus, all conduct altering the husband’s bloodline is adulterous.<sup>50</sup> Artificial insemination of a wife, achieved using donor sperm, introduces into the family blood that is not the husband’s. Therefore, artificial insemination using donor sperm is adultery and produces an illegitimate child.<sup>51</sup>

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40. *In re Findlay*, 170 N.E. 471, 472 (N.Y. 1930).

41. *Serafin v. Serafin*, 258 N.W.2d 461, 462 (Mich. 1977) (quoting *Goodright v. Moss*, 2 Cowp. 591, 98 Eng. Rep. 1257 (1777)).

42. *Michael H.*, 491 U.S. at 125. Illegitimate children were often accorded fewer benefits than legitimate children. *See, e.g., Levy v. Louisiana*, 391 U.S. 68, 71–72 (1968) (invalidating a law allowing legitimate, but not illegitimate, children to bring an action for the wrongful death of a parent). The Supreme Court, however, has since called for equal treatment of legitimate and illegitimate children. *See, e.g., Gomez v. Perez*, 409 U.S. 535, 538 (1973) (“[A] State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally.”).

43. *In re Findlay*, 170 N.E. at 473; *see also, e.g., Miles v. Stovall*, 132 Md. App. 71, 82–83, 750 A.2d 729, 736 (2000) (holding that the presumption of paternity is rebuttable by genetic testing).

44. *See, e.g., infra* text accompanying note 63 (providing an example of statute that creates a presumption of paternity and, therefore, endorses legitimacy).

45. *Gursky v. Gursky*, 242 N.Y.S.2d 406, 408 (N.Y. Sup. Ct. 1963).

46. *People v. Sorensen*, 437 P.2d 495, 501 (Cal. 1968) (en banc).

47. *Flood v. Flood*, 24 Md. App. 395, 396 n.1, 330 A.2d 715, 716–17 n.1 (1975) (citing the *American Heritage Dictionary of the English Language*).

48. *See Orford v. Orford* [1921], 58 D.L.R. 251, 258 (Can. Ont. S.C.) (contending that artificial insemination is adultery).

49. *Id.*

50. *Id.*

51. *Id.* at 259. *But see Sorensen*, 437 P.2d at 501 (“Since the doctor may be a woman, or the husband himself may administer the insemination by a syringe, this is patently absurd; to consider

Early cases demonstrate a lack of consensus regarding whether artificial insemination was adultery. In *Strnad v. Strnad*,<sup>52</sup> where a wife, with the consent of her husband, was artificially inseminated using donor sperm, the court held that the child was legitimate.<sup>53</sup> The *Strnad* court acted on the desire to avoid illegitimizing children; thus, it compared a child born through artificial insemination to “a child born out of wedlock who by law is made legitimate upon the marriage of the interested parties.”<sup>54</sup> Alternatively, some early courts ruled that children born through artificial insemination were illegitimate.<sup>55</sup> In the absence of statutes addressing artificial insemination, these courts adhered to the common law concept of illegitimacy and were unwilling to alter the statutes that were available to them.<sup>56</sup>

### B. Artificial Insemination Statutes

As the use of artificial insemination gained in popularity, state legislatures began to answer the question of whether a child produced through artificial insemination is legitimate.<sup>57</sup> In 1968, the Governor’s Commission to Review and Revise the Testamentary Law of Maryland, convened by Governor J. Millard Tawes, proposed the introduction of Section 1-206(b)—an artificial insemination statute—to the testamentary law of Maryland.<sup>58</sup> In the proposal, the Commission commented, “The Commission feels that this addition is desirable in view of the increased use of artificial insemination and

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it an act of adultery with the donor, who at the time of insemination may be a thousand miles away or may even be dead, is equally absurd.”).

52. 78 N.Y.S.2d 390 (N.Y. Sup. Ct. 1948).

53. *Id.* at 392.

54. *Id.* To protect innocent children from the troubles of illegitimacy, states had statutes that legitimized children born to an unwed man and woman who later married. *Dilworth v. Dilworth*, 134 Md. 589, 591, 108 A. 165, 166 (1919); *see also, e.g.*, MD. CODE, PUB. GEN. L. art. XLVI, § 29 (1888) (“If any man shall have a child or children by any woman whom he shall afterwards marry, such child or children, if acknowledged by the man, shall, in virtue of such marriage and acknowledgement, be hereby legitimated . . .”).

55. *See Happel v. Mecklenburger*, 427 N.E.2d 974, 979 n.1 (Ill. App. Ct. 1981) (discussing *Doornbos v. Doornbos*, 139 N.E.2d 844 (Ill. App. Ct. 1954), which held that a child born through artificial insemination using donor sperm was illegitimate).

56. *See Gursky v. Gursky*, 242 N.Y.S.2d 406, 409 (N.Y. Sup. Ct. 1963). The *Gursky* court stated:

Unless there can be read into the statutory enactments of this State, dealing with persons born out of wedlock, an intention to modify the settled concept as to the status of a child whose father was not married to its mother, it must be presumed that the historical concept of illegitimacy with respect to such a child remains in force and effect.

*Id.*

57. *See* COMM’N TO REVIEW AND REVISE THE TESTAMENTARY LAW OF MD., SECOND REPORT OF GOVERNOR’S COMMISSION TO REVIEW AND REVISE THE TESTAMENTARY LAW OF MARYLAND 8 (1968) [hereinafter COMM’N, SECOND REPORT] (“The Commission feels that this addition is desirable in view of the increased use of artificial insemination . . .”).

58. *Id.*

the lack of any statute or case law on the subject in Maryland.”<sup>59</sup> The statute and report explicitly mention artificial insemination, but not other ARTs like IVF.<sup>60</sup>

Other states’ statutes regarding artificial insemination and legitimacy are not uniform in their inclusion of IVF and other ARTs.<sup>61</sup> For example, Connecticut’s artificial insemination statute provides that, “‘Artificial insemination’ . . . includes, but is not limited to, intrauterine insemination and in vitro fertilization . . . .”<sup>62</sup> On the other hand, New York’s statute reads, “Any child born to a married woman by means of artificial insemination . . . shall be deemed the legitimate, birth child of the husband and his wife for all purposes.”<sup>63</sup> Like Maryland’s artificial insemination statute, New York’s mentions only artificial insemination, which adds a prong to the conundrum of ARTs and illegitimacy: whether the mention of only artificial insemination in these statutes was made to the exclusion of other ARTs.<sup>64</sup>

### C. Artificial Insemination Statutes and Other ARTs

When ART statutes reference only artificial insemination, courts must engage in statutory interpretation to determine whether the statutes apply to other ARTs. Thus, first, this Section presents Maryland’s rules of statutory interpretation.<sup>65</sup> Second, this Section explicates two cases that demonstrate statutory interpretation of artificial insemination statutes.<sup>66</sup> Third, this Sec-

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59. *Id.*

60. See MD. CODE ANN., EST. & TRUSTS § 1-206(b) (LexisNexis 2011).

61. See *infra* text accompanying notes 62–63 (presenting different forms of artificial insemination statutes).

62. CONN. GEN. STAT. ANN. § 45a-771a(1) (West 2014).

63. N.Y. DOM. REL. LAW § 73(1) (McKinney 2010).

64. Compare EST. & TRUSTS § 1-206(b), with N.Y. DOM. REL. LAW § 73(1) (McKinney 2010). Maryland and New York are far from alone in having statutes that mention only artificial insemination. See ALASKA STAT. § 25.20.045 (2016); ARIZ. REV. STAT. ANN. § 25-501(B) (2007); GA. CODE ANN. § 19-7-21 (2015); IDAHO CODE § 39-5405 (2011); KAN. STAT. ANN. § 23-2301 (Supp. 2014); MASS. GEN. LAWS ANN. ch. 46, § 4B (West 2009); MINN. STAT. ANN. § 257.56 (West 2015); MO. ANN. STAT. § 210.824 (West 2010); MONT. CODE ANN. § 40-6-106 (2015); N.C. GEN. STAT. § 49A-1 (2015); N.J. STAT. ANN. § 9:17-44 (West 2013); OHIO REV. CODE ANN. § 3111.95 (LexisNexis 2015); OKLA. STAT. ANN. tit. 10, § 551 (West 2009); OR. REV. STAT. §§ 109.239, .243, .247 (2015); TENN. CODE ANN. § 68-3-306 (2013); WIS. STAT. ANN. § 891.40 (West Supp. 2016). For an example of the problems caused when other ARTs are not read into artificial insemination statutes, consider *Sieglein v. Schmidt*, 224 Md. App. 222, 120 A.3d 790 (2015), *aff’d*, 447 Md. 647, 136 A.3d 751 (2016). Had the court not read “artificial insemination” to include IVF, Sieglein would have been able to successfully deny paternity of a child whose creation he consented to. See *id.* at 230, 238, 120 A.3d at 795, 800.

65. See *infra* Part II.C.1.

66. See *infra* Part II.C.2.



tion discusses two cases where courts, without conducting statutory interpretation, assume other ARTs fall within “artificial insemination” and apply artificial insemination statutes to facts involving other ARTs.<sup>67</sup>

### 1. *Statutory Interpretation in Maryland*

Statutory interpretation is meant “to ascertain and effectuate the real and actual intent of the Legislature.”<sup>68</sup> The first step to statutory interpretation is to determine whether the plain meaning of the statute is susceptible to multiple interpretations and, therefore, ambiguous.<sup>69</sup> The meaning of statutory language is considered in light of its statutory scheme and legislative “purpose, aim, or policy,” not “in a vacuum.”<sup>70</sup> Additionally, statutory interpretation is done with an eye toward avoiding absurdity.<sup>71</sup> Absurdity arises if the suggested interpretation is “inconsistent with common sense.”<sup>72</sup>

When statutory language is unambiguous, statutory interpretation begins and ends with the first step of analyzing the language’s plain meaning.<sup>73</sup> When the language is ambiguous, courts determine its meaning “by looking to the statute’s legislative history, case law, statutory purpose, as well as the structure of the statute.”<sup>74</sup> Courts consider the entire statutory scheme, so that no provision is rendered superfluous.<sup>75</sup>

### 2. *Statutory Interpretation of Artificial Insemination Statutes*

When ART statutes do not explicitly mention IVF or other ARTs, some jurisdictions hold the statutes do not encompass IVF and some jurisdictions hold the statutes do encompass IVF.<sup>76</sup> In *In re O.G.M.*,<sup>77</sup> the court considered the legislative history of Texas’s artificial insemination statute, which has

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67. See *infra* Part II.C.3.

68. *Gardner v. State*, 420 Md. 1, 8, 20 A.3d 801, 806 (2011) (emphasis added).

69. See *Anderson v. Council of Unit Owners of the Gables on Tuckerman Condo.*, 404 Md. 560, 571–72, 948 A.2d 11, 18–19 (2008) (detailing the steps of statutory interpretation).

70. *Gardner*, 420 Md. at 9, 20 A.3d at 806.

71. *Anderson*, 404 Md. at 571–72, 948 A.2d at 18.

72. *Blandon v. State*, 304 Md. 316, 319, 498 A.2d 1195, 1196 (1985) (citing *State v. Intercont'l, Ltd.*, 302 Md. 132, 137, 436 A.2d 174 (1985); *Bailey v. Woel*, 302 Md. 38, 43, 485 A.2d 205 (1984)).

73. *Anderson*, 404 Md. at 572, 948 A.2d at 19.

74. *Id.* (citing *Barbre v. Pope*, 402 Md. 157, 173, 935 A.2d 699, 709 (2007); *Dep't of Health & Mental Hygiene v. Kelly*, 397 Md. 399, 419–20, 918 A.2d 470, 482 (2007); *Smack v. Dep't of Health & Mental Hygiene*, 378 Md. 298, 305, 835 A.2d 1175, 1179; *Mayor & City Council of Baltimore v. Chase*, 360 Md. 121, 129, 756 A.2d 987, 991–92 (2000)).

75. *Anderson*, 404 Md. at 572, 948 A.2d at 19.

76. See *infra* text accompanying notes 77–83. Compare *In re O.G.M.*, 988 S.W.2d 473 (Tex. App. 1999) (holding that artificial insemination does not include IVF), with *Yulia C. v. Angelo C.*, 32 N.Y.S.3d 860 (N.Y. Sup. Ct. 2016) (suggesting that artificial insemination does include IVF).

77. 988 S.W.2d 473 (Tex. App. 1999).

since been repealed, and the plain meaning of the term “artificial insemination.”<sup>78</sup> The court reasoned that the statute did not encompass IVF, because IVF was mentioned in neither the statute nor dictionary definitions of “artificial insemination.”<sup>79</sup> In contrast, in *Yulia C. v. Angelo C.*,<sup>80</sup> the court emphasized the legislative purpose of New York’s artificial insemination statute,<sup>81</sup> noting that “the policy goal of protecting the legitimacy of children born to married couples via alternative reproductive methods is the ultimate guidepost for the existing and developing legal framework on the issue.”<sup>82</sup> Although the court did not state whether or not artificial insemination includes IVF, it did conclude that where legitimacy is concerned, the scale tips in favor of recognizing all ARTs.<sup>83</sup> Generally, when determining whether “artificial insemination” includes IVF, courts consult dictionary definitions, and the legislative history and purpose of artificial insemination statutes, but rarely have courts definitively claimed that “artificial insemination” includes IVF and other ARTs.<sup>84</sup>

### 3. Artificial Insemination Statutes Applied to Other ARTs

The lack of cases stating that “artificial insemination” includes IVF and other ARTs is misleading, because it might cause the reader to believe that IVF and other ARTs are not covered by artificial insemination statutes. More jurisdictions apply artificial insemination statutes to cases involving other ARTs, without explicitly resolving the interpretive issue of whether “artificial insemination” encompasses other ARTs.<sup>85</sup> For example, in *Okoli v. Okoli*,<sup>86</sup> when determining a husband’s responsibility for children produced through IVF, a Massachusetts appellate court applied the Massachusetts artificial insemination statute<sup>87</sup> without explicitly stating that “artificial insemination” encompasses IVF.<sup>88</sup> Although the court did not aim to determine whether the Massachusetts artificial insemination statute encompasses IVF, the court demonstrated that the statute does extend to other ARTs.<sup>89</sup>

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78. See *In re O.G.M.*, 988 S.W.2d at 477.

79. *Id.*

80. 32 N.Y.S.3d 860 (N.Y. Sup. Ct. 2016).

81. See *supra* text accompanying note 63 for the New York artificial insemination statute.

82. 32 N.Y.S.3d at 862.

83. *Id.*

84. See *supra* text accompanying notes 76–83.

85. See *infra* text accompanying notes 86–89, 97–98.

86. 963 N.E.2d 730 (Mass. App. Ct. 2012).

87. The Massachusetts statute provides, “[a]ny child born to a married woman as a result of artificial insemination with the consent of her husband, shall be considered the legitimate child of the mother and such husband.” MASS. GEN. LAWS ANN. ch. 46, § 4B (West 2009).

88. 963 N.E.2d at 731, 733.

89. See *id.* (applying the Massachusetts artificial insemination statute to facts involving IVF).

The *Okoli* court sought to determine whether the consent prong of the statute requires “consent to create a child” or “consent to become a parent.”<sup>90</sup> The court presented an alternative phrasing of the statute: “if the spouse of a woman who undergoes artificial insemination consents to the procedure, that spouse is considered the legitimate parent of a resulting child.”<sup>91</sup> Thus, the court concluded that consent to create a child is sufficient to bring on the responsibilities of parenthood.<sup>92</sup> That court recognized that this conclusion is rooted not only in law, but also in logic:

When engaging in sexual intercourse, a male may have no belief at all that his actions will result in the creation of a child, yet in cases of unintentional pregnancy the male participant is still held responsible for child support. Artificial insemination or IVF has no purpose except to create a child, so the intent of the husband that a child will be created strongly supports parental responsibility.<sup>93</sup>

Therefore, the court held that parenthood should follow when a husband consents to the use of an ART, which may yield a child, regardless of what particular technique is used.<sup>94</sup>

Just as the *Okoli* court recognized consent to create a child as supporting parental status, other courts recognized intent as the basis of parenthood.<sup>95</sup> In *In re Marriage of Buzzanca*,<sup>96</sup> a California appellate court was faced with determining the parentage of a child born through gestational surrogacy and genetically unrelated to either of its intended parents.<sup>97</sup> The court reasoned that “[t]he same rule which makes a husband the lawful father of a child born because of his consent to artificial insemination should be applied here,” conferring parental status to the child’s intended parents.<sup>98</sup> The court explained

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90. *Id.* at 733. Some artificial insemination statutes explicitly require consent to become a parent. See, e.g., D.C. CODE § 16-909(e)(1) (2001) (“A person who consents to the artificial insemination of a woman . . . with the intent to be the parent of her child, is conclusively established as a parent of the resulting child.” (emphasis added)).

91. *Okoli*, 963 N.E.2d at 734 (quoting *T.F. v. B.L.*, 813 N.E.2d 1244, 1253 (Mass. 2004)).

92. *Id.*

93. *Id.* at 735 n.8 (citation omitted) (citing MASS. GEN. LAWS ANN. ch. 209C, § 1 (West 2009) (“Every person is responsible for the support of his child born out of wedlock . . .”).

94. *Id.* at 735.

95. See *Laura WW. v. Peter WW.*, 856 N.Y.S.2d 258, 262 (N.Y. App. Div. 2008) (“[E]quity and reason require a finding that an individual who participated in and consented to a procedure intentionally designed to bring a child into the world can be deemed the legal parent of the resulting child.”); *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993) (“[A]lthough . . . both genetic consanguinity and giving birth [are] means of establishing a mother and child relationship, when the two means do not coincide in one woman, she who intended to procreate the child . . . is the natural mother . . .”).

96. 72 Cal. Rptr. 2d 280 (Cal. Ct. App. 1998).

97. *Id.* at 282.

98. *Id.*

that the same rule should apply to both procreation through artificial insemination and procreation through gestational surrogacy because both involve the creation of a child through an ART, “initiated and consented to by intended parents.”<sup>99</sup> The court noted that artificial insemination and gestational surrogacy are distinguishable only because, when intended parents use gestational surrogacy, “there is no reason to distinguish between [them],” which is not the case when intended parents use artificial insemination.<sup>100</sup> Where gestational surrogacy involves a donor egg and donor sperm, both intended parents are completely unrelated to the child, whereas when artificial insemination involves a donor egg and donor sperm, the intended mother is connected to the child through gestation. Although there might be a difference between artificial insemination and gestational surrogacy, the *Buzzanca* court found the two ARTs similar enough to warrant application of the artificial insemination statute to both techniques.<sup>101</sup> Thus, as demonstrated by *Okoli* and *In re Marriage of Buzzanca*, there is a practice of applying artificial insemination statutes to ARTs other than artificial insemination.<sup>102</sup>

Prior to *Sieglein v. Schmidt*, there was no indication that Maryland law allowed for the application of its artificial insemination statute to ARTs other than artificial insemination. Those seeking to establish parental status over children of other ARTs relied on other Maryland legitimacy statutes, such as the paternity statute.<sup>103</sup> Maryland’s paternity statute allows for legitimation through a rebuttable presumption,<sup>104</sup> an affidavit of parentage,<sup>105</sup> and genetic testing.<sup>106</sup> In addition to the paternity statute, Estates and Trusts Article Section 1-208 allows for the establishment of paternity through adjudication, ac-

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99. *Id.*

100. *Id.*

101. *Id.*

102. *See supra* text accompanying notes 86–101.

103. MD. CODE ANN., FAM. LAW §§ 5-1001 to 1048 (LexisNexis 2012); *see Conover v. Conover*, 450 Md. 51, 56, 146 A.3d 433, 435 (2016) (“[The non-biological parent of a child born through artificial insemination] asserted that she had standing because she met the paternity factors for a ‘father’ set forth in [Section 1-208.]”); *Turner v. Whisted*, 327 Md. 106, 112–13, 607 A.2d 935, 938 (1992) (asserting that courts should apply Estates and Trusts Article Section 1-208 when determining the parental status of an individual who is not a presumptive parent).

104. FAM. LAW § 5-1027(c)(1) (“There is a rebuttable presumption that the child is the legitimate child of the man to whom its mother was married at the time of conception.”). A similar presumption is contained in the Estates and Trusts Article. EST. & TRUSTS § 1-206(a) (LexisNexis 2011) (“A child born or conceived during a marriage is presumed to be the legitimate child of both spouses.”).

105. FAM. LAW § 5-1028(d)(1) (“An executed affidavit of parentage constitutes a legal finding of paternity, subject of any signatory to rescind the affidavit . . .”).

106. *Id.* § 5-1029(f)(4) (“A laboratory report [of a blood or genetic test] received into evidence establishing a statistical probability of the alleged father’s paternity of at least 99.0% constitutes a rebuttable presumption of his paternity.”).

knowledging a child as one's own, treating a child as one's own, and marriage to the child's mother after its birth.<sup>107</sup> Although Maryland laws regarding the establishment of parental status refer only to paternity, the laws also apply to maternity.<sup>108</sup> In *In re Roberto d.B.*,<sup>109</sup> the Court of Appeals of Maryland held that, "[b]ecause Maryland's [Equal Rights Amendment] forbids the granting of more rights to one sex than to the other, in order to avoid an equal rights challenge, the paternity statutes in Maryland must be construed to apply equally to both males and females."<sup>110</sup> Given all the working parts of Maryland law relating to parentage and ARTs, Maryland law on this subject is best described as fragmented, requiring one to look to multiple articles when resolving a single inquiry.

*D. Uniform Parentage Act and Uniform Probate Code*

The Uniform Parentage Act<sup>111</sup> ("UPA") and the Uniform Probate Code<sup>112</sup> ("UPC") are much more thorough in their protection of children resulting from ARTs than the typical artificial insemination statute.<sup>113</sup> The UPC applies to all ARTs, which it broadly defines as "a method of causing pregnancy other than sexual intercourse," and thereby embraces more scenarios than just the artificial insemination of a wife with her husband's consent.<sup>114</sup> Similarly, the UPA encompasses all ARTs and applies to more than the case of a married couple procreating through artificial insemination.<sup>115</sup> Yet, the UPA and UPC differ in that the UPC uses the term "individual" in

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107. EST. & TRUSTS § 1-208(b). Section 1-208 provides:

A child born to parents who have not participated in a marriage ceremony with each other shall be considered to be the child of his father only if the father:

- (1) Has been judicially determined to be the father . . . ;
- (2) Has acknowledged himself, in writing, to be the father;
- (3) Has openly and notoriously recognized the child to be his child; or
- (4) Has subsequently married the mother and has acknowledged himself, orally or in writing, to be the father.

*Id.*

108. *In re Roberto d.B.*, 399 Md. 267, 283, 923 A.2d 115, 124 (2007).

109. 399 Md. 267, 923 A.2d 115.

110. *Id.*

111. UNIF. PARENTAGE ACT (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2002).

112. UNIF. PROB. CODE (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2010).

113. In UPC terms, a child resulting from an ART is a "child of assisted reproduction." *Id.* § 2-120(a)(2) ("'Child of assisted reproduction' means a child conceived by means of assisted reproduction by a woman other than a gestational carrier . . .").

114. *Id.* § 2-115(2). This definition is taken from the UPA. See UNIF. PARENTAGE ACT § 102(4).

115. *Id.* Specifically, the UPA encompasses: "(A) intrauterine insemination; (B) donation of eggs; (C) donation of embryos; (D) in-vitro fertilization and transfer of embryos; and (E) intracytoplasmic sperm injection." *Id.*

its provisions, whereas the UPA is written in terms of “man” and “woman.”<sup>116</sup> Thus, unlike traditional artificial insemination statutes and the UPA, portions of the UPC could apply to same-sex and unmarried couples.<sup>117</sup> Despite this distinction, the UPC and UPA provisions are very similar.<sup>118</sup> Because the language of the UPC is more inclusive than that of the UPA, this Note’s summary of the UPC and UPA provisions quotes the UPC. And because both the UPC and UPA address gestational surrogacy independently of other ARTs, this Section first describes the parent-child relationships of children of ARTs<sup>119</sup> and, second, the parent-child relationships of children of gestational surrogacy.<sup>120</sup>

### 1. *The Parent-Child Relationship*

Both the UPC and UPA provide rules for determining the parentage of children of ARTs. In summary, the UPC and UPA both prescribe:

(1) There is no parent-child relationship between a third-party donor and a child of ART.<sup>121</sup>

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116. See, e.g., UNIF. PROB. CODE § 2-120(e) (using the word “individual”); UNIF. PARENTAGE ACT § 703 (using the words “man” and “woman”).

117. Compare UNIF. PROB. CODE § 2-120(f) (“[A] parent-child relationship exists between a child of assisted reproduction and an individual . . . who consented to assisted reproduction . . .”), with UNIF. PARENTAGE ACT § 703 (“A man who provides sperm for, or consents to, assisted reproduction by a woman . . . is a parent of the resulting child.”), and MD. CODE ANN., EST. & TRUSTS § 1-206(b) (LexisNexis 2011) (“A child conceived by artificial insemination of a married woman with the consent of her husband is the legitimate child of both of them for all purposes.”). Under the UPC (and depending on state law), an individual can be the parent of a child of ART regardless of whether that person is the husband of the birth mother. See UNIF. PROB. CODE § 2-120 cmt. (e) (stating that a presumption of parentage due to being named on a birth certificate can apply to any individual). Therefore, a same-sex spouse, or opposite- or same-sex, non-spousal partner of the birth mother may be the other parent of a child of ART. See *id.* But see UNIF. PARENTAGE ACT §§ 202, 301 (demonstrating that the UPA does allow unmarried persons to be co-parents, but not people of the same sex).

118. For example, neither the UPC nor the UPA allow for disparate treatment of children based on their parents’ marital status. See UNIF. PROB. CODE § 2-117 (“[A] parent-child relationship exists between a child and the child’s genetic parents, regardless of the parents’ marital status.”); UNIF. PARENTAGE ACT § 202 (“A child born to parents who are not married to each other has the same rights under the law as a child born to parents who are married to each other.”).

119. See *infra* Part II.D.1.

120. See *infra* Part II.D.2.

121. UNIF. PROB. CODE § 2-120(b); UNIF. PARENTAGE ACT § 702. “‘Third-party donor’ means an individual who produces eggs or sperm used for assisted reproduction, whether or not for consideration.” UNIF. PROB. CODE § 2-120(a)(3). The UPC excludes from the scope of this term a husband or wife who provides genetic material to be used by the wife, a birth mother, an individual who signs the child’s birth certificate, or an individual who otherwise consents to parent. *Id.* §§ 2-120(a)(3)(A)–(C), 120(e)–(f); see also UNIF. PARENTAGE ACT § 102(8) (providing the same definition under the term “donor”). For a list of the ways to establish consent, see *infra* text accompanying notes 130–133.

(2) There is a parent-child relationship between a child of ART and its birth mother.<sup>122</sup>

(3) There is a parent-child relationship between a child of ART and its birth mother's husband if the mother was inseminated with the husband's sperm during his lifetime.<sup>123</sup> If the married couple divorces, or the husband revokes his consent to artificial reproduction "before [the] placement of eggs, sperm, or embryos," the husband is not the child's parent, unless he consented to parent in the event that "assisted reproduction were to occur after divorce," or otherwise consents to parent under such circumstances.<sup>124</sup>

(4) There is a parent-child relationship between a child of ART and a person listed on the child's birth certificate.<sup>125</sup>

(5) There is a parent-child relationship "between a child of [ART] and an individual other than the birth mother who consented to assisted reproduction by the birth mother with the intent to be treated as the other parent of the child."<sup>126</sup> If such consent was provided by the birth mother's spouse and the "married couple is divorced before placement of eggs, sperm, or embryos, a child resulting from the assisted reproduction is not a child of the birth mother's former spouse, unless the former spouse [agreed to be the child's parent under such circumstances]."<sup>127</sup> Further, if an individual revokes consent "before [the] placement of eggs, sperm, or embryos," that person may still be the child of ART's parent if they otherwise consent to being the child's parent.<sup>128</sup>

122. UNIF. PROB. CODE § 2-120(c); UNIF. PARENTAGE ACT § 201(a)(1). "Birth mother" means a woman, other than a gestational carrier . . . , who gives birth to a child of assisted reproduction. The term is not limited to a woman who is the child's genetic mother." UNIF. PROB. CODE § 2-120(a)(1).

123. *Id.* § 2-120(d); *see also* UNIF. PARENTAGE ACT § 705(b)(1) (recognizing a presumption of paternity where a husband "provide[s] sperm for . . . assisted reproduction by his wife").

124. *See* UNIF. PROB. CODE § 2-120(i)-(j) (explaining the effect of "[d]ivorce [and withdrawal of consent] before placement of eggs, sperm, or embryos" on parentage); *see also* UNIF. PARENTAGE ACT § 706 (explaining the "effect of dissolution of marriage or withdrawal of consent" on parentage). For a list of the ways to establish consent, *see supra* text accompanying notes 130-133.

125. UNIF. PROB. CODE § 2-120(e); UNIF. PARENTAGE ACT § 204(a)(4)(B).

126. UNIF. PROB. CODE § 2-120(f); UNIF. PARENTAGE ACT § 703.

127. UNIF. PROB. CODE § 2-120(i); UNIF. PARENTAGE ACT § 706(a).

128. UNIF. PROB. CODE § 2-120(j). *But see* UNIF. PARENTAGE ACT § 706(b) (declaring that "[a]n individual who withdraws consent . . . is not a parent of the resulting child"). Still, under the UPA, it is possible that one who withdraws consent may subsequently establish a parent-child relationship by adjudication, adoption, or acknowledgement of paternity. *Id.* § 201(a)(2)-(3), (b)(2)-(4). Additionally, if the individual who withdrew consent is a man who created a child with a woman, there may still be "a finding of paternity if the woman and the 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." *Id.* § 704(b); *see also id.* § 204(a)(5) (creating a presumption of paternity under the same circumstances without specifying that the man created a child with a woman).

Finally, an individual other than the child of ART's birth mother can be the child's parent only if there is "proof that the individual consented to assisted reproduction by the birth mother with intent to be treated as the other parent of the child."<sup>129</sup> Consent with intent to parent a child of ART may be established by: (a) writing, executed "before or after the child's birth"<sup>130</sup>; (b) "function[ing] as a parent of the child no later than two years after the child's birth"<sup>131</sup>; (c) intending to do so although such function was "prevented . . . by death, incapacity, or other circumstances"<sup>132</sup>; or (d) "inten[t] to be treated as a parent of a posthumously conceived child . . ."<sup>133</sup> UPC Section 2-120 creates a rebuttable presumption that a birth mother's spouse satisfies (b) or (c), and is therefore the other parent of her child of ART, provided "no divorce proceeding is pending."<sup>134</sup> There is also a rebuttable presumption that the birth mother's deceased spouse satisfies (c) or (d), provided "no divorce proceeding was pending" when the spouse died.<sup>135</sup>

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129. UNIF. PROB. CODE § 2-120 cmt. subsection (f). Consent is required regardless of whether the prospective parent provided genetic material to create the child because, generally, "merely depositing genetic material is not, by itself, sufficient to establish a parent-child relationship with the child." *Id.*

130. *Id.* § 2-120(f)(1). *But see* UNIF. PARENTAGE ACT § 704(a) (requiring that consent "be in a record signed by the woman and the man"). The writing needs to demonstrate "consent considering all the facts and circumstances," but "need not explicitly express consent to the procedure with intent to be treated as the other parent of [the] child." UNIF. PROB. CODE § 2-120 cmt. subsection (f)(1).

131. *Id.* § 2-120(f)(2)(A); *see also* UNIF. PARENTAGE ACT §§ 204(a)(5), 704(b) (providing for paternity where a man lives with a child and acts as though he is the child's parent). Functioning as a parent involves:

behaving toward a child in a manner consistent with being the child's parent and performing functions that are customarily performed by a parent, including fulfilling parental responsibilities toward the child, recognizing or holding out the child as the individual's child, materially participating in the child's upbringing, and residing with the child in the same household as a regular member of that household.

UNIF. PROB. CODE § 2-115(4).

132. *Id.* § 2-120(f)(2)(B).

133. *Id.* § 2-120(f)(2)(C); *see also* UNIF. PARENTAGE ACT § 707 ("[T]he deceased individual is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.").

134. UNIF. PROB. CODE § 2-120(h)(1); *see also* UNIF. PARENTAGE ACT § 204(a)(1), (5) (creating a presumption of paternity where a man is married to the child's mother, and alternatively, where "for the first two years of the child's life, [the man] resided in the same household with the child and openly held out the child as his own"). The presumption is rebuttable by "clear and convincing evidence" that the husband did not function, nor intend to function, as a parent. UNIF. PROB. CODE § 2-120(h)(1).

135. *Id.* § 2-120(h)(2). This presumption is rebuttable by "clear and convincing evidence" that the deceased did not intend to function as a parent, nor intend to be treated as a parent. *Id.* § 2-120(h)(2).



## 2. Gestational Surrogacy

Under the UPA, whether a parent-child relationship is created through gestational surrogacy may depend on the terms of a judicially validated gestational agreement.<sup>136</sup> In the absence of a valid gestational agreement, parentage is determined based on the consideration of a variety of factors generally relied on to determine parent-child relationships.<sup>137</sup> The provisions of the UPC, however, place no emphasis on a valid, enforceable agreement.<sup>138</sup> The UPC provides:

(1) There is no parent-child relationship between a “gestational child”<sup>139</sup> and its “gestational carrier,”<sup>140</sup> unless the gestational carrier’s parentage is established by a court order,<sup>141</sup> or the gestational carrier is the child’s genetic mother and the child has no other parent-child relationship.<sup>142</sup>

(2) If no court order exists, there is a parent-child relationship between a gestational child and its intended parent(s)<sup>143</sup> if the parent “functioned as a parent of the child no later than two years after the child’s birth . . . .”<sup>144</sup>

(3) “A parent-child relationship is conclusively established by a court order designating the parent or parents of a gestational child.”<sup>145</sup>

136. *Id.* §§ 801(a), 802(a), 809(a); *see also id.* § 801 (specifying the permissible terms and required parties of a gestational agreement); *id.* § 803 (specifying the findings a court must make before validating an agreement). Where there is a “validated gestational agreement,” the parties to the agreement must also rely on the validating court to confirm parentage of the resulting child. *Id.* § 807(a)(1).

137. *See id.* § 809(b) (stating that, where there is an unenforceable gestational agreement, parent-child relationships will be determined under Article 2, which is generally titled, “Parent-Child Relationship”).

138. *See* UNIF. PROB. CODE § 2-121(c)–(e).

139. *Id.* § 2-121(a)(3) (“‘Gestational child’ means a child born to a gestational carrier under a gestational agreement.”).

140. *Id.* § 2-121(a)(2) (“‘Gestational carrier’ means a woman who is not an intended parent who gives birth to a child under a gestational agreement. The term is not limited to a woman who is the child’s genetic mother.”).

141. *Id.* § 2-121(c)(1).

142. *Id.* § 2-121(c)(2).

143. “‘Intended parent’ means an individual who entered into a gestational agreement providing that the individual will be the parent of a child born to a gestational carrier by means of assisted reproduction.” *Id.* § 2-121(a)(4).

144. *Id.* § 2-121(d)(1). The UPC also specifies when there is a parent-child relationship between a gestational child and a deceased intended parent. *See id.* § 2-121(d)(2) (providing that a deceased intended parent is a parent of a gestational child when a co-intended parent or relative functions as a parent). Additionally, *see id.* § 2-121(e), for provisions regarding a “Gestational Agreement after Death or Incapacity,” *id.* § 2-121(f), for provisions regarding a presumption of intent to parent, where there is a gestational agreement, after death or incapacity, *id.* § 2-121(g), for provisions regarding when that presumption is inapplicable, and *id.* § 2-121(h), for provisions regarding “[w]hen [a] [p]osthumously [c]onceived [g]estational [c]hild [is] [t]reated as in [g]estation.”

145. *Id.* § 2-121(b).

By allowing intended parents to establish their parental status by playing the role of a parent, rather than requiring a court order or the absence of other parents as is the standard for gestational carriers, the UPC exudes a preference for parent-child relationships between children and their intended parents.<sup>146</sup> Similarly, as discussed in Part II.C.3, courts have a tendency to resolve parentage issues by enforcing the parties' original agreement and determining parentage in favor of intended parents.<sup>147</sup> Thus, consent and intent are constants in the task of determining the parentage of children of ARTs.

### III. THE COURT'S REASONING

The Court of Appeals of Maryland affirmed the Court of Special Appeals' decision. Emphasizing that Sieglein consented to artificial reproduction with his wife, the court held that Sieglein is the father of the child conceived through IVF during his marriage, and further, that "artificial insemination" does encompass IVF.<sup>148</sup> First, the court recognized its primary task: determining the meaning of "artificial insemination."<sup>149</sup> Second, the court conducted statutory interpretation of Maryland's artificial insemination statute to discern its legislative purpose.<sup>150</sup>

The court began its interpretation by asking whether the plain meaning of "artificial insemination" is clear and unambiguous.<sup>151</sup> The court recited three definitions of "artificial insemination": (1) "introduction of semen into the uterus or oviduct by other than natural means"<sup>152</sup>; (2) "the introduction of semen into the vagina by artificial means"<sup>153</sup>; and (3) introduction of semen into the vagina other than by coitus."<sup>154</sup> The court went on to note that Black's Medical Dictionary recognizes "two forms of artificial insemination," and that there are "multiple techniques for introducing the sperm into the woman."<sup>155</sup> Thus, the court concluded that "artificial insemination" has

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146. Compare text accompanying *supra* notes 139–142 (addressing the parental status of intended parents), with text accompanying *supra* notes 143–144 (addressing the parental status of gestational carriers).

147. See *supra* Part II.C.3.

148. Sieglein v. Schmidt, 447 Md. 647, 652, 670, 136 A.3d 751, 754, 765 (2016).

149. *Id.* at 660, 136 A.3d at 759.

150. *Id.* at 662, 136 A.3d at 760.

151. *Id.* at 660, 136 A.3d at 759.

152. *Id.* at 661, 136 A.3d at 760 (quoting *Artificial insemination*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED (1961)).

153. *Id.* (quoting *Artificial insemination*, BLACK'S MEDICAL DICTIONARY (26th ed. 1965)).

154. *Id.* (quoting *Artificial insemination*, STEDMAN'S MEDICAL DICTIONARY (28th ed. 2007)).

155. *Id.* Artificial insemination may be conducted using a woman's husband's sperm or donor sperm. *Id.* Additionally, artificial insemination may be conducted by placing sperm in a woman's fallopian tube or uterus, or other locations within the woman's body. *Id.* at 661–62 n.13, 136 A.3d at 760 n.13 (citing DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 943 (32d ed. 2012)).

many meanings “generally related to artificial reproduction” and, therefore, that Maryland’s artificial insemination statute is ambiguous.<sup>156</sup>

The court went on to resolve the ambiguity of “artificial insemination” by deciphering, from its legislative history, the legislative purpose of Maryland’s artificial insemination statute.<sup>157</sup> The Commission to Review and Revise the Testamentary Law of Maryland commented on the addition of Section 1-206(b), revealing that “[i]t is derived from” Section 2-111(b) in the 1967 draft of the Uniform Probate Code (“draft UPC”).<sup>158</sup> A comment on Section 2-111(b) asserts that the provision intended to demonstrate the modern trend towards avoiding illegitimacy, as conception via donated sperm continued to raise concerns regarding the paternity of offspring.<sup>159</sup> Thus, the court reasoned that the purpose of Maryland’s artificial insemination statute is to legitimize children conceived using donated sperm.<sup>160</sup> The court interpreted the statute as applying to all ARTs (other than gestational surrogacy), and as protecting the legitimacy of children of ARTs involving donated sperm, regardless of what particular method is used.<sup>161</sup> Therefore, given that Sieglein, as Schmidt’s husband, consented to the use of IVF, which the court held is encompassed by “artificial insemination,” the Court of Appeals found that Sieglein is the child’s father.<sup>162</sup>

Judge Watts concurred, arguing that while Sieglein is the father of the child, the court should leave the extension of Maryland’s artificial insemination statute to the General Assembly.<sup>163</sup> Judge Watts did not believe the court needed to conduct statutory interpretation of Section 1-206(b), because Section 1-206(a) of Maryland’s Estates and Trusts Article applied.<sup>164</sup> Section 1-206(a) provides that “[a] child born or conceived during a marriage is presumed to be the legitimate child of both spouses.”<sup>165</sup> Judge Watts posited that the purpose of Section 1-206(a) is to “extend a statutory presumption of legitimacy to children who are born or conceived during a marriage,” and that “no parent who voluntarily consented to the use of IVF . . . could overcome the presumption of legitimacy that is established by [Section] 1-206(a).”<sup>166</sup> Therefore, because Sieglein consented to and participated in the

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156. *Sieglein*, 447 Md. at 662, 136 A.3d at 760.

157. *Id.*

158. *Id.* (quoting COMM’N, SECOND REPORT, *supra* note 57, at 8).

159. *Id.* at 663–64, 136 A.3d at 761–62 (quoting UNIF. PROBATE CODE § 2–111 cmt. (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, Third Working Draft, 1967)).

160. *Id.* at 666, 136 A.3d at 763.

161. *Id.* at 666–67, 136 A.3d at 763.

162. *Id.* at 667, 670, 136 A.3d at 763, 765.

163. *Id.* at 677–78, 136 A.3d at 769–70 (Watts, J., concurring).

164. *Id.* at 678, 136 A.3d at 770.

165. MD. CODE ANN., EST. & TRUSTS § 1-206(a) (LexisNexis 2011).

166. *Sieglein*, 447 Md. at 680–81, 136 A.3d at 771 (Watts, J., concurring).

IVF process, Judge Watts believed that Section 1-206(a) established his paternity.<sup>167</sup>

#### IV. ANALYSIS

In *Sieglein v. Schmidt*, the Court of Appeals of Maryland held that Maryland's artificial insemination statute encompasses all ARTs, other than gestational surrogacy.<sup>168</sup> Part IV.A suggests that the court reached the correct conclusion in extending the application of the artificial insemination statute, despite improperly interpreting the term "artificial insemination."<sup>169</sup> Part IV.B.1 suggests that existing Maryland law surrounding ARTs is inadequate.<sup>170</sup> Part IV.B.2 proposes and justifies a new statute for dealing with ARTs.<sup>171</sup> Part IV.B.3 compares the proposed ART statute to Maryland's current artificial insemination statute by analyzing hypothetical cases.<sup>172</sup>

##### *A. Although the Sieglein Court's Reasoning Was Flawed, the Court Properly Concluded That Maryland's Artificial Insemination Statute Encompasses Other ARTs*

The *Sieglein* court's reasoning was flawed because it found ambiguity where there was none among the cited definitions of "artificial insemination," which clearly describe one particular method of assisted reproduction.<sup>173</sup> Instead, the court should have found the term "artificial insemination" to be ambiguous, within the context of the artificial insemination statute, because declaring that "artificial insemination" refers to only one ART would not effectuate the artificial insemination statute's purpose—to minimize illegitimacy.<sup>174</sup>

The term "artificial insemination" is ambiguous insofar as it refers to the multiple means by which semen is inserted into the woman during artificial insemination.<sup>175</sup> It is clear, however, that artificial insemination involves the insertion of semen, rather than the insertion of an embryo or any other medical procedure.<sup>176</sup> Yet, the *Sieglein* court found ambiguity in "artificial

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167. *Id.* at 681, 136 A.3d at 771.

168. *Id.* at 666–67, 136 A.3d at 763.

169. *See infra* Part IV.A.

170. *See infra* Part IV.B.1.

171. *See infra* Part IV.B.2.

172. *See infra* Part IV.B.3.

173. *See infra* text accompanying notes 175–177 (arguing that the *Sieglein* court's reasoning was flawed).

174. *See infra* text accompanying notes 179–182 (explaining why it would be absurd for Maryland's artificial insemination statute to apply to only artificial insemination).

175. *See supra* note 155 (noting the different methods of artificial insemination).

176. *See supra* text accompanying notes 152–154 for definitions of artificial insemination, none of which mention any procedure other than the introduction of semen into a woman.

insemination” because the technique can be performed in different ways.<sup>177</sup> Then, rather than determining *which form* of artificial insemination the term refers to, the court interpreted “artificial insemination” as referring to *all ARTs*.<sup>178</sup> Thus, if nothing else, the *Sieglein* court took a circuitous route to reach the correct conclusion that the artificial insemination statute encompasses all ARTs.

Instead, the *Sieglein* court should have reasoned that an inclusive interpretation of “artificial insemination” is necessary to effectuate the purpose of Maryland’s artificial insemination statute, which would have allowed it to then conclude that “artificial insemination” refers to all ARTs.<sup>179</sup> The Governor’s Commission to Review and Revise the Testamentary Law of Maryland (“the Commission”) declared that an artificial insemination statute was “desirable in view of the increased use of artificial insemination and the lack of any statute or case law on the subject in Maryland.”<sup>180</sup> Thus, at the very least, one could conclude that the General Assembly of Maryland intended to protect the legitimacy of children born through artificial insemination.<sup>181</sup> It would be absurd, however, to conclude that the legislature wanted to protect children born through artificial insemination, but not children born through other ARTs.<sup>182</sup>

Due to the Commission’s reference to the draft UPC,<sup>183</sup> it is probable that the legislature had a broader purpose than to exclusively legitimize children created through artificial insemination. In its comment to the proposal of Maryland’s artificial insemination statute, the Commission acknowledged that the statute “is derived from” Section 2-111(b) of the draft UPC,<sup>184</sup> and the comment to that section states, “[t]his section is designed to reflect the modern policy toward minimizing illegitimacy and its impact on inheritance rights . . . .”<sup>185</sup> Because Section 2-111(b) of the draft UPC motivated the leg-

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177. See *supra* text accompanying notes 155–156 (explaining the *Sieglein* court’s reasoning for finding ambiguity in “artificial insemination”).

178. See *supra* text accompanying note 161 (stating the *Sieglein* court’s final interpretation of Maryland’s artificial insemination statute).

179. Recall that a court is allowed to consider statutory purpose in interpreting the plain meaning of statutory language. See *supra* text accompanying note 74 (listing the considerations of statutory interpretation).

180. COMM’N, SECOND REPORT, *supra* note 57, at 8.

181. See *id.*

182. Again, recall that in interpreting statutory language, a court must avoid prescribing a meaning that will lead to absurdities. See *supra* text accompanying note 71.

183. UNIF. PROB. CODE (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS, Third Working Draft, 1967) [hereinafter UNIF. PROB. CODE, Third Working Draft].

184. COMM’N, SECOND REPORT, *supra* note 57, at 8.

185. UNIF. PROB. CODE, Third Working Draft § 2-111 cmt.

islature, it is fair to conclude that the legislature endorsed the section's purpose, and adopted the same goal—the goal of “minimizing illegitimacy”<sup>186</sup>—in drafting its own artificial insemination law.<sup>187</sup> Protecting children created through artificial insemination, but not children created through any other ART, would do little to effectuate the legislature's goal of minimizing illegitimacy, because the most commonly used ART is IVF.<sup>188</sup> Protecting children created through artificial insemination, but not IVF, would not be an efficient way to minimize illegitimacy. For that reason, provided the legislature's goal in creating Maryland's artificial insemination statute was to minimize illegitimacy, it would be nonsensical to limit the statute's application to artificial insemination. Therefore, the court could have deemed “artificial insemination” ambiguous because, in light of the artificial insemination statute's purpose, it is unclear whether the term refers exclusively to artificial insemination or to all ARTs.<sup>189</sup>

Although the *Sieglein* court did not base its finding of ambiguity on statutory purpose, it properly interpreted “artificial insemination”—to effectuate the legislature's intent—as including all ARTs (except surrogacy).<sup>190</sup> Covering all ARTs under the artificial insemination statute is the most effective way to minimize illegitimacy. Yet, as Judge Watts noted in her concurrence, it is possible that the legislature did not intend to include all ARTs in Maryland's artificial insemination statute because the techniques “did not exist at the time [the statute] was enacted.”<sup>191</sup> Considering her point, three alternatives are possible: (1) the legislature intended not to protect children of ARTs other than artificial insemination; (2) the legislature intended to protect children of all ARTs and used “artificial insemination” as an umbrella term; or (3) the legislature did not consider children of other ARTs at all. It is unclear which was true when the legislature drafted Section 1-206(b).<sup>192</sup> In any event, it is clear today that Maryland's artificial insemination statute needs to be updated to accommodate medical advances in the realm of procreation.<sup>193</sup>

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186. *Id.*

187. See COMM'N, SECOND REPORT, *supra* note 57, at 8.

188. *Reproductive Health*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/reproductivehealth/infertility/> (last visited Apr. 2, 2017).

189. See *supra* text accompanying notes 184–188.

190. *Sieglein v. Schmidt*, 447 Md. 647, 666–67, 136 A.3d 751, 763 (2016).

191. *Id.* at 681, 136 A.3d at 772 (Watts, J., concurring).

192. See Emily McAllister, *Defining the Parent-Child Relationship in an Age of Reproductive Technology: Implications for Inheritance*, 29 REAL PROP. PROB. & TR. J. 55, 69 (1994) (claiming that the application of artificial insemination statutes “to other assisted conception procedures is uncertain,” but “[t]here is a strong case for construing ‘artificial insemination,’ . . . as encompassing other methods of assisted conception,” because of the similarities between artificial insemination and other ARTs).

193. See *Sieglein*, 447 Md. at 678, 136 A.3d at 770 (recognizing a possibility that Maryland's artificial insemination statute needs to be amended in order to accommodate modern medicine).

*B. Maryland's Artificial Insemination Statute Should Be Extended to Protect Children Born Through Any ART*

*1. Existing Maryland Parentage Statutes Fall Short of Adequately Answering Questions Presented in ART Cases*

Maryland needs a broader statute that will work to prevent the illegitimacy of children created through any ART.<sup>194</sup> One might argue that a statute specifically addressing ARTs is unnecessary because other paternity statutes can effectively prevent illegitimacy, namely, Estates and Trusts Article Sections 1-206(a)<sup>195</sup> and 1-208(b),<sup>196</sup> or Family Law Article Sections 5-1027(c)(1),<sup>197</sup> 5-1028(d)(1)<sup>198</sup> and 5-1029(f)(4).<sup>199</sup> For example, Judge Watts suggested that Section 1-206(a) of the Estates and Trusts Article should have been used to resolve the paternity issue in *Sieglein v. Schmidt*, arguing that, under that statute, a husband is presumed to be the father of a child conceived during marriage.<sup>200</sup> Yet, Judge Watts's argument falls short because genetic testing can be used to rebut a presumption of paternity.<sup>201</sup> Thus, applying 1-206(a) in cases where ARTs are used, such as in *Sieglein* where the child was not genetically related to the husband or the wife, is problematic because someone like Schmidt, who denies parentage, could rebut the presumption of paternity by showing that he and the child are not genetically related.<sup>202</sup> On a related note, using genetic testing to establish parentage in ARTs cases, as permitted by Family Law Article Section 5-1029(f)(4), is insufficient because, in many cases, the individual seeking parentage will not be genetically related to the child.<sup>203</sup> Ultimately, the General Assembly created Estates and Trusts Article Section 1-206(b) because of "the lack of any statute . . . on the subject in Maryland," suggesting that other paternity statutes were never meant to apply to ARTs cases.<sup>204</sup> Therefore, there is an unmet "need for the

194. See Elliott L. Biskind, *Legitimacy of Children Born by Artificial Insemination*, 5 J. FAM. L. 39, 43 (1965) (recognizing "that it is necessary to remove from children the stigma of illegitimacy").

195. MD. CODE ANN., EST. & TRUSTS § 1-206(a) (LexisNexis 2011).

196. *Id.* § 1-208(b).

197. MD. CODE ANN., FAM. LAW § 5-1027(c)(1) (LexisNexis 2012).

198. *Id.* § 5-1028(d)(1).

199. *Id.* § 5-1029(f)(4).

200. See *supra* text accompanying notes 164–167.

201. *Miles v. Stovall*, 132 Md. App. 71, 82–83, 750 A.2d 729, 736 (2000).

202. See *Sieglein v. Schmidt*, 224 Md. App. 222, 227, 230, 120 A.3d 790, 793, 795 (2015), *aff'd*, 447 Md. 647, 136 A.3d 751 (2016).

203. See, e.g., *id.* at 229, 120 A.3d at 794–95.

204. COMM'N, SECOND REPORT, *supra* note 57, at 8; see Richard F. Storrow, *Parenthood By Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 599 (2002) ("[L]egislatures addressing assisted reproduction have fashioned unique statutes to resolve these issues, suggesting that well-established parentage principles do not adequately

law to recognize [families created through ARTs, which] are not accounted for by the parentage rules of the past.”<sup>205</sup>

## 2. Proposed ART Statute

Maryland’s artificial insemination statute should be replaced by an ART statute modeled off of the current statute:

*A child conceived by an assisted reproductive technology is the child of an individual, or individuals—not to exceed two persons—who consented to artificial reproduction with intent to parent the child.*<sup>206</sup>

The proposed ART statute maintains the consent element of the artificial insemination statute because consent has been “crucial” to establishing parentage,<sup>207</sup> and is seemingly equally important to determining parentage where other ARTs are used to create children.<sup>208</sup> Nevertheless, the proposed statute differs from Maryland’s artificial insemination statute in three ways: (1) it refers to ARTs rather than artificial insemination; (2) it does not make parentage dependent on marital status; and (3) it makes intent to parent a prerequisite for parental status.<sup>209</sup>

The first change proposed in the ART statute is to mention “assisted reproductive technology,” rather than “artificial insemination,” because as articulated throughout this Note, a major failing of current statutes is their mention of only artificial insemination.<sup>210</sup>

The second change proposed in the ART statute is to abandon marriage as a determinant of legitimacy because it “run[s] afoul of sound social policy.”<sup>211</sup> Marriage-based restrictions on families created through ARTs are problematic for the following four reasons. First, heterosexual intercourse

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account for the policy ramifications of the use of these techniques.”); *see also supra* text accompanying note 75 (noting that statutes should be interpreted so that no portion is superfluous).

205. Storrow, *supra* note 204, at 601.

206. This model ART statute was drafted by the author. *Compare* MD. CODE ANN., EST. & TRUSTS § 1-206(b) (LexisNexis 2011).

207. Michael J. Higdon, *Fatherhood by Conscriptio: Nonconsensual Insemination and the Duty of Child Support*, 46 GA. L. REV. 407, 439 (2012); *see supra* text accompanying notes 146–147 (recognizing the UPC and judicial reliance on intent).

208. *See, e.g., Sieglein*, 447 Md. at 666, 136 A.3d at 763 (emphasizing consent in the determination of paternity where a child was created using IVF). Just as with artificial insemination statutes, consent should be demonstrable through writing or orally, or “under contract theories or equitable principles.” Storrow, *supra* note 204, at 624; *see also supra* text accompanying notes 130–133 (listing different ways to establish consent).

209. *See* EST. & TRUSTS § 1-206(b).

210. McAllister, *supra* note 192, at 100–01.

211. Richard F. Storrow, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. DAVIS L. REV. 305, 318 (2006).



has been thought of as the purpose of marriage, but sexual intercourse is clearly beyond the scope of ARTs.<sup>212</sup> Because ARTs do not involve sexual intercourse, marriage-based restrictions on procreation through ARTs “cannot be justified as advancing marriage’s role in the regulation of human sexual relations.”<sup>213</sup> Second, it has been suggested that marriage-based restrictions may promote legitimacy due to marriage-based presumptions of paternity.<sup>214</sup> Yet, the UPA seeks to treat marital and non-marital children equally, making marriage-based restrictions counterproductive, and such restrictions are harmful to non-marital children.<sup>215</sup> Third, while it is true that marriage-based restrictions are an efficient means for guaranteeing two-parent support, there is a trend toward measuring the guarantee of support by commitment rather than marriage; and marriage is not a prerequisite for a commitment to parenting.<sup>216</sup> Fourth, it could be that marriage-based restrictions are a benefit of marriage, meant to encourage the institution of marriage<sup>217</sup>; but “married couples are [rarely] made the sole beneficiaries of newly created privileges,” and it is doubtful that marriage-based restrictions actually promote marriage.<sup>218</sup> Additionally, consistent with the American commitment to equal treatment, the American practice is to avoid “condition[ing] procreative liberty upon marital status.”<sup>219</sup> Therefore, application of the ART statute should not be limited to married couples.<sup>220</sup>

The final change proposed in the ART statute is to base the establishment of parentage on intent, as opposed to genetics or gestation.<sup>221</sup> Where a

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212. *Id.* at 319; *see also* Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 337 (1990) (noting the “separation of sexual behavior from procreative behavior” in ARTs).

213. Storrow, *supra* note 211, at 319–20.

214. *Id.* at 320; *see also* Hannah Alsgaard, *Decoupling Marriage & Procreation: A Feminist Argument for Same-Sex Marriage*, 27 BERKELEY J. GENDER L. & JUST. 307, 319 (2012) (“By writing these paternity laws, legislatures have extended the marital presumption of paternity to children who were knowingly conceived through technology with non-marital genetic material.”).

215. Storrow, *supra* note 211, at 321; Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177, 1192 (2010).

216. Storrow, *supra* note 211, at 321, 323; *see also* Shultz, *supra* note 212, at 332 (suggesting that intent should determine parentage because of the magnitude of the commitment necessary to parenting).

217. Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 248 (2006) (“[T]he presumption of legitimacy serves to establish the unitary family or the marital family as the normative family.”).

218. Storrow, *supra* note 211, at 324, 326; *see also* Shultz, *supra* note 212, at 326 (claiming that non-traditional family forms are gaining “recognition and tolerance”).

219. Storrow, *supra* note 211, at 327, 331; Appleton, *supra* note 217, at 243; *see also supra* note 42 (demonstrating the progression towards embracing the equal treatment of legitimate and illegitimate children).

220. *See supra* text accompanying notes 212–219.

221. *See* Shultz, *supra* note 212, at 323 (asserting that intent should be the basis of parentage where ARTs are involved).

child is created through an ART, there are eight potential parents: “the egg donor, the sperm donor, their spouses, the surrogate and her husband, and the intending mother and father.”<sup>222</sup> In ARTs, a genetic donor “plays the passive role of providing the seed from which the child will develop,” which is insufficient for the establishment of parentage.<sup>223</sup> In fact, the genetic tie between a donor and child is no greater than the genetic tie between a child and his or her sibling.<sup>224</sup> Thus, if genetics were to be the basis of parentage, siblings and donors would have equal claims to parental status, which lawmakers would likely deem unacceptable.<sup>225</sup> Additionally, most sperm and egg donors have given up their rights to their genetic material and cannot claim a property right in parentage.<sup>226</sup> Alternatively, some argue that gestation should determine parentage due to the bond created between a host and child, and the harm that could result from a child not developing that sort of emotional tie.<sup>227</sup> A bond between a host and child, however, is not necessary for a child to receive optimal “love and nurtur[ing],” and it is not clear that only natural parents develop such bonds with children.<sup>228</sup> Some further argue that gestation should determine parentage because of “the effects . . . of relinquishing the child” on the host, but this “must be weighed against a similar harm to the intended parents in the event that the surrogate does not turn over the child.”<sup>229</sup> Additionally, there is an argument that gestation should determine parentage because of the amount of “work” done by a gestational host; yet a host gives up her ability to make such a claim when she agrees to carry a child, understanding that she will relinquish the child after gestation.<sup>230</sup> Thus, the arguments in favor of genetics and gestation as indicators of parentage are unconvincing.

Professor Hill makes three arguments for supporting intention as the basis of parentage: (1) “The ‘But For’-Causation Argument”; (2) “The Contract Argument”; and (3) “The Avoidance-of-Uncertainty Argument.”<sup>231</sup> The

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222. Storrow, *supra* note 204, at 602.

223. John Lawrence Hill, *What Does it Mean to be a “Parent”? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 391 (1991); Appleton, *supra* note 217, at 270 (noting that “the legal significance of genetic connection seems to have been often overstated”); see also *supra* note 129 (noting the negligible role of donating genetic materials to ART processes).

224. Hill, *supra* note 223, at 391.

225. *Id.*

226. *Id.* at 391–92. Further, “children are not property.” *Id.*

227. *Id.* at 394, 401.

228. See *id.* at 400, 402 (“[S]tudies of attachment between adoptive mothers and children report no difference in the quality of attachment between adoptive and natural parent-child relationships.”).

229. *Id.* at 405, 407.

230. *Id.* at 407–08 (“Even assuming she could have property rights in the child, the surrogate has no more of a claim to the ‘property’ by virtue of this argument than a builder has in a house constructed for another.”); see also Shultz, *supra* note 212, at 331 (describing the work done by a gestational host).

231. Hill, *supra* note 223, at 414–17.

“‘But For’ Causation” argument suggests that intent should determine parentage because the intended parents are the ones who brought about the creation of the child.<sup>232</sup> This argument lies on the premise that intent to have a child, rather than any biological linkage, is the essence of parenthood.<sup>233</sup> Some might counter that other participants are necessary in the creation of the child and are also but-for causes, but the “intended parents are the first cause” and the other participants are not essential—they can be replaced with other persons willing to play their roles.<sup>234</sup> The “Contract” argument suggests that intent should determine parentage due to the promise of other participants “to refrain from claiming parental rights.”<sup>235</sup> Enforcement of these promises is in the interest of children of ARTs, because intended parents need to be able to rely on such promises in order to fully prepare to be good parents.<sup>236</sup> Finally, the “Avoidance-of-Uncertainty” argument suggests that intent should determine parentage at the time of conception to avoid an adverse impact on all parties<sup>237</sup>; “[p]ermitting challenges to the parental status of the intended parents virtually ensures that the child will grow up in the functional equivalent of a broken home.”<sup>238</sup> For these reasons, and in accord with the UPA, UPC, and jurisprudence related to parentage and ARTs, the proposed ART statute focuses on intent as the basis for parentage.

Because the proposed ART statute refers to ARTs in general, applies to married and unmarried persons, and bases parental status on intent rather than the assumption that a woman conceives only with her husband, the proposed statute is wider reaching and less presumptive than Maryland’s artificial insemination statute, making it a more effective law.<sup>239</sup>

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232. *Id.* at 414; *see also* Joslin, *supra* note 215, at 1182 (“[I]f one is truly concerned with the well-being of children, then one should support parentage rules that ensure that *all children* are provided with adequate financial protections by and through the people who intentionally brought them into the world.”).

233. Hill, *supra* note 223, at 414.

234. *Id.* at 415; Alsgaard, *supra* note 214, at 320 n.90.

235. Hill, *supra* note 223, at 415.

236. *Id.* at 416; *see also* Joslin, *supra* note 215, at 1223 (positing that another benefit of intent-based parentage is that it prevents the child from having to litigate to enjoy the benefits of legal familial ties).

237. Hill, *supra* note 223, at 417 (“In cases where litigation over parental rights takes years, the child may grow up with uncertainty regarding the identity of her parents.”); Shultz, *supra* note 212, at 324.

238. Hill, *supra* note 223, at 417.

239. *See infra* text accompanying notes 243–267 (comparing the current statute to the proposed ART statute).

3. *Comparison of the Proposed ART Statute and Maryland's Artificial Insemination Statute*

Legal philosopher Lon Fuller proposed eight elements of good law, which have been characterized as: “[g]enerality”; “[n]otice or publicity”; “[p]rospectivity” (or non-retroactivity); “[c]larity”; “[n]on-contradictoriness”; “[c]onformability”; “[s]tability”; and “[c]ongruence.”<sup>240</sup> The proposed ART statute would be a better law, fulfilling more of those eight elements, than Maryland’s artificial insemination statute. To demonstrate this, what follows is a comparison of the proposed ART statute and the current artificial insemination statute, as applied to nine hypothetical cases. After all, “[w]hen it comes to advocating for a change in the law, storytelling can be an extremely powerful tool.”<sup>241</sup> The following hypothetical cases are based on cases presented by Emily McAllister in *Defining the Parent-Child Relationship in an Age of Reproductive Technology: Implications for Inheritance*, which she used to illustrate the utility of a proposed statute that reformed deficiencies in a uniform act encompassing inheritance and parentage law related to children of ARTs.<sup>242</sup>

a. *Case 1*

X conceives through IVF, using an egg and semen from anonymous donors, with X’s spouse’s consent and intent to parent.<sup>243</sup>

This is the scenario presented in *Sieglein v. Schmidt*.<sup>244</sup> Given the Court of Appeal’s holding in *Sieglein*—that Maryland’s current statute applies to all ARTs other than surrogacy—X and her spouse would be the parents of the resulting child as long as her spouse is a man.<sup>245</sup> Under the proposed ART statute, both X and her spouse would be the resulting child’s parents, regardless of the spouse’s sex, because they intended to parent the child.

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240. Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 784–85 (1989); see also LON L. FULLER, *THE MORALITY OF LAW* 38–39 (1964).

241. Higdon, *supra* note 207, at 409.

242. McAllister, *supra* note 192, at 101, 103.

243. *Id.* at 103.

244. See *supra* text accompanying note 20 (providing the facts of *Sieglein*).

245. See *Sieglein v. Schmidt*, 447 Md. 647, 666–67, 136 A.3d 751, 763 (2016) (interpreting the current statute as extending the presumption of *paternity* to children of ARTs other than surrogacy, conceived with a *husband’s* consent). Given that women must be able to prove maternity using the same means through which men are able to prove paternity, it might be that the artificial insemination statute applies to all married couples—heterosexual and homosexual. *In re Roberto d.B.*, 399 Md. 267, 283, 923 A.2d 115, 124 (2007).

*b. Case 2*

X conceives through IVF, using an egg and semen from anonymous donors, without X's spouse's consent or intent to parent.<sup>246</sup>

Under both the current statute and the proposed ART statute, X, but not her spouse, would be the resulting child's parent, because X's spouse did not consent to the ART, as required by the current and proposed ART statutes.<sup>247</sup>

*c. Case 3*

X conceives through IVF, using an egg and semen from anonymous donors, with X's non-spousal partner's consent and intent to parent.<sup>248</sup>

The current statute would be inapplicable because X and her partner are not married.<sup>249</sup> Under the proposed ART statute, however, the result is the same as in case 1<sup>250</sup>; X and her partner would be the parents of the resulting child, because the determining factor under the proposed ART statute is consent and marital status is irrelevant.

*d. Case 4*

X conceives through IVF, using an egg and semen from anonymous donors, without X's non-spousal partner's consent or intent to parent.<sup>251</sup>

Here, the result would be the same as in case 2, although the current statute would not apply because X is not married to her partner.<sup>252</sup> Still, under the proposed ART statute, X's partner is not the resulting child's parent because they did not consent to the reproductive procedure.

*e. Case 5*

X conceives through IVF, using a donor egg and a friend's semen. Although the friend consented to the use of his semen, he did not agree to act as a parent.<sup>253</sup>

In this case, the current statute would not apply because X is unmarried.<sup>254</sup> Under the proposed ART statute, X, but not her friend, would be a parent of the resulting child, because the friend did not consent to the reproductive procedure with the intent to parent.

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246. McAllister, *supra* note 192, at 104.

247. See MD. CODE ANN., EST. & TRUSTS § 1-206(b) (LexisNexis 2011).

248. McAllister, *supra* note 192, at 105.

249. See EST. & TRUSTS § 1-206(b).

250. See *supra* Part IV.B.3.a.

251. McAllister, *supra* note 192, at 105.

252. See EST. & TRUSTS § 1-206(b); *supra* Part IV.B.3.b.

253. McAllister, *supra* note 192, at 106.

254. See EST. & TRUSTS § 1-206(b).

*f. Case 6*

X conceives through IVF, using a friend's semen. The friend consented to the use of his semen and agreed to act as a parent.<sup>255</sup>

Again, the current statute would be inapplicable because X is unmarried.<sup>256</sup> Under the proposed ART statute, X and her friend would be parents of the resulting child, because the friend consented to the reproductive procedure with intent to parent.

*g. Case 7*

X conceives through IVF, using an egg and semen from anonymous donors, pursuant to a gestational surrogacy agreement whereby X is to relinquish the child to Y and Z, or alternatively to Y, who intend to parent.<sup>257</sup>

The current statute would not apply in this case because the *Sieglein* court did not extend the reach of the statute to surrogacy.<sup>258</sup> Under the proposed ART statute, Y and Z, or Y alone, would be the resulting child's parents because, although X, Y, and Z, all consented to participate in artificial reproduction, Y and Z, not X, intended to parent the child.

*h. Case 8*

X conceives through IVF, using her own egg and semen from an anonymous donor, pursuant to a surrogacy agreement whereby X is to relinquish the child to Y and Z, or alternatively to Y, who intend to parent.<sup>259</sup>

The parentage in this case would be the same as in Case 7 because the proposed ART statute emphasizes intent, not genetic relation or gestation.<sup>260</sup>

*i. Case 9*

X conceives through IVF, using her spouse's egg and sperm from an anonymous donor, with the consent of her same-sex spouse, who intends to parent.<sup>261</sup>

Since this case involves a same-sex couple, the current statute might not apply because it appears to be written to encompass heterosexual, married couples.<sup>262</sup> If, however, X and her partner were married and the current statute did apply, X and her partner would be the resulting child's parents because

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255. McAllister, *supra* note 192, at 107.

256. *See* EST. & TRUSTS § 1-206(b).

257. McAllister, *supra* note 192, at 107.

258. *See* Sieglein v. Schmidt, 447 Md. 647, 666–67, 136 A.3d 751, 763 (2016).

259. McAllister, *supra* note 192, at 107.

260. *See supra* Part IV.B.3.g.

261. McAllister, *supra* note 192, at 109.

262. *See* MD. CODE ANN., EST. & TRUSTS § 1-206(b) (LexisNexis 2011).

X's partner consented to the artificial reproduction.<sup>263</sup> Under the proposed ART statute, there would be no room to doubt whether X and her partner were the resulting child's parents because the requisite consent is present, and sexuality and marital status are irrelevant under the proposed ART statute.

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In at least six of the nine cases presented above—cases 3 through 8—Maryland's current statute would be inapplicable due to its consideration of only married couples and exclusion of surrogacy, whereas the proposed ART statute would be applicable in all nine cases.<sup>264</sup> Thus, considering Fuller's elements of good law, the proposed ART statute is more effective than the current statute because it is more general—more cases “can be seen to fall under or lie within” the proposed ART statute than the current statute.<sup>265</sup> Further, prior to the holding in *Sieglein v. Schmidt*, Maryland's current statute failed Fuller's notice and prospectivity elements because the statute was not known to apply to ARTs other than artificial insemination.<sup>266</sup> There was an issue with notice, because it was unclear to whom the current statute would apply. Additionally, there was a problem with prospectivity, because the current statute did not necessarily exist as a rule applying to all ARTs prior to the question of such application coming before the court.<sup>267</sup> Therefore, the proposed ART statute is more effective than Maryland's current statute because it is broader, provides better notice of applicability to the public, and is not retroactive.

## V. CONCLUSION

In *Sieglein v. Schmidt*, the Court of Appeals of Maryland improperly found ambiguity in the term “artificial insemination,” but properly concluded that Maryland's artificial insemination statute applies to all ARTs.<sup>268</sup> Still, as written, Maryland's artificial insemination statute leaves some children of ARTs unprotected.<sup>269</sup> The goal is to maximize legitimacy, but the current law falls short of covering all cases where ARTs are used, thereby leaving

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263. *See id.*

264. *See supra* Part IV.B.3.a-i (comparing the current statute and the proposed ART statute through hypothetical cases).

265. *See Radin, supra* note 240, at 785 (describing generality).

266. *See id.* (explaining notice as requiring that “[t]hose who are expecting to obey the rules must be able to find out what the rules are,” and prospectivity as requiring that “rules must exist prior in time to the actions being judged by them”); *supra* text accompanying note 33 (asserting that the Court of Appeals of Maryland heard *Sieglein v. Schmidt* to determine the reach of the current statute).

267. *See Radin, supra* note 240, at 785 (describing notice and prospectivity).

268. *See supra* Part III.

269. *See supra* Part IV.B.3.

room for illegitimacy.<sup>270</sup> The General Assembly of Maryland should amend Maryland's artificial insemination statute, to include all ARTS and individuals who procreate, and ensure that no child of ART experiences illegitimacy.<sup>271</sup>

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270. *See supra* text accompanying note 187; Part IV.B.3.

271. *See supra* Part IV.B.1–2.