

INTRODUCTION

Today, family law attorneys and students work in a time of exhilarating change. They must grapple with upheavals in longstanding principles and challenges to the traditional understanding of the family itself. Among the many important shifts that are remaking family law, certain transformations in the fundamental concept of parentage stand out. No longer can one unequivocally answer questions as basic as: Who is a child's parent? On what basis does the law recognize the rights and impose the responsibilities that parental status entails? How many parents may a given child have?

Once, parentage rules relied on biology, marriage to the child's mother, and adoption. Now, such familiar connections merely provide a starting point for more expansive and often more contested approaches that look to behaviors, functions, and intentions. These new approaches also defy conventional assumptions reflected in gendered terms such as "mother" and "father."

Scientific developments, such as more accurate genetic testing and assisted reproductive technologies (or ARTs), account for some of the ongoing changes in the law of parentage. Social developments have also played an important role, including high divorce and remarriage rates, the increasing emergence of families headed by gay men and lesbians, a decreasing number of white infants available for placement, a growing number of older children with special needs without permanent homes, the rise of adoptions across earlier racial and geographic boundaries, and a burgeoning market for infertility treatments.

Against the background of the changing landscape of parentage, this book explores adoption and ARTs. As ordinarily understood, adoption ends an existing parent-child relationship and replaces it with a new one. Hence, an examination of adoption must consider how the law begins such relationships, what legal consequences follow from such relationships, and how the law terminates such relationships.

Today, a study of adoption would remain incomplete without a study of ARTs, too. Millions of babies now have been born as a result of such medical interventions. Two principal ARTs, alternative insemination (once called

“artificial insemination”) and in vitro fertilization (commonly called “IVF”) permit a range of collaborations, including use of donated genetic material or gestational services. Such arrangements require rethinking traditional parentage rules and also complicate the concept of adoption.

Investigating adoption and ARTs together highlights several important themes and tensions. First, the juxtaposition of these topics recognizes that for many persons who face reproductive challenges (from infertility, perhaps, or the absence of a heterosexual partner) adoption, increasingly, has become only one option among many.

Second, the laws governing adoption and ARTs are entwined because the resolution of legal problems in one context often provides models for issues arising in the other, although not without controversy. The law’s familiarity with adoption has provided one ready guidepost for addressing novel problems presented by ARTs. Indeed, popular locutions, such as “embryo adoption,” illustrate the pervasiveness of this analogical reasoning.

Third, adoption and ARTs both exemplify a more far-reaching tension between privacy and state intervention in family decisionmaking. Some children become available for adoption after state child-protective efforts result in termination of parental rights. Further, although the right to privacy protects sexual reproduction, child welfare remains a centerpiece of American adoption law, with “best interests” as the test, even in contemporary variations such as stepparent and second-parent adoptions. Hence, the state closely regulates adoption—from the acquisition of the original parents’ consent to the criteria for child placement. Increased use of independent placements, in which birth parents select adoptive parents, however, reveals a movement toward greater autonomy and private ordering. This tension surfaces in a number of particular contexts, including the ongoing debate over the disclosure of the identities of birth and genetic parents, in which both proponents and opponents of secrecy invoke privacy principles.

If sexual reproduction and adoption mark the ends of a continuum that runs from protected privacy, on the one hand, to state regulation, on the other, then each particular arrangement permitted by ARTs (for example, donor insemination, “surrogacy” agreements, and “embryo adoption”) occupies a contested place along this continuum. More specifically, these alternatives to adoption raise the question whether reproductive autonomy includes protection for medical interventions that facilitate procreation. This question, in turn, implicates issues of gender equality, morality, religion, race, class, market freedom, and the role of the state in health care.

Fourth, a study of the parentage rules and procedures applicable to adoption and ARTs emphasizes how the law constructs our understanding of the family. These rules and procedures accord official recognition to certain relationships while making others legally irrelevant. The new Uniform Parentage Act, promulgated in 2000 and revised in 2002, provides one model for such construction. Although observers often point out that modern family law attempts to reflect the realities of family life, the process is a dynamic one because the constructions imposed by the law necessarily shape lived experience.

Finally, this book's topics and themes—which raise issues of identity, ancestral roots, and family secrets—touch deep emotions. Hence, one can find many relevant works in literature, popular culture, and nonlegal scholarship. This book reaches beyond the law to include contributions from such other sources, which help to bring the legal materials to life and to evoke a deeper understanding of them.

Teaching Notes

Before the semester begins, instructors might wish to assign to each student a relevant book or film (from those summarized throughout this book or from a much longer list that one might compile). Inviting each student to introduce his or her book or film to the other members of the class on the first day provides a stimulating point of departure for the course; returning to the “student experts” on particular topics (based on the earlier assigned book or film), as different issues arise during the semester, helps to enrich the discussion.

Editorial Matters

Cases and excerpts have all been edited, often quite extensively. Most deletions are indicated by ellipses, with some exceptions: Some concurring and dissenting opinions have been eliminated; citations have been modified or eliminated; some footnotes and references have been omitted; and paragraphs have been modified, and sometimes combined, to save space and to make the selections more coherent. Brackets are used at times to indicate substantial deletions. Original footnotes in cases and excerpts are reprinted nonconsecutively throughout the book. The editors' textual footnotes are numbered consecutively in each chapter and appear in brackets to differentiate them from original footnotes. We have relied on *A Uniform System of Citation* (18th ed. 2005), except when that style conflicts with the publisher's style. In addition, statutory citations were checked on Lexis or Westlaw, with the date in each citation showing the year appearing on the database.

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