PROPOSED STATUS OF CHILDREN BILL:
RESPONSE BY THE NATIONAL COUNCIL OF CHURCHES[1]

The National Council of Churches (NCCS) appreciates the invitation by the Ministry of Community Development, Youth and Sports (MCYS) to offer feedback on the consultation paper on the status of the Children Bill prepared by the Ministry of Health (MOH) and the Ministry of Law (MinLaw). NCCS acknowledges that with the proliferation of newer forms of Assisted Reproductive Technology (ART), existing legislations must be revised and new ones introduced. The NCCS appreciates the Singapore Government's concern for the family and the status and welfare of children, especially those born as the result of ART.

This paper is divided into four sections. Section 1 delineates the Christian understanding of marriage and family. The NCCS upholds these two institutions, which it sees as indispensable for the flourishing of society, and the basis for laws governing paternity and the status of children. In the Section 2, the Council's view of ART, especially those procedures that involve the use of donor gametes, sperm and ova, is briefly presented, with special reference to intrauterine insemination. Section 3 discusses the basis for determining legal parentage in the case of a non-traditional family, that is, a family where the child is not the biological offspring of the husband of his or her gestational mother. The position taken on this issue would have profound implications on the thorny issue of the parentage of the child in an ART mix-up case, the twin doctrines of paternity by presumption and paternity by estoppel, and the place of scientific tests for determining parentage.

I. MARRIAGE AND FAMILY

The Christian Faith upholds the institutions of marriage and the family. These institutions are established on the Decalogue, especially on the commandment that prohibits adultery (Exodus 20:14) and the commandment to honour one's parents (Exodus 20:12). According to the Christian Faith, God himself instituted the covenant of marriage having created human beings as male and female (Genesis 2:24). In marriage, two discrete individuals (a man and a woman) come together to form a couple, or a bonded pair. Although sexual intercourse is a distinctive aspect of this special union, marriage entails more than this. This union in which two individuals become 'one flesh' is a covenant where a man and a woman pledge themselves unreservedly to one another to be companions and partners in a common life and conjugal love. As covenant, marriage in the Christian understanding is therefore a permanent and exclusive union, binding a man and a woman to each other in lifelong companionship. Marriage is therefore a 'lofty vocation' that a man or a woman must embrace only after careful thought.

[1] This paper was written by Dr Roland Chia on behalf of the National Council of Churches of Singapore.

Even apart from children, the married couple form a distinct social unit characterised by a unique relationship. When God blesses the couple with children, the conjugal structure (marriage) takes on a new dimension (parenthood). The term 'family' generally refers to this expanded structure (although it may also refer to the childless married couple). But the conjugal-parental structure is sometimes called a 'nuclear family' to distinguish it from other ways in which the term family can be used. According to the Christian Faith, parenthood is more than just the transmission of biological life. In the event that their loving self-giving becomes life-giving, the husband and wife must welcome and embrace this new life with thanksgiving and gratitude. As ethicist Gilbert Meilaender has so eloquently put it:

> They have not simply reproduced themselves, nor are they merely a cause she is the effect. Rather, the power of their mutual love has given rise to another who, though different from them and equal in dignity to them, manifests in her person the love that unites them. Their love-giving has been life-giving: it is truly *pro*creation. The act of love that overcame their separation and united them in 'one flesh', that directed them out of themselves and toward each other.[2]

In this way, non-conjugal parenting puts great stress on the children because it deprives them of the basic structure that supports their economic as well as emotional welfare.

On the institutional level, therefore, we must maintain that marriage and family belong together. These institutions must never be taken for granted because they are the oldest and most basic, and they have through the history of human civilisation guarantee human culture and the development of the human person. Institutions are therefore important for human flourishing, and their deconstruction would only result in the impoverishment of human communal life. As Brigette Berger poignantly reminds us:

> Human beings could not survive without institutions … If it were not for institutions, the world would have to be reinvented every day … If a man and a woman, mutually attracted to each other, had no institutional patterns to have recourse to in their efforts to act on the basis of the attraction, they would have before them a vast number of thinkable options.[3]

Postmodern iconoclasm, inspired by the dogmas of individualism and egalitarianism, has sought to demolish the institutions of marriage and family. The institutions of marriage and family can be seriously undermined by hostile ideologies (e.g., radical feminism, homosexualism) and practices (no-fault divorce, non-conjugal cohabitation, sexual license). Such practices are said to liberate individuals from the constraints that traditional institutions impose. But as Robert Bellah has pointed out, 'Institutions are not only constraining but also enabling. They are the substantial forms through which we understand our own identity and the identity of others as we seek cooperatively to achieve a decent society'.[4]

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[2] Gilbert Meilaender, *Bioethics: A Primer for Christians* (Grand Rapids: Eerdmans, 1996), 15.
[3] Brigette Berger and Peter L. Berger, *The War Over the Family: Capturing the Middle Ground* (Garden City, N.Y.: Anchor/Doubleday, 1983), 145.
[4] Robert Bellah et al., *The Good Society* (New York: Knorpf, 1991), 12.

The institutions of marriage and family in turn need society to ensure their security and stability so that they may fulfil their inalienable functions. Just as families contribute to the flourishing of human society in so many significant ways, society has the obligation to protect and support families. The Government must therefore seek to empower families through its various policies instead of supplanting them. In similar vein, the legal system must also protect the integrity of marriage and the family, especially in the wake of their erosion in the modern society. Unfortunately, in some cases instead of preserving the integrity of these ancient institutions, the legal system is complicit in causing their decline. Writing about marriage and family in American society, Sylvia Ann Hewlett observes:

> Our legal system has given up on the idea that marriage should be a binding, lifelong commitment and that parents should take enduring responsibility for their children. Adults can now live with whomever they want for as long as they want; they can also abort or abandon babies and bear children in or out of wedlock. Indeed, individual Americans can pretty much do anything that tickles their fancy without fear that the state will step in and constrain their freedom 'for the sake of the children'.[5]

The Christian Faith has always rejected the dissociation between marriage and family. It therefore does not countenance the practice of cohabitation and the bearing or the raising of children out of wedlock.[6] Such arrangements sould in the long run be detrimental to the wellbeing of society. As the *Catechism of the Catholic Church* has put it so clearly:

> The family is the original cell of social life. It is the natural society in which husband and wife are called to give themselves in love and in the gift of life. Authority, stability, and a life of relationships within the family constitute the foundations for freedom, security, and fraternity within society.[7]

II. THE COUNCIL'S POSITION ON ART (WITH SPECIAL REFERENCE TO INTRAUTERINE INSEMINATION)

It is on the basis of this larger theological and moral framework of the Christian understanding of marriage, family and children that the NCCS reflects on the new assisted reproductive technologies. Distortions would invariably result when ART is taken out of this context. In fact, the common language that is in use already reveals a

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[5] Sylvia Ann Hewlett, *When the Bough Breaks: The Cost of Neglecting Our Children* (New York: Basic, 1991), 103.

[6] Social science research has shown that cohabitation can harm the couple's chances for a stable marriage. In addition, cohabitation also has a negative impact on children because of the unstable nature of the relationship. A stable marriage between parents is 'the most human and humanising context for welcoming children, the context which most readily provides emotional security and guarantees greater unity and continuity in the process of social integration and education'. Pontifical Council for the Family, *Family, Marriage and the 'De Facto' Unions* (Washington, DC: USCCB, 2001), no. 26.

[7] *Catechism of the Catholic Church* (2nd Ed) (Washington, DC: Libereria Editrice Vaticanna – USCCB, 2000), no. 2207.

subtle but significant shift in our perspectives and attitudes procreation that the new technologies have urged. In 1985, Leon Kass draws our attention to shift in language from pro-creation to reproduction, a metaphor associated with a factory.[8] This shift in language, though subtle, has serious and undesirable implications. The image of commodities, production line, quality control, and the rejection of inferior products have suddenly eclipsed that of the loving husband-wife relationship.[9] Together with the modern emphasis on rights and freedom, this shift from procreation to reproduction will have serious implications on our view of parenthood and what it means to have children. These considerations can never be pushed to the periphery when thinking about the moral and legal implications of ART.

Intrauterine insemination is without doubt the simplest and oldest of reproductive technologies whose origins can be traced back to 1884. The procedure itself is simple, relatively painless and safe. There are essentially two forms of intrauterine insemination: AIH (artificial insemination by husband) and AID (artificial insemination by donor), and they elicit very different ethical responses from the Christian perspective.

There are few ethical problems associated with AIH from the Christian standpoint, since the sperm of the husband of the woman receiving treatment is used for insemination. Although such a procedure does separate procreation from sexual intercourse between the husband and the wife, it does not in the main nullify what Christians believe to be the meaning and purpose of the gift of sex, contradict the divine intention for procreation or transgress the relationship between the husband and the wife.

AID, however, must be seen as a different phenomenon altogether. In AID (1) the sperm donor is anonymous, (2) there is no relationship between the donor and the mother, and (3) there is no responsibility on the part of the donor (i.e., genetic) father to the child. The question of whether AID constitutes adultery is being debated among some Christians. The NCCS is of the view that AID cannot be equated with adultery in the technical sense since it does not involve the physical union between a man and a woman. The problem remains, however, that in AID there is an intrusion of a third party into the marital relationship. Technology has made possible the genetic union of two persons without a relationship and with one parent that is exempted from having any responsibility for his own offspring. As Christian ethicists John Kilner and Ben Mitchell put it, 'When a third party intrudes into the procreative relationship, the divinely instituted structure of the family is altered'.[10]

From the Christian perspective, ART introduces several serious problems to society. One of the dangers of AID (or any ART, for that matter) is that 'conception takes on a higher priority than the marriage itself. The one flesh union is perilously jeopardised under the strain and demands we make upon ourselves, on each other, and on God'.[11]

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[8] Leon Kass, *Towards a More Natural Science* (New York: The Free Press, 1985), 48.
[9] Aminocentesis, ultrasound and genetic screening during pregnancy enables one to examine what clinicians have called 'the product of conception', the aim of which is quality control. Abortion becomes the means by which the inferior product is rejected.
[10] John Kilner and Ben Mitchell, *Does God Need our Help? Assisted Suicide, & Other Challenges in Bioethics* (Wheaton, Illinois: Tyndale House Publishers, 2003), 147.
[11] Richard Eyer, *Holy People, Holy Lives* (St. Louis, MO.: Concordia Publishing House, 2000), 126.

The child should not be seen as the product of the will of the husband and wife, but as a gift from God to their mutual self-giving and love. Procreation is neither a right nor a means of self-fulfilment. It is impossible to ascertain at this stage the consequences of the social experiment of donor-conceived children. Longitudinal studies have been conducted on children born of ART, but it is still too early to know what are the effects on these children. Perhaps the statement of a young man, whose story is told in *The Genius Factory* could bring out the startling ambiguities that result from donor-based ART:

> And so now I have no father: My father – my mom's husband – isn't my father. My *real* father – the donor – isn't my father because all he did was donate sperm, which is no enough to make him a father. Co nobody is my father.[12]

Finally, ART opens the door to two related issues in bioethics, namely (1) the medicalisation of procreation and (2) the commodification (and commercialisation) of human beings, their bodies and their bodily products. Both these realities have important ramifications to society. As ART scientists celebrate the fact that the 'process [of fertilisation] is wholly independent of each of its contributors',[13] procreation is taken out of the hands of the husband and wife and placed in the hands of scientists, doctors and technicians. According to the Christian tradition, God is the Creator and parents are the only legitimate *pro*creators. The commercialisation of ART contradicts human dignity because it involves direct or indirect payments to 'donors' (the language of 'donation' is misleading) and surrogate mothers. Edwin Hui has articulated the Christian perspective well when he writes:

> … the very thought of a commercial reproductive process that reduces a human creature – one God deemed so uniquely valuable as to relate to each one as his *imago* – to mere saleable merchandise would be totally incompatible with the account of personhood … for a person is first constituted by the loving relationship of God whose love is marked by its gratuitousness in creation, providence and in redemption, *all gratis*.[14]

III. NATURE VERSUS NURTURE

The pertinent question that must be addressed is whether the genetic or biological factor should be given priority over other factors in deciding parentage. That the genetic aspect of paternity can be separated from other aspects – psychological, emotional, relational and social – is made more acute with donor-dependent ART. The Christian Faith endorses the traditional family where the husband and the wife are united in marriage, and where their children are their biological offspring. The benefits of a stable, functioning two-parent family, where the husband and wife are biological related to their children remains undisputed. Such families of course continue to enjoy protection under statutory or common-law paternity or parentage laws. Biological ties

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[12] David Poltz, *The Genius Factory* (New York: Random House Trade Paperbacks, 2006), 57.
[13] Eugene C. Sandberg, 'Only an Attitude Away: The Potential of Reproductive Surrogacy', *American Journal of Obstetric and Gynaecology* 160 (June 1989), 1442.
[14] Edwin Hui, *At the Beginning of Life: Dilemmas in Theological Bioethics* (Downers Grove, Il: InterVarsity Press, 2002), 201.

between adults and children continue to be the basis of understanding the family, and biology continue to be the basis of establishing parentage and familial relationships. The importance of biology is implied in the marital presumption law and stressed in modern genetic testing.

The NCCS, however, recognises that more and more families exist without such ties. This situation is exacerbated with the prevalence of donor-dependent AR procedures. The problem with defining the family on the basis of genetic or biological ties between the parents and the child is that children with parents who are not biologically related to them would lose parental and family ties, together with the legal, social and economic benefits associated with them. While the NCCS continues to uphold the traditional family, and hence the importance of the biological factor, it must also respond to the presence of non-traditional families where the biological link between the parent and the child does not exist. In such non-traditional families, especially those resulting from the use of donor-dependent ART, the NCCS maintains that the marital relationship between the husband and the wife and their relationship to the child is more important, and therefore should be given priority over, genetics or biology. This view is based on several considerations. The first has to do with the institution of marriage, which must be preserved. The second relates to the importance of the functioning family unit. And the third is that the 'best interests of the child' must be given special consideration and priority.

As we have alluded to in the previous section, marriage is much more than simply the physical relationship between the husband and the wife, important though this is. Marriage is a covenant between a man and a woman in which they pledge their commitment to one another expressed in their mutual self-giving. Similarly, parenthood is more than simply the transmission of biological life. Parenthood has to do with the commitment of a man and a woman united in marriage to love, protect and care for their child. The NCCS maintains that these other qualities of marriage and parenting could prevail even when the child is not the biological offspring of the married couple (for example, in the case of an adopted child). A third party should not be allowed to interfere in and disrupt the stable and loving relationship between the child and his or her parents even if he is the biological parent of the child.

In existing, functioning non-traditional families, therefore, the biological determination of the paternity could prove detrimental, and may result in the dissolution of the marriage and the break-up of the family, all of which would work against the best interests of the child. The following are just some possible outcomes:

1. When parentage laws favour biology, a stranger is allowed to challenge the family on the basis of his / her biological connection to the child. The existing parent-child relationship is disrupted by the putative father's claim that he has a biological connection to the child.
2. Viewing paternity through biological lens could encourage fathers who are already in a long-term relationship with their children to abandon them because their paternity is contested.
3. The biological approach often focuses on the interests of the adults involved by emphasising the adult's rights arising out of their biological connection with the child. The interests of the child are often eclipsed in the process.

The approach that the NCCS is advocating in cases of donor-dependant ART and ART mix-ups for the determination of paternity is based on the existing relationship between the husband and the wife, and their relationship with the child. The husband and the wife who have chosen to have the child through ART using genetic materials from a donor because they are otherwise unable to have a child, who plans to welcome the child when its arrives into their home, nurture it, care for it and love it, and who jointly acknowledges the child to be their own, should be statutorily granted priority over others (including the donor, the child's genetic parent). Once this parenting unity is established, no one should have legal rights over the child. In non-traditional families, fathers must be recognised, not for their genetic contribution, but for the emotional, psychological and financial support they give to the child. In such a situation, 'The most important moral requirement at stake here is that adults care and provide for children'.[15] As Niccol Kording has put it, in such a context 'the parent-child relationship has to be defined by the parent's role in the child's life and the child's dependence on the parent to provide that role'.[16]

This approach also puts the child's needs and relationships at the very centre. Paternity laws are often adult-centred, leaving very little consideration for the best interests of the child. The approach in ascertaining legal parentage in donor-dependent ART that the NCCS favours takes the 'best interests of the child' seriously. This approach maintains that the best interests of the child is not always served when the biological criterion causes the presumptive father of the child who is in a loving relationship as the husband of its gestational mother to abandon it. The child in this case would be harmed by the loss of a parent, even if it has no biological relationship with the parent. Kording captures the effect the biological approach to the family has in a non-traditional family well:

> Even though parentage and paternity laws recognise the biologically-based family, the child understands the relationships that make up his family, not genetics. While those relationships can lose their importance under parentage laws when they are not founded on biology, they are not so easily disposed of by the child whose emotional, financial and psychological well-being grew out of those relationships.[17]

The child-centred approach should therefore be based on the child's physical, emotional and relational needs. Child-centred decisions on paternity must seek to support the existing relationship between the child and its parents in order to enhance stability and security. Priority must therefore be given to the parents who have already been contributing to the physical and emotional health of the child. The approach that the NCCS is advocating for ascertaining paternity in a non-traditional family upholds the fact the institutions of marriage and family. It protects the functioning and intact non-traditional family from the intrusion of a (legal) stranger, and takes seriously the best interests of the child.

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[15] Leslie Joan Harris, *Reconsidering the Criteria for Legal Fatherhood*, UTAH L. REV. (1996), 63, at 480.

[16] Niccol Kording, *Nature v. Nurture: Children Left Fatherless and Family-Less when Nature Prevails in Paternity Actions*, U. OF PITTS. L. REV. 65:811, at 859.

[17] Kording, *Nature v. Nurture*, at 859.

IV. FEEDBACK AND RECOMMENDATIONS

The above discussion raises issues that have profound implications on the law concerning the eligibility of individuals or couples for ART and on the parentage of children conceived or born through these procedures. The NCCS would therefore like to make the following feedback and recommendations.

A. Legal Status of Children Conceived or Born through ART

The NCCS agrees with Clause 12, which states that the gestational mother is to be treated in law as the mother of the child, and that no one else can claim to be the child's mother. The NCCS also agrees with the general thrust of Clause 13(1) and (2) which maintains that the husband of the gestational mother shall be treated in law as the father of the child (the issue of consent will be addressed below). Despite its unease with AID, the NCCS is able to concur with these statements on parentage on the basis of its view on marriage and the family outlined above. These basic views on legal parentage are also widely accepted in many countries, including Victoria (Australia),[18] United States,[19] Canada[20] and the United Kingdom.[21]

The NCCS, however, is of the view that in the interest of preserving the institutions of marriage and the family, more stringent criteria should be put in place to assess the eligibility of persons for fertility treatment. In the case of a married couple, the NCCS recommends that both the wife and the husband must consent to the procedure. As it stands, the Bill implies that the wife is allowed to go through the procedure without the consent of the husband. The Bill stipulates that the husband who did not consent to the fertilisation procedure will be treated as the father of the child 'if he has accepted the child as a member of his family' (Clause 13(2)). What would be the status of the child if the husband of the woman who underwent the procedure without his consent were to reject the child? In his book, *Regulating Reproduction: Law, Technology and Autonomy* Emily Jackson makes this observation:

> Where a woman's husband does not consent to her treatment, or where an unmarried woman is not treated 'together' with a man, then the child will have no legal father. Section 28 of the [HFEA] thus creates what Derek Morgan and Robert Lee have referred to as 'a new class of child, the (legally) fatherless child' …[22]

In the interest of the institutions of marriage and the family, the NCCS also recommends that ART should not be made accessible to cohabiting but unmarried couples and partners (like same-sex couples) who are unable to provide the child with a stable family environment. Single women should also not be allowed to access ART. These restrictions are also required to protect children, which is the primary concern of the Status of Children Bill. Here, the NCCS is in full agreement with Section 13(5) of the HFEA, which states that:

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[18] *Status of Children Act 1974* s 10A(1), 10C.
[19] CA Family Code § 7613(b).
[20] *Children's Law Act*, RSNL 1990, Chapter C-13 s 12 (Newfoundland).
[21] *Human Fertilisation and Embryology Act 1990* (UK) s 28(2), (3).
[22] Emily Jackson, *Regulating Reproduction: Law, Technology and Autonomy* (Portland, Oregon: Hart Publishing, 2001), 240.

> A woman shall not be provided with treatment services unless account has been taken of the welfare of any child who may be born as a result of treatment (including the need of that child for a father), and of any other child who may be affected by the birth.

It must be emphasised that ART should be made available to married couples who are unable to have children on their own. It is not be treated as a procedure that should be simply offered on demand. There should be clear and sound legislation on the issue of eligibility.

B. Legal Status of Children Conceived and Born as a Result of ART Mix-Ups

The seriousness of human error in ART procedures, where mix-ups resulting from the accidental or incorrect use of gametes (sperm, ova, and embryos) during in vitro fertilisation, are magnified because they have to do with the creation of new human life and lifelong relations. Resolving parental disputes that result from ART mix-ups are often complex and difficult. Although in the US, legal cases concerning ART mix-ups decided by the courts are few, the decisions tend to ignore the needs of the child in favour of those of the disputing parents. In *Perry-Rogers v. Fasano*, for instance, the child, Akeil, was taken away from his gestational mother and her husband with whom he has bonded in the name of privileging the parents' claim to genetic sanguinity. [23] The court's parent-centred approach completely failed to consider Akeil, who through no fault of his own has established a relational bond with his gestational mother and her husband:

> We are also cognizant that a bond may well develop between a gestational mother and the infant she carried, before, during and immediately after the birth … In the present case, any bonding on the part of Akeil to his gestational mother and her family was the direct result of the Fasanos' failure to take timely action upon being informed of the clinic's admitted error. Defendants cannot be permitted to purposefully act in such a way as to create a bond, and then rely upon it for their assertion of rights to which they would not otherwise be entitled.[24]

The NCCS recognises that in such disputes there is a tension between the constitutional concerns for the parental rights and the concerns for the child's best interest, and that the two concerns sometimes cannot be satisfactorily addressed. The NCCS maintains that in such a situation, the 'best interests of the child' should be taken seriously, and parental rights or desires must give way to the child's best interest. Precedence is found analogously in divorce disputes for custody of the child, where the judicial system applies the 'best interests of the child' approach by prioritising the child's needs over the parents' rights or desires. This approach is deemed appropriate in cases of ART mix-ups where issues of parentage are further complexified by donor gametes, ova or sperm.

The child-centred approach is broadly based on the physical, emotional and relational needs of the child. In a child-centred approach, decisions taken are purposed at nurturing and supporting the ongoing relationship between the child and his parents with whom he or she already has an existing relationship. In relation to ART mix-up

[23] Perry-Rogers v. Fasano, 715 N.Y.S.2d 19 (N.Y. App. Div. 2000).
[24] Perry-Rogers v. Fasano, 715 N.Y.S.2d at 19, 26.

cases, the child-centred approach is relational in that it emphasises the ongoing relationship that the child has with his or her parents. This means that priority must be given to the parents who contributed significantly to physical and emotional health of the child. This includes the parents who have contributed to the development of the child through their relationship with him or her, including the relationship that is forged *in utero* (i.e., by the gestational mother).[25]

Although the NCCS advocates the application of the 'best interests' principle to determine the legal parentage of children in ART mix-up cases, it must emphasise the profound differences between such cases and divorce settlements where the 'best interests' standard is routinely observed. Unlike in a divorce where the child has an existing relationship with both his parents, in the ART mix-up case the child has no relationship with the parent whose gametes were mistakenly 'donated'. The child and its gamete-donor parent in a mix-up case are total strangers. Thus, unlike in a divorce where the parties were once co-parents of the child and who have once been united in caring for it, in the ART mix-up case, the child has an existing relationship only with the gestational mother and her co-parenting partner (i.e., husband) and not with its genetic parent (donor). Based on the approach that upholds the 'best interests of the child' and a relational understanding of the family, the NCCS maintains that in ART mix-up cases, the existing familial unit comprising the child, the gestational mother and the co-parent (husband) is the relationship that the law should protect, not a potential relationship based on genetics.

On the basis of these considerations, the NCCS would favour options that place special emphasis on the 'best interests of the child' (i.e., Option 1 and Option 3). Option 5 is not desirable because of the complexities that would result from the child having four legal parents. Option 2 is also problematic because the child may be parentless if both the gestational mother and genetic mother rejects the child. Between Options 1 and 3 (both of which underscore the 'best interests' standard), Option 1 is less desirable because it leaves all parties to ART mix-up cases to different judges' analyses and interpretations of statutes that were not formulated to address to determine parentage in ART mix-ups. Option 3 is therefore the preferred approach because on the one hand it clearly provides that the 'gestational mother and her husband who consented to the AR treatment will be parents of the child', and it takes the interests of the child into account, on the other. The 'paternity by estoppel' principle applied to the gestational mother and her husband, however, may not always work towards the best interest of the child (even if it in effect 'guarantees' that the child would not be parentless).

In addition to this, the NCCS recommends that fertility clinics should be statutorily mandated to reveal health information related to the genetic connections to children and parents, while maintaining complete confidentiality of the parties. This should apply to all ART procedures involving gamete donations, not just to mix-up cases. When the child reaches a certain age, he or she should be allowed to inquire about his

[25] *In utero* bonding relationship between the gestational mother and the child is as important as *ex utero* bonding relationship and must therefore take precedence in the relational and child-centred model that is being advocated here over genetics. Furthermore, it may not be unreasonable to postulate that the gestational mother's co-parenting partner's (i.e., husband's) relationship with her and the child *in utero* is also significant. As Ellen Waldman and others have shown, many genetic fathers do nor form a relationship with their genetic offspring if they do not have an ongoing relationship with the gestational mother. See Ellen Waldman, *The Parent Trap: Uncovering the Myth of 'Coerced Parenthood' in Frozen Embryo Disputes*, 1044.

or her genetic lineage. But until such time, the name(s), address(es) or any information about the genetic 'relatives' should be withheld from the child and its legal parents. In the same way, donors must not be given access to information about the recipients. Statutes should require fertility clinics to seal all identifying information and deposit it with a government registry. Only when the court mandates to allow the child access to the records at the request of the latter when he or she is of a certain age will the sealed records be opened and made available. The genetic donor who believes he is the parent of a particular child has no statutory, common law or equitable right to open the sealed records.

C. Presumption of Paternity and 'Paternity By Estoppel'

As we turn to the two doctrines, presumption of paternity and paternity by estoppel, we recognise that they are what Chief Justice Flaherty in the majority opinion in *Brinkley v. King* has described as legal fictions:

> [t]he presumption of paternity and the doctrine of estoppel, therefore, embody the two great fictions of the law of paternity: the presumption of paternity embodies the fiction that regardless of biology, the married people to whom the child was born are the parents; and the doctrine of estoppel embodies the fiction that, regardless of biology, in the absence of a marriage, the person who has cared for the child is the parent.[26]

For this and other reasons, the presumption of paternity and paternity by estoppel have been criticised as antiquated systems for establishing antiquity. However, on the basis of its emphasis on the importance of the institutions of marriage and the family, the NCCS maintains that these two theories continue to have an important place in parental laws.

Originating in English common law in the 16th century, the presumption of paternity was introduced to 'protect children from hardship of being defined as "illegitimate"', and 'to preserve the traditional model of the family'.[27] In 16th century England, an illegitimate child is subjected to serious social discrimination. But the modern Court continue to apply the presumption today even when the stigma associated with being a 'illegitimate' child has become less significant in society because it wishes to protect the marital and family units. Thus, in situations where the marital unit is still intact and functioning, the Court has deemed it necessary to apply the presumption, which states that 'a child conceived or born during the marriage is presumed to be the child of the marriage'.[28] The underlying principle and rationale for the presumption is clearly explicated by Chief Justice Flaherty thus:

> [t]he public policy in support of the presumption of paternity is the concern that marriages which function as family units should not be destroyed by disputes over the parentage of children conceived or born during the marriage. Third parties should not be allowed to attack the

[26] Brinkley v. King, 701 A.2d at 180 (Pa. 1997).
[27] Brie S. Rogers, *The Presumption of Paternity in Child Support Cases: A Triumph of Law over Biology*, 70. U. CIN, L. REV. 1151 (2002), 1152-53.
[28] Brinkley v. King, 701 A.2d at 1, 3.

> integrity of a functioning marital unit, and members of that unit should not be allowed to deny their identities as parents.[29]

It is, of course, true to say that when the paternity of the child born during wedlock is challenged, the marriage itself is in jeopardy. In this case, it is futile to maintain a policy that protects the marital unit. But if the married couple elects to continue with their marriage, a third party should not be allowed to attack the institution. As Jacqulyn West puts it, 'The preservation of the marital unit in that case is a worthy endeavour, and courts should do their best to protect it'.[30] In other words, the presumption of paternity is irrebuttable 'when a third party seeks to assert his own paternity as against the husband in an intact marriage'.[31] In this way, the presumption of paternity protects the institutions of marriage and family. The NCCS therefore recommends that the presumption of paternity rule should be applied to protect the intact marriage. The Court should only order scientific tests to rebut paternity if sufficient evidence is presented to rebut the presumption.

In similar vein, the NCCS supports the introduction of paternity by estoppel to Singapore law because it is 'a doctrine of fundamental fairness designed to preclude a party from depriving another of a reasonable expectation when the party inducing the expectation albeit gratuitously knew or should know that the other would rely upon the conduct to his or her detriment'.[32] Paternity by estoppel is the legal theory that 'because of a person's conduct … that person, regardless of his true biological status, will not be permitted to deny parentage, nor will the mother who has participated in this conduct be permitted to sue a third party for support, claiming that the third party is the true father'.[33] In the realm of paternity law, therefore, estoppel is 'applied to prevent a presumptive father (the husband), or the natural mother (the wife), from denying the husband's paternity if the couple has resided together as husband and wife and the husband held the child our as his own'.[34]

> The most common situation in which estoppel should be applied when a man knows that a child is not, or may not be, his genetic child, but the man … accepted his role as child's father and both the mother and the child have relied on the acceptance.[35]

The following factors are therefore to be considered in estoppel cases:

1. the length of time the party waited to contest or establish paternity after the child's biological parentage is obtained;
2. the length of time that the father-child relationship has existed;
3. the facts surrounding the discovery of the lack of biological relationship;

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[29] Brinkley v. King, 701 A.2d at 180.
[30] Jaculyn West, 'Maintaining the Legal Fiction: Application of the Presumption of Paternity and Paternity by Estopel in Pennsylvania', 4.
[31] Brinkley v. King, 701 A.2d at 179.
[32] Barnard v. Anderson, 767 A.2d 592, 595.
[33] J.C. v. J.S. 826 A.2d at 3-4.
[34] Heather Faust, *Challenging the Paternity of Children Born During Wedlock: An Analysis of Pennsylvania Law Regarding the Effects of the Doctrines of Presumption of Legitimacy and Paternity by Estoppel on the Admissibility of Blood Tests to Determine Paternity,* 100 DICK. L. REV. (Summer 1996), 979.
[35] UNIF. PARENTAGE ACT § 608(b)(1-9) (2000), at Comment.

4. and any other factors affecting the father-son relationship or harm to the child.

If, however, the presumptive father is led to believe that he is the biological father by fraud or misrepresentation on the part of the mother, he is not estopped from denying paternity of the child as long as when the fraud is revealed, he ceases to have contact with the child. Although the paternity by estoppel law is not without problems, it should be introduced because it 'protects the existing family and father-child relationship by acknowledging parent-child relationships built on social, psychological and emotional ties rather than biology'.[36] Blood tests should be admissible only when this doctrine and that of presumption of paternity are overcome.

The use of the twin doctrine of presumption of paternity and paternity by estoppel to make blood tests irrelevant has some important benefits. Firstly, it allows the husband and the wife to rescue their marriage. And secondly, it requires adults who have created a bond with the child to maintain the bond despite the difficulties, thereby preventing the child from suffering emotional trauma and hardship. The NCCS endorses these doctrines because the policies underlying them would protect the institutions of marriage and family, and take the best interests of the child into consideration. The purpose of parentage laws is to protect the child's relationship with his or her parents by identifying fathers and defining families by those relationships.

[36] Niccol Kording, 'Nature v. Nurture: Children Left Fatherless and Family-Less When Nature Prevails in Paternity Actions', UNIVERSITY OF PITTSBURGH LAW REVIEW, 65:811 (2004), 835.