

## EXPLORING THE BOUNDARIES OF FAMILIES CREATED WITH KNOWN SPERM PROVIDERS: WHO'S IN AND WHO'S OUT?

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### ABSTRACT

*As methods of family formation have expanded and family forms have proliferated, courts and legislatures have struggled with how to define the boundaries of legal parentage for children conceived with sperm provided by someone known to the intended parent. This article surveys the existing approaches, identifies the boundaries that have been drawn and offers a critique of those boundaries in order to develop a pluralistic regime that better reflects the variety of ways these families are formed and how they operate. In the process, the article identifies a set of core values that should guide any framework for assigning rights, responsibilities and status for families created with known sperm providers. It then elucidates a series of essential principles that should govern. The article argues that the law should not discriminate against non-traditional parents, that it should expand beyond the binary categories of “parent” and “donor” to accommodate the active sperm provider, and that it should open the door to multiple parent families. To facilitate these goals, the article further argues that the law should encourage written expressions of intent while preserving the possibility of functional parenting and setting forth clear default rules.*

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## INTRODUCTION

Jason Patric provided sperm so his one-time girlfriend, Danielle, could conceive a child. He later sued to establish paternity and won.<sup>1</sup> William Marotta answered a Craigslist ad from a lesbian couple seeking a sperm donor so they could have a child. When the couple split and fell on hard times financially, the state of Kansas sought to establish Marotta's paternity and compel him to pay child support. The trial court agreed with the state, and the appeal is pending.<sup>2</sup> J. S. and V.K., a married, same-sex couple from Massachusetts, ran into difficulty when they sought to complete an adoption of their child conceived with sperm donated by V.K.'s brother and carried to term by J.S. The trial court insisted that V.K.'s brother receive notice of the pending adoption. On appeal, the Supreme Judicial Court ruled that he was a donor and thus not entitled to notice.<sup>3</sup> In Virginia, Joyce Bruce asked a friend, Robert Boardwine, to help her conceive a child. She performed the insemination at home. When the two disagreed about the role he was to play in the child's life, Boardwine sued for paternity and won.<sup>4</sup>

These four recent cases are among the latest examples of directed donation<sup>5</sup> cases gone

<sup>1</sup> Jason P. v. Danielle S., 171 Cal. Rptr. 3d 789, 799 (Cal. Ct. App. 2014).

<sup>2</sup> Michael Winter, *Kansas Sperm Donor To Appeal Ruling Over Child Support*, USA TODAY (Jan. 4, 2014), <http://www.usatoday.com/story/news/nation/2014/01/23/kansas-sperm-donor-lesbians-child-support/4807873/>; Chandrika Narayan, *Kansas Court Says Sperm Donor Must Pay Child Support*, CNN (Jan. 4, 2014), <http://www.cnn.com/2014/01/23/justice/kansas-sperm-donation/>.

<sup>3</sup> *In re Adoption of a Minor*, 29 N.E.3d 830, 837 (Mass. 2015).

<sup>4</sup> *Bruce v. Boardwine*, 770 S.E.2d 774, 778 (Va. Ct. App. 2015).

<sup>5</sup> A note about terminology: Although I have used the term "directed donation," I do not mean to imply that the provision of sperm necessarily reflects a donation in the legal sense. One of the problems with the law, as we shall see, is that statutes often refer to any provision of sperm (or eggs) by one party to another as a donation and describe the provider as a donor, simultaneously implying that the provider does not intend to parent the child and determining that the provider is nothing more than a donor legally. As we will see, this assumption is at times incorrect. Hence I will reserve the term donor to describe those who have no intent to parent. However, for ease of syntax, I will continue to use "directed

awry, but they surely will not be the last. As methods of family formation have expanded and family forms have proliferated, courts and legislatures have struggled with how to define the boundaries of legal parentage for children conceived with gametes provided by someone known to the intended parent(s). Most of the legal developments and controversies have involved directed sperm donation, and that will be my focus here.<sup>6</sup>

Scholars have been advocating for more than twenty-five years for laws that appropriately meet the needs of these families.<sup>7</sup> Yet the legal landscape governing the status of gamete donors remains an inconsistent patchwork of statutes and case law that too often leaves families in a state of uncertainty or battling in court. In some cases, these laws reflect efforts to resolve modern-day disputes with laws designed for families in an age before the explosion of family forms and the growth of assisted reproduction. Others are of more modern vintage, but still fail to provide a legal regime that adequately or coherently addresses the varied needs of families using sperm from someone known to them.

Most states have adopted statutes that, at a minimum, address the rights of married women who use donor sperm. These statutes uniformly provide that a husband who consents to the insemination of his wife by a physician is deemed the legal parent of any resulting child.<sup>8</sup> State statutes also typically make clear that a donor who provides semen to a licensed physician for use in artificial insemination of someone other than his wife is not considered a legal father of the child.<sup>9</sup> Some of the statutes classify the sperm provider as donor regardless of the marital

donation” as a neutral term to describe non-anonymous use of gametes by another, without intending a value or legal judgment about the status of the provider.

<sup>6</sup> There have been a few cases involving known egg providers. In these cases, one partner provides eggs to conceive a child through IVF, which is carried to term by the other partner. In all the cases, the court found that both women were legal parents to the resulting children. *In re Adoption of Sebastian*, 879 N.Y.S.2d 677, 682-83 (N.Y. Surr. Ct. 2009); *K.M. v. E.G.*, 33 Cal. Rptr. 3d 61, 64 (Cal. 2005); *D.M.T. v. T.M.H.*, 129 So. 3d 320, 327 (Fla. 2013); *St. Mary v. Damon*, 309 P.3d 1027, 1032 (Nev. 2013) (remanding for factual determination of intent where genetic mother claimed former partner was acting as surrogate despite co-parenting contract).

<sup>7</sup> See, e.g., Nancy D. Polikoff, *Breaking the Link Between Biology and Parental Rights in Planned Lesbian Families: When Semen Donors Are Not Fathers*, 2 GEO. J. GENDER & L. 57 (2000); Richard F. Storror, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 599-600 (2002).

<sup>8</sup> ALA. CODE § 26-17-703 (2015); ARK. CODE ANN. § 9-10-201 (West 2015); CAL. FAM. CODE § 7613(a) (West 2015); COLO. REV. STAT. ANN. § 19-4-106(1) (West 2015); CONN. GEN. STAT. ANN. §§ 45a-771(b), 45a-774 (West 2015); FLA. STAT. ANN. § 742.11(1) (West 2015); GA. CODE ANN. § 19-7-21 (West 2015); IDAHO CODE ANN. § 39-5405(3) (West 2015); 750 ILL. COMP. STAT. ANN. 40/3(a) (West 2015); KAN. STAT. ANN. § 23-2302 (West 2015); MD. CODE ANN., EST. & TRUSTS § 1-206(b) (West 2015); MINN. STAT. ANN. § 257.56(1) (West 2015); MO. ANN. STAT. § 210.824(1) (West 2015); N.J. STAT. ANN. § 9:17-44(a) (West 2015); N.Y. DOM. REL. LAW § 73(a) (McKinney 2015); N.C. GEN. STAT. ANN. § 49A-1 (West 2015); N.D. CENT. CODE ANN. § 14-20-63(705)(1) (West 2015); OHIO REV. CODE ANN. § 3111.95(A) (West 2015); OKLA. STAT. ANN. 10, § 552 (West 2015); OR. REV. STAT. ANN. § 109.243 (West 2015); TENN. CODE ANN. § 68-3-306 (West 2015); TEX. FAM. CODE ANN. § 160.703 (West 2015); UTAH CODE ANN. § 78B-15-703 (West 2015); VA. CODE ANN. § 20-158(a)(2) (West 2015); WASH. REV. CODE ANN. § 26.26.101(7) (West 2015); WIS. STAT. ANN. § 891.40(1) (West 2015); WYO. STAT. ANN. § 14-2-905(b)(i) (West 2015). Some states have reached the same result by case law. See e.g., *In re Baby Doe*, 353 S.E.2d 877 (S.C. 1987).

<sup>9</sup> ALA. CODE § 26-17-702 (LexisNexis 2015); COLO. REV. STAT. ANN. § 19-4-106(2) (West 2015); CONN. GEN. STAT. ANN. § 45a-775 (West 2015); DEL. CODE ANN. tit. 13, § 8-702 (West 2015); FLA. STAT. ANN. § 742.14 (West 2015); IDAHO CODE ANN. § 39-5405(1) (West 2015); MINN. STAT. ANN. § 257.56(2) (West 2015); MO. ANN. STAT. § 210.824(2) (West 2015); N.J. STAT. ANN. § 9:17-44(b) (West 2015); N.M. STAT. ANN. § 40-11A-702 (West 2015); OHIO REV. CODE ANN. § 3111.95(B) (West 2015); OR. REV. STAT. ANN. § 109.239 (West 2015); TEX. FAM. CODE ANN. §

status of the recipient.<sup>10</sup> Many of these statutes derived from the Uniform Parentage Act of 1973 (“UPA”).<sup>11</sup>

Outside of the opposite-sex marriage context, state laws diverge. Some jurisdictions have adopted an “opt-in” system, where sperm providers for assisted reproduction are considered donors with no parental rights unless the provider and recipient expressly agree otherwise.<sup>12</sup> One jurisdiction has adopted an “opt-out” system by case law, where the presumption is reversed: sperm providers are considered parents, with full parental rights and responsibilities, unless the provider and recipient expressly agree otherwise.<sup>13</sup> Yet other states have adopted a version of the UPA revised in 2002, which uses intent to distinguish parents from donors.<sup>14</sup> The revised UPA also no longer requires the donor to provide the sperm to a licensed physician to be considered a non-parent,<sup>15</sup> though statutory versions often retain the requirement.<sup>16</sup>

Even where the rule seems straightforward enough, complications ensue when the conduct of the parties creates ambiguity about the role of the gamete provider in the child’s life. In cases such as *Jason P. v. Danielle S.*, courts have stoked controversy by opening the door to recharacterization of the gamete provider from donor to parent based on post-birth conduct.<sup>17</sup> Other cases have arisen because the existing law, even when it is clear, is too narrow to encompass the diversity of family forms using gametes provided by others to create their families.

Despite the disparate approaches taken by the statutes and case law, they share some common features. For the most part, they reflect a binary approach to categorizing gamete providers. Laws addressing the use of gametes thus far uniformly adhere to an all-or-nothing

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160.702 (West 2015); UTAH CODE ANN. § 78B-15-702 (West 2015); VA. CODE ANN. § 20-158(3) (West 2015); WASH. REV. CODE ANN. § 26.26.101(7) (West 2015); WIS. STAT. ANN. § 891.40(2) (West 2015); WYO. STAT. ANN. § 14-2-902 (West 2015).

<sup>10</sup> CONN. GEN. STAT. ANN. § 45a-775 (West 2015); DEL. CODE ANN. tit. 13, § 8-702 (West 2015); FLA. STAT. ANN. § 742.14 (West 2015); IDAHO CODE ANN. § 39-5405(1) (West 2015); N.J. STAT. ANN. § 9:17-44(b) (West 2015); N.M. STAT. ANN. § 40-11A-702 (West 2015); OHIO REV. CODE ANN. § 3111.95(B) (West 2015); OR. REV. STAT. ANN. § 109.239 (West 2015); TEX. FAM. CODE ANN. § 160.702 (West 2015); UTAH CODE ANN. § 78B-15-702 (West 2015); VA. CODE ANN. § 20-158(3) (West 2015); WIS. STAT. ANN. § 891.40(2) (West 2015); WYO. STAT. ANN. § 14-2-902 (West 2015).

<sup>11</sup> See *Parentage Act Summary*, UNIF. LAW COMM’N (2015), <http://www.uniformlaws.org/ActSummary.aspx?title=Parentage%20Act>; see, e.g., CAL. FAM. CODE §§ 7600–7671 (West 2015).

<sup>12</sup> CAL. FAM. CODE § 7613(b) (West 2015); D.C. CODE § 16-909(e)(2) (2015); KAN. STAT. ANN. § 23-2301 (West 2015); 750 ILL. COMP. STAT. ANN. 40/3(b) (West 2015); KAN. STAT. ANN. § 23-2208(f) (West 2015); N.J. STAT. ANN. §9:17-44(b) (West 2015); TEX. FAM. CODE ANN. § 160.7031 (West 2015); WASH. REV. CODE ANN. § 26.26.705 (West 2015).

<sup>13</sup> See *Ferguson v. McKiernan*, 940 A.2d 1236, 1248 (Pa. 2007).

<sup>14</sup> UNIF. PARENTAGE ACT §§ 702–704 cmt. 63–64 (amended 2000); see, e.g., CAL. FAM. CODE § 7613.5 (West 2015).

<sup>15</sup> UNIF. PARENTAGE ACT § 702 cmt. 63 (amended 2000); see, e.g., CAL. FAM. CODE § 7613 (West 2015).

<sup>16</sup> E.g., N.M. STAT. ANN. § 40-11A-702 (West 2015); WASH. REV. CODE ANN. § 26.26.011(4)(a) (West 2015) (defining assisted reproduction as a “method of causing pregnancy other than through sexual intercourse,” including “artificial insemination”).

<sup>17</sup> *Jason P. v. Danielle S.*, 171 Cal. Rptr. 3d 789, 796-97 (Cal. Ct. App. 2014).

status determination: gamete providers are either legal parents, with all of the rights and responsibilities that inhere in that status, or they are donors—legal strangers to their offspring. The law also continues to presume that only two people can fill the role of parent.

Beyond these problematic points of commonality, the boundaries between “donor” and “parent” vary. Two boundaries in particular stand out and have already been noted. First, many statutes focus on marital status. These laws often address only the use of donated sperm by married couples, leaving everyone else at risk of a determination that all sperm providers to unmarried women are parents. Second, many statutes and cases make physician involvement the critical determinant of status.<sup>18</sup>

The existing law’s rigid adherence to a binary structure, refusal to recognize more than two parents, and assignment of rights based on marital status and physician involvement create serious problems. Chief among them is that they leave too many families and donors in limbo, that they compel some families to conform to a model at odds with their intent or daily reality, and that they leave participants in a knowledge vacuum, without adequate tools to effectuate their intentions.<sup>19</sup> It is time to consider a new legal framework, and in this article I take up that challenge. In doing so, I will build on a rich body of scholarship that has sought to explain the conceptual underpinnings of family law, though I will not attempt, as some have ably done,<sup>20</sup> to uncover a unifying theory of parentage law. Rather, my approach is pragmatic, seeking to integrate insights from these various approaches in a way that captures the needs of the wide variety of families created through directed donation.

This paper will begin in Part I by laying out a taxonomy of cases involving sperm provided by one party for use by another. The cases that have arisen reveal some recurring factual patterns, but also hint at the considerable diversity of family forms created through directed donation. This part surveys the existing legal approaches, identifies the boundaries that have been drawn, and offers a critique of those boundaries in order to develop a pluralistic regime that better reflects the various ways these families are formed and how they operate.

Having thoroughly elucidated the features and problems that inhere in the current system, Part II considers the values and corollary principles that should guide any framework for assigning rights, responsibilities, and status for families created with known sperm providers. I begin by identifying the five values that should underlie the new framework: child welfare, parental rights, pluralism, coherence with the broader realm of family law, and functionality—ensuring that the rules operate effectively for those subject to them. This section then proceeds to

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<sup>18</sup> ALA. CODE §§ 26-17-702, 26-17-704 (2015); CAL. FAM. CODE § 7613 (West 2015); CONN. GEN. STAT. ANN. § 45a-771a(1) (West 2015); D.C. CODE § 16-401(1) (2015); FLA. STAT. ANN. § 742.13(1) (West 2015); IDAHO CODE ANN. § 39-5402 (West 2015); 750 ILL. COMP. STAT. ANN. 40/3 (West 2015); MO. ANN. STAT. § 210.824 (West 2015); MINN. STAT. ANN. § 257.56 (West 2015); N.J. STAT. ANN. §9:17-44 (West 2015); N.Y. DOM. REL. LAW § 73 (McKinney 2015); OHIO REV. CODE ANN. § 3111.90 (West 2015); OKLA. STAT. ANN. tit. 10, § 551 (West 2015); OR. REV. STAT. ANN. § 677.360 (West 2015); WIS. STAT. ANN. § 891.40 (West 2015); *Jhordan C. v. Mary K.*, 224 Cal. Rptr. 530, 537-38 (Cal. Ct. App. 1986); *In re Paternity of M.F.*, 938 N.E.2d 1256, 1260-61 (Ind. App. 2010).

<sup>19</sup> The disconnect between the law and the reality of family life for lesbian couple-headed households is not unique to the United States. See Fiona Kelly, *(Re)forming Parenthood: The Assignment of Legal Parentage Within Planned Lesbian Families*, 40 OTTAWA L. REV. 185, 194 (2008-09) (studying lesbian mothers in Canada and finding a perception that “their familial definitions were rarely reflected within the law.”).

<sup>20</sup> E.g., Storrow, *supra* note 7, at 643 (arguing for a framework that bases parenthood on pure intention); Dara E. Purvis, *The Origin of Parental Rights: Labor, Intent, and Fathers*, 41 FLA. ST. U. L. REV. 645, 648 (2014) (arguing for a labor-based theory of parentage).

generate a comprehensive set of principles governing directed sperm donation that honors both the intentions and the reality of the broad variety of families using directed sperm donation. More specifically, I argue for protecting non-traditional parents, for expanded recognition of sperm providers who play a significant role in the child's life and for families with more than two parents, and for legal recognition for those sperm providers who actually function as parents.

Part IV concludes with a call for further discussion and reform and for a legal regime that comports with these values and principles. Creating such a legal regime will defy easy resolution. It will force us to consider the apparent tension between intent-based parentage and functional parentage and require tempering the aspirational with the realistic.

## I. A TAXONOMY OF THE CASES

### A. *Who Is Using Sperm From Known Providers?*

No data exists about the number of women using gametes from others to conceive children, but some estimate that 80,000 to 90,000 donor inseminations and 15,000 donor egg cycles take place each year.<sup>21</sup> Sources also estimate that anywhere from 30,000 to 60,000 donor-conceived children are born each year.<sup>22</sup> Most recipients likely obtain those gametes from anonymous sources, whether a sperm bank, an egg donor agency, or the growing number of egg banks. There is no reliable data on how many people use sperm from known donors, but the practice likely is not rare, as approximately thirty published appellate decisions address questions raised by directed donation.

A close look at these cases reveals the range of family forms created through sperm donation as well as the struggles that have arisen for families and courts when disputes develop over who has parental rights and responsibilities. No reported cases involve a dispute between a known sperm provider and a "traditional" family in the historic sense—a heterosexual married couple using a known donor to conceive a child to be raised exclusively by the couple as their own. Heterosexual married couples generally look to sperm donation because of medical infertility issues and use sperm donated anonymously.<sup>23</sup> Moreover, the number of opposite-sex couples requiring sperm donation has dropped dramatically because of advances in fertility techniques for treating male factor infertility.<sup>24</sup>

The problems arise, then, in the use of sperm from known providers to single women and lesbian couples. The intent of the individuals participating in this method of family formation and

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<sup>21</sup> LIZA MUNDY, *EVERYTHING CONCEIVABLE: HOW ASSISTED REPRODUCTION IS CHANGING OUR WORLD* 94 (2008).

<sup>22</sup> The data on the number of donor-conceived children is sketchy, at best. See Jacqueline Mroz, *One Sperm Donor, 150 Offspring*, N.Y. TIMES, Sept. 5, 2011, [http://www.nytimes.com/2011/09/06/health/06donor.html?\\_r=0](http://www.nytimes.com/2011/09/06/health/06donor.html?_r=0) (stating that 30,000 to 60,000 donor-conceived children are born yearly); MUNDY, *supra* note 21, at 94 (asserting that 30,000 donor-conceived children are born each year).

<sup>23</sup> *But see* Engelking v. Engelking, 982 N.E.2d 326, 327 (Ind. Ct. App. 2013) (involving a friend of the husband and wife who provided sperm for insemination); *In re Marriage of A.C.H.*, 210 P.3d 929, 931 (Or. Ct. App. 2009) (concerning a wife who used sperm from a "private semen donor" located by friend).

<sup>24</sup> NAOMI CAHN, *THE NEW KINSHIP: CONSTRUCTING DONOR-CONCEIVED FAMILIES* 14 (2013); Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 846 (2000).

the nature of the families they actually create surely are as diverse as the people themselves. But it is possible to identify some common categories: single women who wish to parent entirely alone, without any donor involvement; single women who wish to enjoy exclusive legal parenthood, but desire some donor involvement in the child's life; and single women who may—or may not—be “single” in the romantic sense, but wish to raise the child with the sperm provider as a co-parent. This latter category may include women who are in a relationship with the donor, i.e. an unmarried couple that needs fertility treatment to conceive. Indeed, even among the previous categories, the woman may have enjoyed a romantic relationship with the sperm provider. We also need to keep in mind that the family structure as originally contemplated may change over time.<sup>25</sup>

As with single women, some lesbian couples may desire to parent exclusively, without any donor involvement; others may desire some donor involvement in the child's life short of parental status; while yet others may desire to parent with the sperm provider and perhaps even with the sperm provider's partner. To further complicate the landscape, some lesbian couples are now married, while others are not.

Most of these family configurations can be found in the reported cases that have arisen, but they do not comprise the whole universe. I have received queries from physicians who have been asked by married women who are separated or contemplating divorce to conceive using sperm from another man.<sup>26</sup> It takes little imagination to conjure other possibilities as well. Given this plethora of family forms, can the law do justice for them all? Certainly our existing options have fallen woefully short. As the case survey that follows amply demonstrates, families using sperm from known providers live either in a world of uncertainty or in a world that fails to protect the family choices they have made.

## B. An Overview of the Cases

### 1. Single Women

Nearly half of the reported cases involve single women. In most of these cases, the sperm provider was a friend or acquaintance of the mother,<sup>27</sup> but in about one-third of them, the mother

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<sup>25</sup> It's not just in the movies that the mother marries the sperm donor. A woman who conceived a child with sperm from an anonymous donor met the donor when the child was 10 months old. The two fell in love, had a second child, and are now seeking to establish the donor's legal parentage of the first child. *Sperm Donor Romance: Victorian Government Slates Review Into Adoption as Stories of 'Unconventional' Families Challenge Current System*, ABC NEWS (Mar. 1, 2015, 12:00 PM), <http://www.abc.net.au/news/2015-03-02/sperm-donor-family-victoria-adoption-review/6272426>. For the movie version of the scenario, see *The Switch*, WIKIPEDIA, [http://en.wikipedia.org/wiki/The\\_Switch\\_%282010\\_film%29](http://en.wikipedia.org/wiki/The_Switch_%282010_film%29) (last visited May 19, 2015) (discussing the film *The Switch*).

<sup>26</sup> Perhaps this is not surprising. In some of the reported cases, the sperm provider was married to someone else at the time he helped the mother conceive, see *In re Parentage of J.M.K.*, 119 P.3d 840, 842 (Wash. 2005) (en banc) and *Steven S. v. Deborah D.*, 25 Cal. Rptr. 3d 319, 323 (Cal. Ct. App. 2005), so why shouldn't the mother be married?

<sup>27</sup> *In Interest of R.C.*, 775 P.2d 27, 27–28 (Colo. 1989) (en banc) (asserting that the sperm provider described the relationship between the sperm donor and mother as “friends,” but the mother described their relationship as “acquaintances”); *Brown v. Gadson*, 654 S.E.2d 179, 179 (Ga. Ct. App. 2007); *In re K.M.H.*, 169 P.3d 1025, 1029 (Kan. 2007); *E.E. v. O.M.G.R.*, 20 A.3d 1171, 1172 (N.J. Super. Ct. Ch. Div. 2011); *McIntyre v. Crouch*, 780 P.2d 239, 241 (Or. Ct. App. 1989); *In re Sullivan*, 157 S.W.3d 911, 912 (Tex. Ct. App. 2005); *Bruce v. Boardwine*, 770 S.E.2d 774, 775 (Va. Ct. App. 2015).

and sperm provider had been in a romantic relationship at some point or were still in a relationship at the time of conception or birth of the child.<sup>28</sup>

The role the sperm provider was expected to play in the child's life in these cases was sometimes clear, at least at the outset. In three of the cases, the court honored those intentions one way or another. In two, the parties had entered into a written agreement describing the sperm provider as a donor, and in which he relinquished all his rights.<sup>29</sup> In the third case, *Ferguson v. McKiernan*, the Pennsylvania Supreme Court upheld an oral agreement that the provider would be a donor and denied the mother's petition to establish paternity and obtain child support.<sup>30</sup>

In two other cases where the intentions were clear, but in the opposite direction, the court also ruled consistently with the agreements. In *In re Sullivan*, the mother and sperm provider signed a co-parenting contract prior to the insemination, agreeing that both would act as parents, and the court found the sperm provider had standing to pursue a paternity action.<sup>31</sup> Similarly, in *L.F. v. Breit*, various writings, as well as the parties' conduct, evidenced clear intent for the sperm provider to parent. The parties, who were in a long-term relationship, went through two cycles of IVF together, which the sperm provider attended; they signed a written custody and visitation agreement as well as a voluntary declaration of paternity; and the sperm provider was listed as the father on the birth certificate. They also lived together for four months following the birth, and the father continued to visit until the mother cut him off when the child was a year old.<sup>32</sup> Acknowledging that despite all the evidence of the parties' intent, the father would merely be a donor under Virginia's artificial insemination statute, the Virginia Supreme Court nonetheless held in his favor, finding that the voluntary acknowledgment of paternity established his paternity. To rule otherwise would violate the father's constitutional rights.<sup>33</sup>

However, not all courts have respected the parties' clear intention. In *E.E. v. O.M.G.R.*, the mother and donor signed a contract purporting to terminate the donor's parental rights.<sup>34</sup> When they sought a court order effectuating that intention, the court denied it because New Jersey law did not allow the termination of parental rights by contract, and the mother's in-home insemination failed to comply with the New Jersey artificial insemination statute. The statute required physician involvement to extinguish the sperm provider's rights.<sup>35</sup>

More often, the parties' intentions were considerably murkier. In some cases, the dispute

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<sup>28</sup> Jason P. v. Danielle S., 171 Cal. Rptr. 3d 789, 791 (Cal. Ct. App. 2014); *Steven S.*, 25 Cal. Rptr. 3d at 484; C.M. v. C.C., 377 A.2d 821, 821 (Juv. & Dom. Rel. Ct. 1977); *In re Parentage of M.J.*, 787 N.E.2d 144, 146 (Ill. 2003); *Ferguson v. McKiernan*, 940 A.2d 1236, 1238 (Pa. 2007); *L.F. v. Breit*, 736 S.E.2d 711, 715 (Va. 2013); *In re Parentage of J.M.K.*, 119 P.3d 840, 842 (Wash. 2005). In *B.W.P. v. A.L.H.*, 155 So. 3d 1229, 1229–30 (Fla. Dist. Ct. App. 2015), the facts did not reveal how the mother and sperm provider knew each other.

<sup>29</sup> *Brown*, 654 S.E.2d at 180; *Lamaritata v. Lucas*, 823 So. 2d 316, 318 (Fla. Dist. Ct. App. 2002) (both applying Florida law).

<sup>30</sup> *Ferguson*, 940 A.2d at 1248.

<sup>31</sup> *In re Sullivan*, 157 S.W.3d 911, 922 (Tex. Ct. App. 2005). The court did not base its ruling specifically on the contract nor decide whether the contract was enforceable.

<sup>32</sup> *Breit*, 736 S.E.2d at 715.

<sup>33</sup> *Id.* at 722.

<sup>34</sup> *E.E. v. O.M.G.R.*, 20 A.3d 1171, 1172 (N.J. Super. Ct. Ch. Div. 2011).

<sup>35</sup> *Id.* at 1174.



over intentions erupted relatively soon after the child's birth. In *In re K.M.H.*, the mother solicited a friend to provide sperm for her to conceive a child.<sup>36</sup> On the second attempt, she conceived twins, using a physician to perform the insemination. Two days after the births, she filed a petition to terminate the sperm provider's parental rights. He responded with a paternity action, alleging an oral agreement that he would be a parent to the twins. The court ruled for the mother based on the Kansas insemination statute, which provides that donors are not parents unless they have executed a written agreement to the contrary.<sup>37</sup>

Another case where the situation deteriorated rather quickly exemplifies how failure to clarify intentions can lead to trouble. In *Bruce v. Boardwine*, the parties talked about having a written agreement, but never followed through.<sup>38</sup> Bruce told Boardwine she "trusted him and, if it worked, they could 'talk about it some more.'"<sup>39</sup> Apparently, they never discussed his role.<sup>40</sup> Bruce testified that she expected Boardwine to visit and be involved with the child as "other friends" were, but that she did not expect him to see the child without her or that he would have formal visitation. She wanted to be the "sole parent."<sup>41</sup> Boardwine claimed that he agreed that Bruce would be the sole parent, but that he intended "to always be involved" with the child, that he would have the opportunity to see the child "as little or as much as he wanted," and that he expected to participate in the child's life by attending athletic activities and "being involved in the child's educational and health decisions."<sup>42</sup> Hence although the parties seemed to agree on formal parentage, they disagreed about the exact nature of Boardwine's role in the child's life. While "being involved" with the child could describe many adults in the child's life, "decision-making" sounds distinctly parental.

The court ruled in Boardwine's favor, not based on the parties' intent, but because of the method of conception. Bruce performed the artificial insemination herself at home with the aid of a turkey baster.<sup>43</sup> The court held that Virginia's assisted reproduction statute, which would have classified Boardwine as a donor, did not apply because turkey-baster insemination did not qualify as "assisted conception" under the statute.<sup>44</sup> Assisted reproduction encompassed pregnancies "resulting from any intervening medical technology."<sup>45</sup> Although the list of such treatments included "artificial insemination by donor," the court did not consider the use of a kitchen implement comparable to the other types of intervention listed in the statute, such as IVF.

In other cases, the claims regarding intent strain credulity and seem almost beside the point. In *Ryan v. Wright*, the parties had a twenty year on-again, off-again relationship that

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<sup>36</sup> *In re K.M.H.*, 169 P.3d 1025, 1029 (Kan. 2007).

<sup>37</sup> *Id.* at 1029, 1045.

<sup>38</sup> *Bruce v. Boardwine*, 770 S.E.2d 774, 775 (Va. Ct. App. 2015).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 777.

<sup>45</sup> *Id.* at 776 (internal quotations omitted).

produced two children by fertility treatments and artificial insemination.<sup>46</sup> The mother claimed that the two had an oral agreement that Ryan would be a sperm donor. Ryan denied any agreement, and the parties were living together at the time the children were conceived and born. Indeed, they apparently broke up because they could not agree on whether to have more children. Not surprisingly, the court found no valid oral contract and no intent by Ryan to relinquish parental rights.<sup>47</sup>

A claim of donor status was similarly far-fetched in *In re Parentage of J.M.K.*<sup>48</sup> In *J.M.K.* the parties had no written agreement to share parentage and disputed their intentions regarding the two children born using sperm from Kepl, a man with whom the mother had a lengthy extramarital relationship.<sup>49</sup> Kepl and the mother first attempted conception via sexual intercourse, and then underwent multiple fertility treatments. Two children eventually resulted from IVF. The parties' conduct strongly evinced an intention to share parentage regarding the first child. Kepl signed a voluntary acknowledgment of paternity (VAP) after the birth of the first child and acted in all ways as a parent—visiting weekly, traveling together on vacation, participating in holiday events and providing financial support. The record also contained professional photos of the three “posed as a traditional family.”<sup>50</sup>

Under these circumstances, there seems little room for disagreement regarding Kepl's status as parent to the first child. However, the parties disputed the intent regarding the birth of the second child. Kepl did not sign a VAP for the second child and ceased support for both children. Moreover, during the litigation, he claimed that he donated as a “friend” and never intended to parent either child. He further asserted that he provided support and signed the VAP to continue his sexual relationship with the mother and because the mother was threatening to disclose the affair to his wife.<sup>51</sup> Kepl's disavowal of the second child seems highly suspect in light of the family's history.

The court ruled that Kepl was a father of the first child based on execution of the VAP.<sup>52</sup> It then went on to find paternity for the second child based on blood test results.<sup>53</sup> The insemination statute, which would have rendered him a donor, was held inapplicable because the sperm was provided for IVF, rather than artificial insemination.<sup>54</sup>

The statutory context clearly can be critical to the outcome, and the common requirement that the parties use a physician to ensure donor status has led to conflicting court rulings when the sperm provider intends to be a parent. As we saw with *Breit*, where the intentions were clear that the sperm provider intended to be a parent, the court ruled that strict application of the donor

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<sup>46</sup> Ryan v. Wright, 872 N.W.2d 410, \*1 (Iowa Ct. App. 2015) (final publication decision pending).

<sup>47</sup> *Id.*

<sup>48</sup> *In re Parentage of J.M.K.*, 119 P.3d 840, 842–43 (Wash. 2005) (en banc).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 843.

<sup>52</sup> *Id.* at 848.

<sup>53</sup> *Id.* at 850.

<sup>54</sup> *Id.* at 849.

statute would raise constitutional concerns.<sup>55</sup>

Oregon reached a similar conclusion where the sperm provider and mother disagreed about the intent regarding parentage. In *McIntyre v. Crouch*, the sperm provider alleged that he gave the semen in reliance on an agreement with the mother that he “would remain active” in the child’s life and have monthly and summer visitation rights.<sup>56</sup> The mother denied those assertions and relied on the Oregon insemination statute, which like Section 5 of the UPA, extinguished the rights of donors of semen provided to physicians, to oppose his paternity petition. The court found that the statute *did* apply to bar a sperm provider’s claim for paternity, even though the semen was not provided under the supervision of a physician, as the statute stated.<sup>57</sup> However, the court went on to determine that application would be an unconstitutional violation of the sperm provider’s due process rights *if* the sperm provider could prove that he donated in reliance on an agreement to be a parent.<sup>58</sup>

In *In re R.C.*, the Colorado Supreme Court considered the same issue but used statutory interpretation to avoid the constitutional question. It found in favor of a sperm provider seeking an opportunity to show that he and the mother agreed that he would be a father if the insemination were successful.<sup>59</sup> Although Colorado had adopted Section 5 of the UPA, extinguishing rights of sperm donors who provide sperm through a physician to a non-spouse, the court held that the statute did not apply if the sperm provider could prove, as alleged, that he donated with intent to parent.<sup>60</sup> Thus both *McIntyre* and *R.C.* preserved the sperm provider’s right to try to prove that he should be considered a parent, though they reached that result via different routes. We will consider two California cases that yielded conflicting rulings when addressing clashes of intentions and application of the UPA in depth in section IIID *infra*.<sup>61</sup>

Finally, in the earliest case to consider the issue, *C.M. v. C.C.*, a New Jersey trial court found a man who provided sperm for insemination of a friend to be a father.<sup>62</sup> The parties disputed the role the man was to play: he expected to be a father, but she viewed him as “only a visitor” like her other friends.<sup>63</sup> In the absence of any case law or statutory authority, the court

<sup>55</sup> L.F. v. Breit, 736 S.E.2d 711, 715, 721–22 (Va. 2013). For two other cases that considered the constitutional implications of ignoring the sperm provider’s intent, see *Browne v. D’Alleva*, No. FA064004782S, 2007 WL 4636692, at \*1, 6, 8, 9–10 (Conn. Super. Ct. 2007) and *C.O. v. W.S.*, 639 N.E.2d 523, 524–25 (Ohio Misc. 1994). Compare with *B.W.P. v. A.L.H.*, 155 So. 3d 1229, 1230 (Fla. Dist. Ct. App. 2015), where the court, in considering a claim for attorney’s fees for a mother who defended a paternity action brought by the sperm donor, denied the fee award because the donor attempted to advance novel questions of law regarding constitutionality of donor statute and availability of equitable estoppel, thus implying the donor’s efforts were unsuccessful (the court provided no facts or specifics of the claim).

<sup>56</sup> *McIntyre v. Crouch*, 780 P.2d 239, 241 (Or. Ct. App. 1989).

<sup>57</sup> *Id.* at 242–43.

<sup>58</sup> *Id.* at 244.

<sup>59</sup> *In Interest of R.C.*, 775 P.2d 27, 35 (Colo. 1989).

<sup>60</sup> *Id.*

<sup>61</sup> *Steven S. v. Deborah D.*, 25 Cal. Rptr. 3d 482, 484–88 (Cal. Ct. App. 2005) and *Jason P. v. Danielle S.*, 171 Cal. Rptr. 3d 789, 791 (Cal. Ct. App. 2014) are discussed in detail *infra* at notes 254–60 and accompanying text.

<sup>62</sup> *C.M. v. C.C.*, 377 A.2d 821, 825 (Juv. & Dom. Rel. Ct. 1977).

<sup>63</sup> *Id.* at 822.

found no reason to distinguish this case from the traditional rule regarding unwed fathers who conceived sexually and artificial insemination cases where the husband consents to the insemination of his wife and thereby becomes the father.<sup>64</sup>

## 2. Lesbian Couples

The majority of cases involve lesbian couples using a known sperm provider to create their families.<sup>65</sup> Several features of these cases stand out. First, as with the cases involving single women, in many of these cases, the insemination took place at home, not in a doctor's office.<sup>66</sup> And like the cases involving single women, in some, this fact was determinative. For example, in *Jhordan C. v. Mary K.*, the California appellate court recognized the paternity of the sperm provider because he had not provided the sperm through a licensed physician as required by the insemination statute.<sup>67</sup> In *C.O. v. W.S.*, although the parties disputed whether the insemination occurred under the supervision of a physician, the court likewise ruled that Ohio's insemination statute required physician involvement.<sup>68</sup> Though as we saw in some of the single women cases,<sup>69</sup> the court opined that even if the parties had complied with the statute, it might not apply where the parties agreed the sperm provider would parent, and might even be unconstitutional under those circumstances.<sup>70</sup> The trial court's decision in the Marotta case (involving the Craigslist sperm donor) also rested on failure to comply with the physician requirement in ruling he was a father obligated to pay child support.<sup>71</sup>

Second, most of the lesbian couple cases, including *Jhordan* and *C.O.*, contemplated some involvement by the donor. In *Jhordan*, although the couple disputed their intentions regarding the role the sperm provider was expected to play, he visited the child in the hospital and on a monthly basis after that; he bought baby items and started a trust fund for the child; and he

<sup>64</sup> *Id.* at 824.

<sup>65</sup> See, e.g., *Jhordan C. v. Mary K.*, 179 Cal. App 3d 386, 389 (Cal. Ct. App. 1986); *Browne v. D'Alleva*, No. FA064004782S, 2007 WL 4636692, at \*1 (Conn. Super. Ct. 2007); *A.A.B. v. B.O.C.*, 112 So. 3d 761, 762 (Fla. Dist. Ct. App. 2013); *In re Paternity of M.F.*, 938 N.E.2d 1256, 1257 (Ind. Ct. App. 2010); *In re Adoption of a Minor*, 29 N.E.3d 830, 832 (Mass. 2015); *LaChapelle v. Mitten*, 607 N.W.2d 151, 157 (Minn. Ct. App. 2000); *Mintz v. Zoernig*, 198 P.3d 861, 862 (N.M. Ct. App. 2008); *Tripp v. Hinckley*, 736 N.Y.S.2d 506, 507 (N.Y. App. Div. 2002); *Thomas S. v. Robin Y.*, 618 N.Y.S.2d 356, 357 (N.Y. App. Div. 1994); *C.O. v. W.S.*, 639 N.E.2d 523, 524 (Ohio Com. Pl. 1994); *Leckie v. Voorhies*, 875 P.2d 521, 521 (Or. Ct. App. 1994); *Jacob v. Shultz-Jacob*, 923 A.2d 473, 476 (Pa. Super. Ct. 2007); *In re B.N.L.-B.*, 375 S.W.3d 557, 560 (Tex. App. 2012); *In re H.C.S.*, 219 S.W.3d 33, 34 (Tex. App. 2006); *In re Madrone*, 350 P.3d 495, 496 (Or. Ct. App. 2015); *W.R.L. v. A.H.*, No. 2014-CA-001240-ME, 2015 WL 1746240, at \*2 (Ky. Ct. App. 2015); *Kansas ex rel. Sec'y Dep't for Child. & Fam. v. W.M.*, No. 12D2686, \*2 (Kan. Dist. Ct. 2014).

<sup>66</sup> *Jhordan C.*, 224 Cal. Rptr. at 532; *A.A.B.*, 112 So.3d at 762; *See M.F.*, 938 N.E.2d at 1260; *Mintz*, 198 P.3d at 862; *Tripp*, 736 N.Y.S.2d at 507; *Thomas S.*, 618 N.Y.S.2d at 357; *Leckie*, 875 P.2d at 522; *Kansas ex rel.*, No. 12D2686 at \*2.

<sup>67</sup> *Jhordan C.*, 224 Cal. Rptr. at 531.

<sup>68</sup> *C.O.*, 639 N.E.2d at 524-25.

<sup>69</sup> See *supra* notes 27-64 and accompanying text.

<sup>70</sup> *C.O.*, 639 N.E.2d at 524-25.

<sup>71</sup> *Winter*, *supra* note 2.

was named on the birth certificate.<sup>72</sup> In *C.O.*, the parties agreed that the sperm provider “was to be considered a ‘male role model’ for the child, and would be called ‘father.’”<sup>73</sup> However, they disputed whether he was intended to have full parental rights.<sup>74</sup>

The parties in *Mintz v. Zoernig* also wanted the sperm provider Zoernig to “serve as a male role model,” with the women as “primary parents.”<sup>75</sup> The understanding was put in writing after the child’s birth, and the parties acted consistently with it. Mintz and her partner split up shortly after the birth of the child, and she subsequently conceived a second child with sperm from Zoernig with the same oral agreement regarding his limited role. Unlike most of the cases, in *Mintz*, the dispute arose because the mother sought child support from the sperm provider.<sup>76</sup>

The court ruled in her favor, finding first that the UPA insemination provision did not apply because the mother inseminated herself, and second, that Zoernig qualified as a presumed father under the UPA by establishing a relationship with the children and holding them out as his own.<sup>77</sup> The court further held that the contract purporting to limit his role was not enforceable because it relinquished only his parental responsibilities, not his parental rights, leaving open the possibility that a true sperm “donor” contract that relinquished all indicia of parental status might be enforceable.<sup>78</sup>

An Oregon court reached the opposite result in a similar case, *Leckie v. Voorhies*, but this time the sperm provider was seeking paternity and visitation.<sup>79</sup> As in *Mintz*, the parties signed a contract delineating that the “Donor,” Leckie, would have limited visitation rights at the convenience of the recipients, that he should not identify himself as father, only as sperm donor, and that he would be included in their lives as “a good male role model” but not as a father. Leckie visited the child for several hours a week over a period of years, made substantial financial contributions to her, and she referred to him as “Dad” without objection from Voorhies.<sup>80</sup> Despite this substantial involvement in the child’s life and the reaffirmation of the contract after mediation, which spelled out further visitation, the court rejected his petition for paternity and visitation, ruling that Leckie had waived his parental rights through the agreement.<sup>81</sup> Hence the court enforced the agreement as far as his relinquishment of parental status and his right to establish paternity, but declined to enforce the provision for visitation, even though the agreement stated that he could describe himself as “sperm donor with limited *visitation rights*.”<sup>82</sup> Nor did the court think Leckie’s conduct after the birth of the child or reaffirmation of the contract sufficed to

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<sup>72</sup> *Jhordan C.*, 224 Cal. Rptr. at 532.

<sup>73</sup> *C.O.*, 639 N.E.2d at 524.

<sup>74</sup> *Id.*

<sup>75</sup> *Mintz v. Zoernig*, 198 P.3d 861, 862 (N.M. Ct. App. 2008).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 863.

<sup>78</sup> *Id.* at 864.

<sup>79</sup> *Leckie v. Voorhies*, 875 P.2d 521, 522 (Or. Ct. App. 1994).

<sup>80</sup> As did Voorhies’ other child. *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Leckie*, 875 P.2d at 522 (emphasis added).

vitiating his waiver.<sup>83</sup>

This result not only contrasts with *Mintz*; it seems to directly contradict the *McIntyre* case (discussed above) decided five years earlier by the same court and which held that application of the donor statute would be unconstitutional if the man donated in reliance on an agreement to parent.<sup>84</sup> *Leckie* distinguished *McIntyre* because it was not relying on the insemination statute to deny the paternity petition, and *McIntyre* did not contain a written waiver.<sup>85</sup> A more compelling distinction may be the anticipated role of the sperm provider. In *McIntyre*, the sperm provider alleged reliance on an “agreement” that he would “remain active” in the child’s life, have specific visitation and “participate in all important decisions.”<sup>86</sup> While it seems splitting hairs to distinguish “remain active” from “visitation,” the involvement in “all major decisions” does more closely resemble full parental status, which *Leckie* had expressly waived.

In *Janssen v. Alicea*, a mother conceived a child with sperm from a close friend.<sup>87</sup> He claimed that they intended to co-parent. He was listed on the birth certificate and claimed he had played an active role during the pregnancy and the first two years of the child’s life. The mother claimed that he was merely a donor, that she and her partner intended to parent the child, and that any visitation that took place was at her discretion.<sup>88</sup> The court reversed the grant of summary judgment for the mother, finding that it was possible to conclude that she and the sperm provider were a “commissioning couple” under Florida’s gamete donation statute, which would make him a legal father.<sup>89</sup>

In a well-known New York case, *Thomas S. v. Robin Y.*, the parties’ initial understanding of the sperm provider’s role appears to have been more limited than in other cases in this category. Here, the couple would be the child’s parents with no rights or responsibilities on the part of the sperm provider; however, Thomas, the sperm provider, would make himself available if the child wished to know her biological father.<sup>90</sup> Thomas did develop a relationship with the child and ultimately sought parental status, which the court granted.<sup>91</sup> This case is discussed in detail later in this article.<sup>92</sup>

Two more cases involved lesbian couples anticipating some role for the sperm provider, but in these cases, the understanding also incorporated the sperm provider’s partner, though the partner’s rights did not become an issue in the case. In *Tripp v. Hinckley*, a lesbian couple recruited a friend to serve as sperm donor.<sup>93</sup> They agreed that the couple would be parents while

<sup>83</sup> *Id.* at 522–23.

<sup>84</sup> *See supra* notes 56–58 and accompanying text.

<sup>85</sup> *Leckie*, 875 P.2d at 523 n. 3.

<sup>86</sup> *McIntyre v. Crouch*, 780 P.2d 239, 241 (Or. Ct. App. 1989).

<sup>87</sup> *Janssen v. Alicea*, 30 So. 3d 680, 681 (Fla. Dist. Ct. App. 2010).

<sup>88</sup> *Id.* at 682.

<sup>89</sup> *Id.*

<sup>90</sup> 618 N.Y.S.2d 356, 358 (N.Y. App. Div. 1994).

<sup>91</sup> *Id.* at 362.

<sup>92</sup> *See infra* notes 169–180 and accompanying text.

<sup>93</sup> 736 N.Y.S.2d 506, 507 (N.Y. App. Div. 2002).

the sperm provider and his gay partner would have regular contact with the child.<sup>94</sup> After a second child was born, the parties signed a visitation agreement specifying regular visits throughout the year. The children called the sperm provider “Daddy,” and he regularly exercised his rights as their father. When the couple split up, he sought to increase visitation. The trial court granted his request, and the appellate court upheld it based on his well-developed relationship with the children. The agreement, though not binding, was enforceable if in the best interests of the children.<sup>95</sup>

In *Browne v. D’Alleva*, D’Alleva conceived a child with sperm provided by a friend, Michael Browne.<sup>96</sup> Both D’Alleva and Browne had partners.<sup>97</sup> The mother alleged that all agreed that her partner would adopt the child and that Browne and his partner would have “some type of role as co-guardians” and “a role as secondary or ‘fun parents,’” while she and her partner would be “primary parents.”<sup>98</sup> The sperm provider denied that he had agreed to be relegated to a “fun parent” and countered that he was supposed to be a legal guardian of the child.<sup>99</sup> The parties did not reduce the agreement to writing, other than a standard sperm donor consent form supplied by the clinic where the insemination took place. After the child’s birth, the mother listed Browne as father on the birth certificate, and both signed an Acknowledgment of Paternity.<sup>100</sup> Browne refused to consent to the child’s adoption by D’Alleva’s partner and sued for custody and visitation.<sup>101</sup> The court found that the Connecticut insemination statute did not bar his suit because it did not reference known sperm donors and had been enacted to ensure legitimacy for married couples using artificial insemination. Even if it had, the court reasoned that such a statute would be unconstitutional if the sperm provider’s willingness to donate was premised on maintaining an ongoing relationship with the child.<sup>102</sup> The court concluded that Browne had standing to bring the action based on both the parties’ preconception intent and the execution of the acknowledgment of paternity.<sup>103</sup>

In one unusual case, *Curtis v. Prince*,<sup>104</sup> the sperm provider apparently changed his mind several times about his role in the child’s life. Curtis donated sperm to a friend and her partner. He signed a written contract providing that he would not be a parent nor listed on the birth certificate, but he would be allowed to babysit occasionally. Shortly after the birth, Curtis initiated an administrative proceeding to establish paternity.<sup>105</sup> The Agency ruled in his favor and ordered

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 507-08.

<sup>96</sup> No. FA064004782S, 2007 WL 4636692, at \*1 (Conn. Super. Ct. Dec. 7, 2007).

<sup>97</sup> *Id.* at \*2.

<sup>98</sup> *Id.* at \*1.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at \*2.

<sup>102</sup> *Id.* at \*12.

<sup>103</sup> *Id.* at \*13.

<sup>104</sup> *Curtis v. Prince*, No. 25194, 2010 WL 5071195 (Ohio Ct. App. 2010).

<sup>105</sup> *Id.* at \*1.

child support. He appealed the child support order, but not the paternity determination. The court ruled that the mother had waived child support. Curtis subsequently moved to Florida. Five years later, the state child support enforcement agency sought a child support order on behalf of the mother. Curtis now argued that he was merely a sperm donor. Although the trial court agreed, the appellate court ruled that the prior proceeding was res judicata on the issue of paternity.<sup>106</sup> The court also noted that the record contained no evidence of compliance with the Ohio insemination statute, presumably referring to the method of insemination, as Ohio requires supervision of a physician.<sup>107</sup>

In an interesting twist, in two of the cases, the sperm provider was the brother of the mother's partner.<sup>108</sup> The choice of a family member to serve as sperm provider may reflect a desire to create a genetic link to the non-biological partner or simply the availability of an accessible and trusted option.<sup>109</sup> In *In re H.C.S.*, the sperm provider sued for paternity when the couple split up and he was denied visitation.<sup>110</sup> The sperm provider alleged that he had donated in reliance on a verbal agreement that he would not act merely as a "donor," but would be involved in the child's life, and that he had visited with the child before being cut off by the biological mother when the couple's relationship ended.<sup>111</sup> The Texas appellate court held that he lacked standing to bring a paternity action because under the 2002 Uniform Parentage Act, adopted in Texas, a "donor is not a parent of a child conceived by assisted reproduction."<sup>112</sup> The court disagreed with the *Sullivan* court's conclusion that the question of donor status should be addressed in evaluating the paternity petition, not at the standing stage.<sup>113</sup>

Likewise, in *A.A.B. v. B.O.C.*, the sperm provider-uncle sought to establish paternity when the child was five, after the biological mother cut off her partner, the sperm provider's sister, from visitation with the child.<sup>114</sup> The sperm provider had not provided financial support for the child but had visited. The court applied the Florida insemination statute, which extinguished all donor rights and obligations.<sup>115</sup> The court found further that the statute did not require that the insemination take place in a clinical setting to be applicable.<sup>116</sup>

One wonders in these cases if the actions would have even been filed if the law recognized the partner's parental rights. Possibly the lack of legal protection for the existing

<sup>106</sup> *Id.* at \*2.

<sup>107</sup> *Id.* at \*3.

<sup>108</sup> *A.A.B. v. B.O.C.*, 112 So. 3d 761, 762 (Fla. Dist. Ct. App. 2013); *In re H.C.S.*, 219 S.W.3d 33, 34 (Tex. Ct. App. 2006).

<sup>109</sup> In a case that involved a dispute between lesbian co-parents, one of the sperm donors was the brother of the non-biological partner, who wanted to be biologically related to the child. The uncle/brother was not involved in the case. *In re Madrone*, No. 1201759CV, 2015 WL 2248221, at \*2 (Or. Ct. App. 2015).

<sup>110</sup> 219 S.W.3d at 34.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 35 (quoting TEX. FAM. CODE ANN. § 160.702 (West 2015)) (The 2002 UPA).

<sup>113</sup> *Id.*; see *In re Sullivan*, 157 S.W.3d 911, 919 (Tex. Ct. App. 2005).

<sup>114</sup> *A.A.B. v. B.O.C.*, 112 So. 3d 761, 762 (Fla. Dist. Ct. App. 2013).

<sup>115</sup> *Id.* at 763-64.

<sup>116</sup> *Id.* at 764.



family unit motivated the uncle/sperm provider's efforts to establish paternity.

Not all the cases involving lesbian couples contemplated involvement by the donor. In *Paternity of M.F. and C.F.*, a case from Indiana, a man agreed to provide semen to a friend and her life partner for the friend to conceive a child.<sup>117</sup> The parties executed a contract relieving the donor of all parental rights and responsibilities. The insemination resulted in the birth of M.F. Seven years later, the mother had a second child, C.F., who was also the donor's biological child. Although the adults obviously maintained some kind of contact, since the second child was conceived some years after the first, the facts do not indicate any contact between the sperm provider and either child. When the mother's relationship with her partner ended, she sought public assistance. The County then filed an action on her behalf against the sperm provider to establish paternity and support.<sup>118</sup>

Although Indiana does not have an artificial insemination statute, the court looked to the UPA for guidance and held that the contract relieving the donor of parental rights and responsibilities was valid if the semen had been provided to a physician, and if the parties had executed a sufficiently thorough and formalized written contract.<sup>119</sup> In this case, the lengthy and sophisticated contract, which had been drafted by an attorney, was sufficient to be enforceable.<sup>120</sup> The parties disputed the manner of insemination, but the court placed the burden on the party seeking to avoid the contract—the mother—to prove that insemination occurred by intercourse and without a physician. She failed to meet that burden, so the court found the contract was enforceable.<sup>121</sup>

However, the parties entered into the contract shortly before the birth of the first child and the document only referenced that child. The parties did not execute another agreement before the second child's birth. Without a contract governing the second child, the court classified the sperm provider as a father to that child and liable for child support.<sup>122</sup> Hence he was a donor to one child and a father to the other.

In the final category of cases, the court in some fashion recognized parental-type rights for both the lesbian co-parents and the sperm provider.<sup>123</sup> The details of these cases are discussed later in Part III.D.3.

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<sup>117</sup> 938 N.E.2d 1256, 1257 (Ind. Ct. App. 2010).

<sup>118</sup> *Id.* at 1257-58.

<sup>119</sup> *Id.* at 1261; *Cf. In re K.M.H.*, 169 P.3d 1025, 1040 (Kan. 2007) (rejecting sperm provider's claim to parental rights based on lack of written agreement, as required by statute).

<sup>120</sup> *M.F.*, 938 N.E.2d at 1261-62.

<sup>121</sup> *Id.* at 1260.

<sup>122</sup> *See id.* at 1263.

<sup>123</sup> *LaChapelle v. Mitten*, 607 N.W.2d 151 (Minn. Ct. App. 2000); *Jacob v. Shultz-Jacob*, 923 A.2d 473 (Pa. Super. Ct. 2007). In one additional case, a court enforced an indemnification provision in a donor contract in which the donor agreed to forgo seeking a legal relationship with the child, who had been adopted by the mother's lesbian partner, but settlement of various proceedings resulted in visitation rights for the donor. *In re B.N.L.-B.*, 375 S.W.3d 557 (Tex. Ct. App. 2012).

C. *Insights From The Cases*

This case survey yields several useful insights for reconsidering the legal regime governing use of sperm provided by men known to the mother. First, most of the women did not use a physician to perform the insemination, with the lesbian couples seemingly choosing in-home insemination more often. Only one of the fifteen lesbian couples definitively used a physician to perform the insemination,<sup>124</sup> though in two cases, the involvement of a physician was disputed and in a few others, the facts were silent as to whether the insemination took place under medical supervision.<sup>125</sup> By contrast, a physician was involved in nearly fifty percent of the cases involving single women or unmarried heterosexual couples.<sup>126</sup> In the cases that did involve a physician, only one applied the statute strictly and held that the sperm provider was a donor, regardless of the parties' intent, without any opportunity to try to establish facts showing he was entitled to parentage based on intention, agreement, or conduct.<sup>127</sup> Several courts did hold, however, that *failure* to comply with the statute required the sperm provider to be considered a parent or rendered the statute inapplicable, forcing the court to consider other rationales for assigning status to the sperm provider.<sup>128</sup>

Second, roughly the same proportion of lesbian couple cases and single/opposite-sex couple cases involved written agreements—about a third, yet courts differed on the enforceability of written agreements that attempted to define the sperm provider's status. The two courts considering co-parenting agreements honored them,<sup>129</sup> but the decisions were nearly evenly split when it came to agreements attempting to limit the donor's rights and responsibilities.<sup>130</sup> By contrast, in every case where the parties executed another type of legal document supporting a father's claim of paternity, such as a voluntary acknowledgement of paternity and naming the

<sup>124</sup> *Browne v. D'Alleva*, No. FA064004782S, 2007 WL 4636692, at \*1 (Conn. Super. Ct. 2007).

<sup>125</sup> *C.O. v. W.S.*, 639 N.E.2d 523, 524 (Ohio Com. Pl. 1994) (method disputed); *M.F.*, 938 N.E.2d at 1260 (same); see *In re H.C.S.*, 219 S.W.3d 33, 34 (Tex. Ct. App. 2005); *In re B.N.L.-B.*, 375 S.W.3d 557, 560 (Tex. Ct. App. 2012); *Jacob*, 923 A.2d at 475–76; *LaChapelle*, 607 N.W.2d at 157 (no facts regarding method). Thus 65% were reported as in-home inseminations.

<sup>126</sup> *Ferguson v. McKiernan*, 940 A.2d 1236, 1240 (Pa. 2007); *L.F. v. Breit*, 736 S.E.2d 711, 715 (Va. 2013); *Steven S. v. Deborah D.*, 25 Cal. Rptr. 3d 482, 484 (Cal. Ct. App. 2005); *Jason P. v. Danielle S.*, 171 Cal. Rptr. 3d 789, 790 (Cal. Ct. App. 2014); *In re K.M.H.*, 169 P.3d 1025, 1029 (Kan. 2007); *In Interest of R.C.*, 775 P.2d 27, 28 (Colo. 1989); *In re Parentage of J.M.K.*, 119 P.3d 840, 842 (Wash. 2005).

<sup>127</sup> *Steven S.*, 25 Cal. Rptr. 3d at 487, discussed *infra* at notes 254–55 and accompanying text.

<sup>128</sup> *Bruce v. Boardwine*, 770 S.E.2d 774, 776–77 (Va. Ct. App. 2015); *E.E. v. O.M.G.R.*, 20 A.3d 1171, 1177 (N.J. Super. Ct. Ch. Div. 2011); *Jhordan C. v. Mary K.*, 224 Cal. Rptr. 530, 537–38 (Cal. Ct. App. 1986); *C.O. v. W.S.*, 639 N.E.2d 523, 525 (Ohio Misc. 1994); *B.W.P. v. A.L.H.*, 155 So. 3d 1229, 1230 (Fl. Dist. Ct. App. 2015).

<sup>129</sup> *In re Sullivan*, 157 S.W.3d 911, 922 (Tex. App. 2005); *L.F.*, 736 S.E.2d at 722.

<sup>130</sup> *Mintz v. Zoernig*, 198 P.3d 861, 864 (N.M. Ct. App. 2008); *Leckie v. Voorhies*, 875 P.2d 521, 522–23 (Or. Ct. App. 1994); *M.F.*, 938 N.E.2d at 1262; *B.N.L.-B.*, 375 S.W.3d at 563; Steve Fry, *Attorney: Marotta Not The Father In The 'Unusual' Circumstances Of Sperm Donor Case*, TOPEKA CAP-J. (Jan. 4, 2015, 4:40PM), <http://cjonline.com/news/2015-01-04/attorney-marotta-not-father-unusual-circumstances-sperm-donor-case>; *E.E. v. O.M.G.R.*, 20 A.3d 1171, 1173 (N.J. Super. Ct. Ch. Div. 2011) (holding that the parental rights of one parent may not be terminated by consent except when it is accompanied by the adoption of the child by another party, contract was not honored); *Brown v. Gadson*, 654 S.E.2d 179, 181 (Ga. Ct. App. 2007) (honoring contract relieving donor of duties); *Lamaritata v. Lucas*, 823 So. 2d 316, 319 (Fla. Dist. Ct. App. 2002) (honoring contract limiting donor's rights).

provider as father on the birth certificate, the court ruled in the sperm provider's favor, even if the court did not always rely solely on the documents.<sup>131</sup> The preference for VAPs, rather than contracts, as a basis for assigning legal parentage may suggest courts' comfort with more traditional markers of parental status, and their reluctance to open the door to the potentially more expansive and still novel option of defining parental rights based on contract.

In terms of outcome, looking at the run of cases, the courts ruled approximately two-to-one in favor of establishing paternity. It is important to keep in mind, though, that in a number of these cases, the posture of the case raised only threshold questions, such as whether the sperm provider had standing to seek paternity, or revived suits that had been adjudicated by motions to dismiss or summary judgment, giving the party the opportunity to prove that he qualified as a father. These decisions do not mean that the party necessarily succeeded in establishing paternity or obtaining custody or visitation rights. Nonetheless, the lopsided results reveal the particular vulnerability of single women and lesbian couples who choose this method of family building.

The causes of the skew could be, and doubtlessly are, many and varied. As we have seen, the statutory parameters vary significantly among jurisdictions. Men's constitutional right to parent was critical for some courts. Beyond that concern, the disproportionate findings in favor of attempts to establish paternity might reflect either structural bias—the statutory underpinnings and default rules favor a legal father for every child—or at least a two-parent family, as well as the binary approach existing laws take to this issue—that is, sperm providers must be either donors with no rights or fathers with full rights. While some courts did ignore the sperm provider's involvement with the children and declare them donors, others—perhaps not surprisingly—leaned toward parental status. Preference for paternity may also reflect bias on the part of the judicial decision-makers, though most of the cases avoid any statements openly evincing bias. Whatever the cause of the disparate results, we can be certain that the current system invites litigation and fails to accurately capture the parties' intentions and lives. What values, then, should guide us in crafting legal rules that will work better for those choosing to use directed donation to create their families?

## II. VALUES AND ESSENTIAL PRINCIPLES FOR GAMETE DONATION LAWS

Family law in the United States is notoriously inconsistent from one jurisdiction to another and sometimes within a particular state, particularly when it comes to assisted reproduction and non-traditional family forms. Yet the system as a whole rests on a shared foundational purpose: to serve the best interests of children. Legislators, scholars, judges and members of the public often strenuously disagree about how to achieve that goal, but there is little dissent that child welfare lies at the heart of our family law system—or at least that it should.<sup>132</sup> Thus our first value should be maximizing children's well-being, recognizing, as scholar Katharine Baker has noted, “that it is incredibly difficult to ascertain children's interests in the abstract.”<sup>133</sup>

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<sup>131</sup> *Janssen v. Alicea*, 30 So. 3d 680, 681 (Fla. Dist. Ct. App. 2010); *Tripp v. Hinckley*, 736 N.Y.S.2d 506, 508 (N.Y. App. Div. 2002); *Browne v. D'Alleva*, No. FA064004782S, 2007 WL 4636692, at \*13 (Conn. Super. Ct. 2007); *Cf. Jason P.*, 171 Cal. Rptr. 3d at 798 (Cal. Ct. App. 2014) (noting that voluntary acknowledgements of paternity by sperm donors are invalid under CAL. FAM. CODE § 7612(f)(3) (West 2015)).

<sup>132</sup> *See Garrison*, *supra* note 24, at 844 (“family law has consistently preferred the interests of children and the public to those of parents and parent claimants.”).

<sup>133</sup> Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 682

The best interest of the child principle, though, does not reign exclusively. Another principle also percolates throughout family law—the concept of parental rights. This principle has found its most powerful expression in our constitutional jurisprudence, which recognizes that parents have a fundamental right to control the care, custody, and upbringing of their children.<sup>134</sup> The notion of parental rights, for my purposes, subsumes three aspects—autonomy, privacy and fairness. The adults involved in assisted reproduction have intentionally created these families, and the role they play in their children’s lives will surely be among their most meaningful experiences. Parenthood has been described as “central to human flourishing” and a “deeply expressive activity” that enables people to fulfill and share their deepest values about life and achieve “transcendent” selflessness.<sup>135</sup> These parents deserve a system that will maximize their freedom, protect their privacy from unwarranted state intrusion,<sup>136</sup> and treat them consistently, without discrimination or arbitrariness.

It is important to note that the parental rights principle to some extent reflects the larger goal of protecting child well-being, for part of the rationale for recognizing parental rights as fundamental is the presumption that “parents” will act in the best interests of their children.<sup>137</sup> Clearly that is not always the case, and family law is replete with instances where the court has to balance the parents’ rights with the child’s interests, often with the understanding that the child’s interests take precedence.<sup>138</sup> The law governing gamete donation may at times present one of those instances.

The third value—pluralism—has the potential to further both of the previous values—child well-being and parental rights. The traditional nuclear family—a married, heterosexual couple raising their naturally conceived, biologically related children—no longer dominates the family structure landscape. Today, a significant percentage of children are being raised in single parent homes (usually by single mothers) and by unmarried couples.<sup>139</sup> The movement toward full

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(2008).

<sup>134</sup> Troxel v. Granville, 530 U.S. 57, 72 (2000); Meyer v. Nebraska, 262 U.S. 390, 399 (1923); Pierce v. Society of Sisters, 268 U.S. 510, 534–35 (1925).

<sup>135</sup> Baker, *supra* note 133, at 679.

<sup>136</sup> Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (“It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. And it is in recognition of this that [our] decisions have respected the private realm of family life which the state cannot enter”).

<sup>137</sup> Troxel, 530 U.S. at 68; Garrison, *supra* note 24, at 864 (“Today, parents’ rights are thought to derive from—and to be limited by—their children’s interests. Family law has thus moved consistently in the direction of a child-centered view of parental entitlements”).

<sup>138</sup> Garrison, *supra* note 24, at 893–94; Linda C. McClain, *Love, Marriage, and the Baby Carriage: Revisiting the Channeling Function of Family Law*, 28 CARDOZO L. REV. 2133, 2175 (2007).

<sup>139</sup> Harvey L. Fiser & Paul K. Garrett, *It Takes Three, Baby: The Lack of Standard, Legal Definitions of “Best Interest of the Child” and the Right to Contract for Lesbian Potential Parents*, 15 CARDOZO J.L. & GENDER 1, 30–31 (2008); Deborah Zalesne, *The Contractual Family: The Role of the Market in Shaping Family Formations and Rights*, 36 CARDOZO L. REV. 1027, 1080 (2015) (“Twenty-eight million children in the United States are raised in families in which their caregivers are not exclusively two heterosexual parents who are biologically related to their children . . .”); CLARE HUNTINGTON, *FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS* 28 (2014) (stating the traditional family accounts for only 20% of U.S. households).

equality for gays and lesbians, coupled with the proliferation of assisted reproduction options, has enabled same-sex couples to build families that are increasingly achieving legal recognition and protection. The growing prevalence of infertility has also led to families created through gamete donation and other forms of collaborative reproduction. As scholars J. Herbie DiFonzo and Ruth C. Stern astutely observe, “[f]or the continued viability of a legal system, demographics are destiny. The family law universe no longer spins on the axis of married heterosexual couples and their children.”<sup>140</sup>

Given this demographic and social change, a core principle for devising a legal regime governing allocation of rights and responsibilities for those using gametes from others must be pluralism: our laws should recognize and protect these various family configurations and allow them to thrive. This approach will serve the interests of children and the adults who are raising them, as well as those of the gamete providers who act as donors, and those who take a more active, but non-parental role in the child’s life.<sup>141</sup> They, too, share an interest in fairness and autonomy.

The fourth value I will call coherence. To the extent possible, the overall scheme of laws governing families should exhibit a reasonable level of consistency. Some would refer to this as the “equality” value: that the laws treat those creating families by assisted reproduction equally—or the same as—those creating families through sex. The equality argument has its greatest force when fighting discrimination in access to reproductive treatment.<sup>142</sup> However, I prefer the term coherence because in determining parentage and relationship rights, pertinent differences among these families do exist, thus “equal” or identical treatment may not be in order. Coherence does align in some respects with legal scholar Marsha Garrison’s “interpretive” mode of analysis, which “requires consistency with current law, public policy, and public values.”<sup>143</sup> However, Garrison elevates consistency to the preeminent value, regardless of the wisdom of existing law and policies.<sup>144</sup> By contrast, my concern with coherence calls for awareness that if we do treat families created through assisted reproduction differently, we should have good reasons. And by “good reasons,” I mean those consonant with the other values I identify here, which in the case of pluralism in particular, may move well beyond the approach of existing law.

The final value—functionality—reflects process concerns and incorporates aspects of two of the functions of family law identified by Carl Schneider: the facilitative and the arbitral.<sup>145</sup> Whatever regime we devise should operate effectively for the parties involved. Ideally, individuals choosing to conceive with gametes from someone known to them should know what legal effects flow from that choice. They should also be able to access the means necessary to

<sup>140</sup> J. Herbie DiFonzo & Ruth C. Stern, *Breaking the Mold and Picking up the Pieces: Rights of Parenthood and Parentage in Nontraditional Families*, 51 FAM. CT. REV. 104, 106 (2013) [hereinafter “*Breaking*”].

<sup>141</sup> Ann Laquer Estin, *Embracing Tradition: Pluralism in American Family Law*, 63 MD. L. REV. 540, 541 (2004) (“a pluralistic approach . . . is based on a commitment to inclusion and respect for difference, grounded in our political and constitutional values of equality, nondiscrimination, and religious freedom.”).

<sup>142</sup> See Judith F. Daar, *Assisted Reproductive Technologies and the Pregnancy Process: Developing an Equality Model to Protect Reproductive Liberties*, 25 AM. J. L. & MED. 455, 465 (1999).

<sup>143</sup> Garrison, *supra* note 24, at 878.

<sup>144</sup> *Id.* (“A consistent result will not necessarily be an ideal result, or one that we would choose if we were beginning life in a brave new world without precedents or past practices.”)

<sup>145</sup> Carl Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495, 497 (1992).

effectuate their intentions and protect their families, and they should enjoy a comfortable level of certainty about their legal rights and responsibilities.

With these five values as guiding principles, the next sections will detail specific core precepts necessary to creating a system consistent with these values.

#### A. *The Law Should Embrace Non-Traditional Parents*

##### 1. The law should not discriminate against unmarried opposite-sex couples or co-parents

Under the current system, some jurisdictions have statutes that on their face discriminate against unmarried couples that use artificial insemination or IVF to conceive. For example, section 5 of the 1973 UPA, adopted in a significant number of states, provides that a donor who provides sperm to a licensed physician for someone other than his wife is not a parent.<sup>146</sup> Texas has an even broader statute, excluding male donors from classification as alleged father and defining donor as “an individual who produces . . . sperm used for assisted reproduction.”<sup>147</sup>

A statute that treats all providers of sperm for someone other than a spouse as a donor without any parental rights essentially denies unmarried couples or opposite-sex co-parents the option of using assisted reproduction to conceive.<sup>148</sup> As indicated above, large numbers of couples now cohabit outside of marriage; many of them are raising children. Although no specific data exists quantifying how many unmarried couples seek fertility treatment, we can assume that the rate of infertility does not dramatically differ among couples that have chosen to eschew marriage.<sup>149</sup> At the same time, social media and the Internet have spawned a new form of intentional co-parenting by men and women who have no prior relationship of any kind and thus may prefer to procreate non-coitally.<sup>150</sup> Research has documented barriers that have deterred

<sup>146</sup> Unif. Parentage Act of 1973, CAL. FAM. CODE § 5 (West 2015); *See, e.g.* ALA. CODE § 26-17-702 (2015); COLO. REV. STAT. ANN. § 19-4-106(2) (West 2015); CONN. GEN. STAT. ANN. § 45a-775 (West 2015); DEL. CODE ANN. § 8-702 (West 2015); FLA. STAT. ANN. § 741.14 (West 2015); IDAHO CODE ANN. § 39-5405(1) (West 2015); MO. ANN. STAT. § 210-824(2) (West 2015); MINN. STAT. ANN. § 257.56(2) (West 2015); N.J. STAT. ANN. § 9:17-44(b) (West 2015); N.M. STAT. ANN. § 40-11A-702 (West 2015); OHIO REV. CODE ANN. § 3111.95(B) (West 2015); OR. REV. STAT. ANN. § 109.239 (West 2015); TEX. FAM. CODE ANN. § 160.702 (West 2015); UTAH CODE ANN. § 78B-15-702 (West 2015); VA. CODE ANN. § 20-158(3) (West 2015); WASH. REV. CODE ANN. § 26.26.101(7) (West 2015); WISC. STAT. ANN. § 891.40(2) (West 2015); WYO. STAT. ANN. § 14-2-902 (West 2015).

<sup>147</sup> TEX. FAM. CODE ANN. §§ 101.0015(b), 160.102(6) (West 2015); *But see In re Sullivan*, 157 S.W.3d 911 (Tex. Ct. App. 2005) (holding that the statute was ambiguous and potential donor had standing to seek paternity where sperm provider and recipient signed co-parenting agreement prior to insemination). *Compare In re H.C.S.*, 219 S.W.3d 33 (Tex. Ct. App. 2006) (sperm provider to lesbian couple held to have no standing to seek paternity where he alleged an oral agreement to be involved in child's life).

<sup>148</sup> On its face, treating all men who provide sperm for artificial insemination as donors also discriminates against unmarried men, but unmarried men wishing to parent exclusively must use surrogacy, which raises other issues beyond the scope of this article.

<sup>149</sup> *Infertility*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Feb. 6, 2015), [www.cdc.gov/nchs/fastats/infertility.htm](http://www.cdc.gov/nchs/fastats/infertility.htm); *Reproductive Health*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Apr. 16, 2015), [www.cdc.gov/reproductivehealth/infertility.index.htm](http://www.cdc.gov/reproductivehealth/infertility.index.htm).

<sup>150</sup> *See How to Find a Co-Parent*, CO-PARENT MATCH, <http://www.co-parentmatch.com/co-parenting.aspx#8> (last visited June 22, 2015) (providing a place for those seeking co-parents, whether opposite or same-sex, to post profiles and connect with potential co-parent matches); Jennifer Griswold, *People Turn to Internet to Find Co-*

unmarried couples and others from accessing treatment. Fortunately, physicians have begun to recognize that discrimination based on marital status is unethical and potentially illegal,<sup>151</sup> which may lead to greater use of artificial insemination by unmarried couples.

As we saw, several of the cases have held that statutes that operate as a complete bar to establishing parentage for a man who provides sperm for assisted reproduction, could violate his constitutional right to parent if he donated intending to parent.<sup>152</sup> In *McIntyre v. Crouch*, the court held that Oregon's insemination statute, which would operate as a complete bar for men who provide sperm for use by a non-spouse, would be unconstitutional if the petitioner could prove that he provided sperm to a friend on the understanding he would act as a parent.<sup>153</sup> The court reasoned that, under *Lehr v. Robertson*, a potential father must have the right to "grasp the opportunity" to act as a father, even in this context: "[t]he Due Process Clause can afford no different protection to petitioner as the biological father because the child was conceived by artificial insemination rather than by sexual intercourse."<sup>154</sup>

The *Breit* case presented an even stronger claim to parentage. Recall that in *Breit*, the parties signed a co-parenting agreement prior to conception, as well as a voluntary acknowledgment of paternity after the child was born. The father lived with the mother and child for four months and acted in every way as a father. The Virginia Supreme Court acknowledged that the insemination statute was enacted with married women in mind, and that its "primary purpose" was "to protect cohesive family units from claims of third-party intruders who served as mere donors."<sup>155</sup> In this situation, Breit was no intruder; he and the mother "represented the closest thing [the child] had to a 'family unit.'"<sup>156</sup> Under these circumstances, applying the statute would be unconstitutional.

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*Parents*, KMTV NEWS (Feb. 4, 2014), <http://www.scrippsmedia.com/kmtv/news/People-Turn-to-Internet-to-Find-Co-Parents—247421991.html> (relating story of co-parents brought together by Facebook).

<sup>151</sup> Judith F. Daar, *Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms*, 23 BERKELEY J. GENDER L. & JUST. 18, 44 (2008); *Access to Fertility Treatment by Gays, Lesbians, and Unmarried Persons: A Committee Opinion*, AM. SOC'Y FOR REPROD. MED. 1524, 1525 (Oct. 2, 2013), [https://www.asrm.org/uploadedFiles/ASRM\\_Content/News\\_and\\_Publications/Ethics\\_Committee\\_Reports\\_and\\_Statement\\_s/fertility\\_gaylesunmarried.pdf](https://www.asrm.org/uploadedFiles/ASRM_Content/News_and_Publications/Ethics_Committee_Reports_and_Statement_s/fertility_gaylesunmarried.pdf); *N. Coast Women's Care Med. Group, Inc. v. San Diego Cnty. Super. Ct.*, 44 Cal. 4th 1145, 1158 (Cal. 2008).

<sup>152</sup> See *In re K.M.H.*, 169 P.3d 1025, 1041 (Kan. 2007) (agreeing in *dicta* that absolute-bar statutes could violate sperm provider's constitutional rights); *McIntyre v. Crouch*, 780 P.2d 239, 244 (Or. Ct. App. 1989); *C.O. v. W.S.*, 639 N.E.2d 523, 525 (Ohio Misc. 1994).

<sup>153</sup> *McIntyre*, 780 P.2d at 244; See also *C.O.*, 639 N.E.2d at 525 (assuming insemination statute does apply, application would be unconstitutional if donor and woman agreed to relationship between donor and child).

<sup>154</sup> *McIntyre*, 780 P.2d at 245. One judge disagreed, finding that the state had a "compelling interest" in regulating artificial insemination" and that "[t]he statutes contemplate that the ultimate relationship, or absence of one, must be defined before the child is conceived in order to facilitate informed decisions about whether to donate and to conceive. The statutory policy assures the stability of all the parties' lives in the aftermath of the decisions. The holding of the lead opinion turns the statutory scheme into a house of sand."; *Id.* at 247–48 (Richardson, P.J., dissenting).

<sup>155</sup> *L.F. v. Breit*, 736 S.E.2d 711, 720 (Va. 2013).

<sup>156</sup> *Id.*

2. The law should respect the integrity of single parents and same sex parents

If one of our guiding values is pluralism, any approach to sperm donation must respect and protect not just unmarried opposite sex couples or men and women who choose to parent together, but single parent families and those headed by same-sex parents.<sup>157</sup> As we have seen, many of the appellate cases have involved disputes between a sperm provider and a woman who planned to raise the child with her lesbian partner, and several of the other cases involved claims by women who intended to parent alone. From a practical standpoint, the best way to protect these families under the current system is clearly to avoid use of known donors altogether. Anonymous sperm donation ensures that a single mother will be able to parent without any involvement or interference by the donor. While the law is in flux regarding the rights of lesbian co-parents in that context too, at least the biological mother will not have to risk claims by the donor.

However, for a variety of reasons, some women prefer to know the identity of the donor. Some choose a known donor out of concern for the future medical and emotional needs of the child. As they mature, some donor offspring may have questions about their family medical history—in some cases urgent; others are curious about their paternal origins or have a psychological need to fill in that missing piece of their identity.<sup>158</sup> Increasingly, commentators and activists have expressed trepidation about donor siblings and the possibility of accidental incest. All of these concerns have led several other countries to ban anonymous donation<sup>159</sup> and for some to call for the same here,<sup>160</sup> which may influence some women's decisions. Some women may desire more than the potential for information about or future contact with the donor. They may intentionally recruit a known donor who will actually play a role in the child's life.<sup>161</sup> Other women may prefer known donors because they are free. A vial of anonymous sperm from a sperm bank can cost several hundred dollars, an amount that could increase rapidly with multiple attempts.<sup>162</sup> Still others may simply feel more comfortable conceiving a child with someone they know, rather than with a complete stranger.<sup>163</sup>

<sup>157</sup> I obviously part company with Garrison on this point as she argues strongly for an approach that would deny single women the right to reliably create a single-parent family. Garrison, *supra* note 24, at 903–09; *See also* Susan Frelich Appleton, *Illegitimacy and Sex, Old and New*, 20 AM. U.J. GENDER SOC. POL'Y & L. 347, 376 (2012) (discussing inconsistency of using “children's equality” as argument for same sex marriage while arguing against mandatory recognition of sperm donors as fathers).

<sup>158</sup> Cahn, *supra* note 24, at 109–11; Fiser, *supra* note 139, at 6; Polikoff, *supra* note 7, at 62; Melanie Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J.L. & FAM. STUD. 309, 337 (2007).

<sup>159</sup> *See* Cahn, *supra* note 24, at 168 (mentioning Switzerland, the UK and Sweden).

<sup>160</sup> *Id.* at 144 (advocating mandatory disclosure of donor identity when offspring reach 18 years of age).

<sup>161</sup> *See* Fred A. Bernstein, *This Child Does Have Two Mothers . . . and a Sperm Donor with Visitation*, 22 N.Y.U. REV. L. & SOC. CHANGE 1, 19 (1996) (discussing attitudes among lesbian women).

<sup>162</sup> *See, e.g., List of Available Services & Fees*, SPERM BANK, INC., <http://www.spermbankcalifornia.com/sperm-bank-cost.html> (last visited June 22, 2015) (providing a standard list of prices).

<sup>163</sup> *See* *Ferguson v. McKiernan*, 940 A.2d 1236, 1247 (Pa. 2007) (noting failure to allow for directed sperm donation would force mother to conceive using anonymous sperm or give up biological motherhood completely, ignoring her “personal preference to conceive using the sperm of someone familiar, whose background, traits, and medical history are not shrouded in mystery.”).



Whatever the motivation, we can be sure that the use of known donors will not disappear. If anything, the practice may increase. There is no way to know how many women use known donors for which of these various reasons, but ideally the law should accommodate these variations. For those who choose known donors for cost or to keep open the possibility of contact when the child has reached adulthood, or in the event a medical need arises, the statutory scheme should allow for true donors who have no rights or responsibilities of any kind with respect to the children conceived with their gametes. This rule would essentially treat known donors the same way the law treats anonymous donors.<sup>164</sup> Both versions of the UPA and other state statutes have language that accomplishes this goal.<sup>165</sup> However, complications arise when this simple proposition occupies the entire field of options for use of known sperm providers, when even those who initially desire a true donor arrangement act inconsistently with that intent, when one party has a change of heart about the arrangement, or when the parties use in-home insemination. How to handle each of these situations will be addressed in the sections that follow.

*B. The Law Should Move Beyond The Binary Parent-Stranger Paradigm To Accommodate The Diversity Of Family Arrangements Created Through Sperm Donation*

As we have seen, in a number of cases, the parties explicitly contemplated that the sperm provider would play a role in the child's life. The agreements variously described him as a "role model" or a "secondary or fun parent," promised him a "significant relationship with the child" or provided that he would have an opportunity to visit the child.<sup>166</sup> When disputes arose, the mother asserted that the intent was always that she (and perhaps her partner, in the lesbian couple cases) would occupy the role of legal parent, with any involvement on the part of the sperm provider dependent on parental discretion, as it generally would be for any other third party. Sometimes this was clear from the written agreement, sometimes not, and a number of the cases turned on supposed oral understandings.

Several problems emerge in these situations. First, in the absence of a written agreement, these disputes inevitably become he-said, she-said contests about the intent of the parties. As the donor often has had contact with the child, the conduct only serves to further muddy the waters. Second, in at least some of the cases, whether by written agreement or oral understanding, all parties expected the donor to be a part of the child's life in some fashion, and the donor relied on this promise in choosing to donate. Yet the law presently has no mechanism for accommodating the donor's involvement in the child's life, short of assigning parental status. Rather, courts are compelled to assign the sperm provider to the "parent" box or the "stranger" box, regardless of his actual role in the family. Unfortunately, this binary approach disserves the needs of both the

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<sup>164</sup> See *id.* (upholding a contract between mother and donor extinguishing donor's rights where "negotiated, clinical arrangement . . . closely mimics the trappings of anonymous sperm donation . . .").

<sup>165</sup> CAL. FAM. CODE § 7613(b) (West 2015) (The statutory language stating that "The donor of semen provided to a licensed physician and surgeon or to a licensed sperm bank for use in assisted reproduction of a woman other than the donor's spouse is treated in law as if he were not the natural parent of a child thereby conceived, unless otherwise agreed to in a writing signed by the donor and the woman prior to the conception of the child" treats known donors and anonymous donors the same.).

<sup>166</sup> See also *W.R.L. v. A.H.*, No. 2014-CA-001240-ME, 2015 Ky. App. LEXIS 668, at \*2 (Ky. Ct. App. Apr. 17, 2015) (sperm provider not involved in dispute between former same sex partners, but case mentions purported donor contract stating that donor "would like to see the child and be a part of its life, but only as a family friend or an uncle or something in that nature").

children and adults involved. How can the law better respond to these issues?

1. “Role Models” do not equal “Fathers”

The “father” versus “interloper” narrative emerges strongly in one of the classic cases in this area. In *Thomas S. v. Robin Y.*,<sup>167</sup> Thomas agreed to provide his sperm so Robin could conceive a child to be raised with her partner Sandra. A daughter, Ry, was born. The parties orally agreed that Thomas would not call, provide support or give gifts to Ry until requested. When Ry was three, her older sister Cade began inquiring about her biological father. Robin and Sandra agreed the girls should meet their biological fathers. Thomas accepted the invitation, and a relationship developed. Although the parties disputed the details, Thomas visited Ry twenty-six times, totaling anywhere from sixty to 148 days over a period of six years. He developed a “warm and amicable relationship” with her, as evidenced by “numerous” cards and letters in which Ry expressed her love for him.<sup>168</sup> The relationship between Thomas and Robin and Sandra broke down when he asked to take Ry and her sister on a trip to visit his family, without the mothers present.<sup>169</sup> The New York court ultimately held that Thomas was Ry’s father, granting his request for an order of filiation.<sup>170</sup>

The mothers argued that recognizing Thomas as Ry’s legal father would disrupt their family unit. They presented psychiatric evidence that Ry feared the disruption and wished to cease all contact with Thomas. The majority attributed Ry’s apparent change of heart toward Thomas to “manipulation” by her mothers and “poisoning” of Ry’s “formerly amicable” relationship with Thomas.<sup>171</sup> In the court’s view, “[t]he asserted sanctity of the family unit is an un compelling ground for the drastic step of depriving petitioner of procedural due process.”<sup>172</sup>

Of course, one cannot help but notice that courts are much more solicitous of protecting the “family” when it adheres to the traditional heteronormative structure.<sup>173</sup> It is hard to read the majority’s opinion as anything but disparaging of the family created by Robin, Sandra and their two daughters. Indeed, the dissent painted a sharply contrasting picture, characterizing Thomas’s relationship with Ry as “that of a close family friend or fond surrogate uncle who, while acknowledging that he was her biological sperm donor, fully recognized that her family unit consisted of her two mothers and her sister Cade and that he was not a family member of that unit.”<sup>174</sup> The dissent went on to expand on the effect the proceedings had had on Ry:

[She] views the proceedings as a threat to her sense of family security. She is angry at petitioner and feels betrayed by him because she and her family had counted on him as a

<sup>167</sup> *Thomas S. v. Robin Y.*, 618 N.Y.S.2d 356 (N.Y. App. Div. 1994).

<sup>168</sup> *Id.* at 358.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 362.

<sup>171</sup> *Id.* at 359–60.

<sup>172</sup> *Id.* at 359.

<sup>173</sup> See *Michael H. v. Gerald D.*, 491 U.S. 110, 119–20 (1989) (upholding conclusive presumption of paternity in favor of husband of over biological father against constitutional challenge).

<sup>174</sup> *Thomas S.*, 618 N.Y.S.2d at 363 (Ellerin, J., dissenting).

supporter of their unconventional family unit. The thought of visiting appellant, and her deep-seated fear that he might seek custody of her, have caused Ry anxiety and nightmares . . . .<sup>175</sup>

The dissent also noted that the court-ordered psychiatrist had found that Ry's fears did not flow from "brainwashing" by her mothers.<sup>176</sup>

Families like Ry's, as well as those headed by single mothers, deserve respect and treatment equal to that afforded opposite-sex, married couples. A sperm provider who plays a limited role in the child's life and inhabits a role other than parent should not have the opportunity to claim parental status. However, perhaps the law needs to change to accommodate some kind of recognition of the active sperm donor.<sup>177</sup> In his thoughtful analysis of the *Thomas S.* case, Carlos Ball notes that "part of the difficulty that Tom Steel faced when litigating his case was that he essentially had to choose between contending that he was a full legal parent, with all the accompanying rights and obligations, and conceding that he was a legal stranger to his biological daughter."<sup>178</sup> Expanding the legal options beyond "stranger" and "parent" may better reflect the agreement among the participants as well as the way these families actually operate and further the interests of children who have developed a relationship with their biological fathers. Doing so might also create a space for gay men who wish to have children and be considered a bona fide part of the child's family, albeit not a parent. As other scholars have observed, gay men face numerous obstacles to becoming full-fledged parents.<sup>179</sup> Gay men were identified as the sperm provider in many of the cases involving lesbian couples.<sup>180</sup> Recognition of a special status might fulfill their need for familial ties while serving the child's interests. Recognition of the active sperm provider might also actually deter litigation by presenting less of a threat to the integrity of

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<sup>175</sup> *Id.* at 364.

<sup>176</sup> *Id.* at 367.

<sup>177</sup> See Polikoff, *supra* note 7, at 82 (arguing for recognition of agreement to allow contact between sperm donor and child); Bernstein, *supra* note 161, at 5 (arguing that a law does not require a "reductionist binary thinking" that limits parentage to either "two functional parents" or "two biological parents"); Kelly, *supra* note 19, at 214–15 (identifying model combining presumption of parenthood for lesbian partners with assignment of non-parental legal recognition of sperm donor as particularly desirable among lesbian couples surveyed: "For mothers whose families actually resembled the combination model—a conjugal couple with an involved known donor—it was particularly attractive. They could see their own families reflected in the model and realized how it would have benefited them if it had been in place when their children were born."); Cf. Pamela Laufer-Ukeles & Ayelet Blecher-Prigat, *Between Function and Form: Towards a Differentiated Model of Functional Parenthood*, 20 GEO. MASON L. REV. 419, 446–48 (2013) (discussing calls for "levels of parenthood rights" based on, *inter alia*, caregiving).

<sup>178</sup> CARLOS BALL, *THE RIGHT TO BE PARENTS: LGBT FAMILIES AND THE TRANSFORMATION OF PARENTHOOD* 132 (2012).

<sup>179</sup> See Elizabeth J. Levy, *Virgin Fathers: Paternity Law, Assisted Reproductive Technology, and the Legal Bias Against Gay Dads*, 22 AM. U.J. GENDER SOC. POL'Y & L. 893, 894–895 (2014) (arguing that presuming that sperm providers are donors discriminates against gay men desiring to be fathers); Bernstein, *supra* note 161, at 12–17 (reviewing the history of gay parenting and noting multiple obstacles).

<sup>180</sup> See Bernstein, *supra* note 161, at 23. See, e.g., *C.O. v. W.S.*, 639 N.E.2d 523 (Ohio Misc. 1994); *Thomas S. v. Robin Y.*, 618 N.Y.S.2d 356 (N.Y. App. Div. 1994); *Tripp v. Hinckley*, 736 N.Y.S.2d 506 (N.Y. App. Div. 2002); *Browne v. D'Alleva*, No. FA064004782S, 2007 WL 4636692 (Conn. Super. Ct. 2007); *LaChapelle v. Mitten*, 607 N.W.2d 151 (Minn. Ct. App. 2000); *Curtis v. Prince*, No. 25194, 2010 WL 5071195 (Ohio Ct. App. 2010).

the family, thus perhaps encouraging resolution of the dispute outside of court. Whether, and how, the law can accomplish that task is considered in the next section.<sup>181</sup>

2. The law should provide limited legal recognition to active sperm providers

In order to create a special non-parent status for active sperm providers, we need to resolve a number of questions. First, what kind of rights or responsibilities would flow from such a special status? As we are positing something less than full parental status, the sperm provider would not have the option of pursuing custody of any kind—whether physical or legal.<sup>182</sup> Nor would the sperm provider be subject to claims for child support.<sup>183</sup> Parental rights and responsibilities would remain vested entirely in the legal parent(s). The active sperm provider would have only a right to visitation with the child if visitation were in the best interests of the child.

The ALI's Principles of the Law of Family Dissolution incorporate this notion. The Principles provide that a biological parent who is not a legal parent, such as a gamete donor, who has reserved some parental rights or responsibilities by agreement with the parent(s) can bring an action to enforce those rights.<sup>184</sup> Indeed, a model for this kind of visitation right already exists. Most states now allow post-adoption visitation where birth mothers have conditioned their consent to adoption on continued contact with the child after the adoption is finalized.<sup>185</sup> These agreements typically must be in writing and approved by the court as part of the adoption. Enforcement depends on whether visitation serves the child's best interests.

The analogy admittedly is not exact: sperm donation typically does not trigger any kind of judicial oversight. Nor am I suggesting that the law mandate judicial involvement at the time the donor agreement is made. Requiring a court proceeding would add substantially to the financial burden on the parties. In adoption, the requirement of court approval for post-adoption contact adds nothing to the parties' burden because adoption already requires court approval. Imposing a similar requirement on those using donated gametes could cause delay in the procedure and would lead to state interference in a private decision between the donor and the recipient. As the state has no say over whether and with whom individuals choose to procreate sexually, it should have no say over whether and with whom individuals choose to procreate using donated gametes. Moreover, gamete donation does not prompt the same concerns as adoption regarding the vulnerability and potential for exploitation of the birth mother and adoptive parents

<sup>181</sup> See *infra* note 182–222 and accompanying text.

<sup>182</sup> See James B. Boskey, *The Swamps of Home: A Reconstruction of the Parent-Child Relationship*, 26 U. TOL. L. REV. 805, 816 (1995) (arguing that parental rights be “unbundled” to allow quasi-parents who enjoyed a substantial relationship with a child but have not assumed all parental rights and duties to claim a right of association).

<sup>183</sup> However, a sperm provider who agreed to provide financial support as part of a valid contract with the intended parents could be liable for breach of contract. He would not be subject to claims by the state or jurisdiction of the family court.

<sup>184</sup> AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATION §§ 2.04, 2.08, illus. 32 & 33, 2.18(2)(b), illus. 6 (2002) (allowing allocation of parental responsibility by court to biological parent who is not legal parent but has agreement with legal parent retaining some parental rights or responsibilities).

<sup>185</sup> Carol Sanger, *Bargaining for Motherhood: Postadoption Visitation Agreements*, 41 HOFSTRA L. REV. 309, 319 (2012) (26 states and the District of Columbia as of 2011).

that makes judicial oversight of adoption essential.<sup>186</sup>

While allowing enforcement of such agreements might seem to undermine the parents' rights, doing so might provide some security by depriving the sperm provider of the ability to seek custody. The parents might feel freer to allow the relationship to develop without fear of such a claim.<sup>187</sup>

A thornier issue is whether recognition of limited rights for the active sperm provider must rest on an express prior agreement among the participants, or whether conduct can suffice. On the one hand, from both the child's perspective and the sperm provider's perspective, once a relationship develops, harm may result if the relationship is severed, regardless of whether the parties expressly agreed prior to conception that the sperm provider would play an active role in the child's life. On the other hand, allowing subsequent conduct to trigger a right to petition the court for visitation over the parents' objections may open the door wider than it should. Although we might hope that a "middle-ground" option for active sperm providers would ease conflict, a standard that is too loose may well prompt more litigation, as sperm providers with little contact seek to expand their access to the child, in violation of the prior agreement or understanding with the parent(s).<sup>188</sup> Moreover, the sperm provider's claim to visitation, from a fairness standpoint, carries significantly more weight if the donation was premised on the opportunity to play a role in the child's life.

The parties' mutual intent may also bolster the sperm provider's rights as a matter of constitutional law. The biggest legal hurdle to adopting a right to visit by active sperm providers premised solely on conduct is undoubtedly *Troxel v. Granville*.<sup>189</sup> In *Troxel*, the Supreme Court considered a challenge to a Washington third-party visitation statute that allowed "[a]ny person" to petition for visitation "at any time," and authorized the court to grant the petition "whenever 'visitation may serve the best interest of the child.'" <sup>190</sup> A fractured court struck down the statute as applied to grandparents seeking to visit their grandchildren after the death of their son, the children's father. The mother had allowed them to visit, but not as much as they liked. Describing the statute as "breathhtakingly broad," the plurality opinion held that the statute impermissibly infringed on the parent's fundamental right to rear her children.<sup>191</sup> To pass constitutional muster, the statute must at a minimum give "special weight" to the parent's determination of whether visitation would be in the child's best interests, though the Court declined to define what "special weight" entails.<sup>192</sup> The plurality also suggested that a court could adjust the amount of weight

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<sup>186</sup> Cf. Sarah Abramowicz, *Contractualizing Custody*, 83 *FORDHAM L. REV.* 67, 122–23 (2014) (discussing concerns over duress in creation of custody or visitation agreements).

<sup>187</sup> See John Bowe, *Gay Donor or Gay Dad?*, *N.Y. TIMES*, Nov. 19, 2006, <http://www.nytimes.com/2006/11/19/magazine/19fathering.html>. (describing mothers' paranoia about allowing visitation); Bernstein, *supra* note 161, at 22 (describing their "anxiety").

<sup>188</sup> See Kelly, *supra* note 19, at 214 (describing importance of consent requirement among lesbian couples surveyed, fearing without it, parental presumption in their favor "would become meaningless").

<sup>189</sup> *Troxel v. Granville*, 530 U.S. 57 (2000).

<sup>190</sup> *Id.* at 60.

<sup>191</sup> *Id.* at 67.

<sup>192</sup> *Id.* at 73; Solangel Maldonado, *When Father (Or Mother) Doesn't Know Best: Quasi-Parents and Parental Deference after Troxel v. Granville*, 88 *IOWA L. REV.* 865, 881–882 (2003).

given to the parents' decision if the parent had "sought to cut off visitation entirely."<sup>193</sup>

Courts not surprisingly have differed about what exactly *Troxel* requires to justify third party visitation, but clearly the court has the power to order such visitation under certain circumstances.<sup>194</sup> Without doubt, a state statute could grant standing to an active sperm provider to seek visitation. In evaluating the claim, the court would have to give due deference to the parents' wishes. If the parties agreed at the time of conception that the sperm provider would enjoy a right to visit, a strong argument can be made that the parent has ceded her parental preference, thus allowing enforcement of the active sperm provider's rights based on the best interest of the child. In the absence of mutual intent, a sperm provider would nonetheless retain the possibility of demonstrating that a sufficient relationship with the child had developed to justify an award of visitation in the child's best interests, but the challenge would be greater.

Many states responded to *Troxel* by curtailing the opportunity for third parties to seek visitation. Although most states have statutes that allow grandparents the chance to seek visitation, many of these statutes grant standing and allow visitation only under highly circumscribed situations, such as where the grandparents have acted in a parental role, where a parent is deceased or divorced or separated, or where denial would cause harm to the child.<sup>195</sup> Cases where grandparents have won visitation against the objections of two united parents likely are rare.<sup>196</sup> Even fewer states have statutes that grant stepparents standing to seek visitation—persons who may have a stronger claim to visitation than active sperm providers because they lived with the child and in many cases will have shared in parenting the child.<sup>197</sup>

Critics of this approach might argue that granting the sperm provider standing to pursue a claim to visitation infringes the parental autonomy of the parent(s) and undermines the integrity of the family. They may well claim that sperm providers do not necessarily enjoy a relationship with the child that differs from any number of other third parties, including grandparents, stepparents, aunts, uncles, family friends and nannies. However, active sperm providers are in a unique position.<sup>198</sup> A child may have multiple grandparents and serial stepparents, but the child will only have one biological father. Scholars, courts and policy-makers have long debated the significance of that singular connection.<sup>199</sup> We know from many quarters that biology is surely

<sup>193</sup> *Troxel*, 530 U.S. at 71–72; *See, e.g.*, MO. REV. STAT. § 452.402 (West 2015) (granting standing to grandparents denied visitation for longer than 90 days, ruled constitutional in *Blakely v. Blakely*, 83 S.W.3d 537 (Mo. 2002)).

<sup>194</sup> Maldonado, *supra* note 192, at 869–70.

<sup>195</sup> *Id.* at 873.

<sup>196</sup> *Id.* at 874 (most states do not grant standing to grandparents to seek visitation where nuclear family intact); *Id.* at 885–86 (discussing courts that have required harm).

<sup>197</sup> *See* Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 399–400 (2008) (discussing recognition of stepparents limited to those functioning as parents); DiFonzo & Stern, *supra* note 140, at 110 (reporting "only a handful of jurisdictions expressly conferring standing on stepparents to seek visitation").

<sup>198</sup> *See* Bowe, *supra* note 187 (discussing common category of known sperm providers as "more than an uncle and less than a father.").

<sup>199</sup> *See, e.g.*, Baker, *supra* note 133, at 689–90 (arguing that children may experience psychological benefits from being raised by biological parents but reserving judgment on how much biology matters); Dara E. Purvis, *Intended Parents and the Problem of Perspective*, 24 YALE J.L. & FEMINISM 210, 219 (2012) (noting "considerable doubt over whether biological connection yields better parenting").

not parental destiny. The laws governing adoption and assisted reproduction are built on that premise. Thriving families created through collaborative reproduction and adoption are testament to the fact that a genetic connection is neither necessary nor sufficient to ensure children's well-being. From a historical view, the primacy of the marital presumption at the expense of the biological father, though weaker today, also evidences that genetic connection and parentage do not automatically go together.

But that truth does not mean that the genetic parent has nothing special to offer the child. The search by adoptees and donor offspring for their genetic parent(s) evidences the importance of that connection. For some, the question is one of curiosity, but others may desire to connect with that person.<sup>200</sup> Indeed, it is for precisely this reason that some single women and lesbian couples choose to create families with a donor known to them.

Moreover, the active sperm providers also have unique interests. They may experience the relationship with the child as distinct from other relationships because of the shared genetic connection.<sup>201</sup> For gay men, donating to a lesbian friend or couple may offer their only chance for developing a meaningful relationship with their offspring. Gay men face their own struggles with parentage and discrimination. The options for becoming a gay father—surrogacy or adoption—are time consuming, expensive, and not universally available.<sup>202</sup> While gay men may, as we have seen, agree to a more limited, non-parental role, that concession does not necessarily signify that the expected relationship has little importance to them.<sup>203</sup> Thus, sperm providers do stand apart from others who may come into the child's life, and grow to know and even love them.

Nonetheless, whether the child perceives the sperm provider as different in a positive way from others in his or her life assuredly varies from one child to another. Some children may call the sperm provider "Daddy" and view their relationship as meaningful in a special way. Although labels may bear little relation to emotional attachment,<sup>204</sup> we cannot dismiss them altogether. For labels carry with them societal expectations that may influence how the child sees herself in relation to the adults in her life.<sup>205</sup> For example, a child may have a wonderful, close

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<sup>200</sup> Cahn, *supra* note 24, at 75–76 (discussing reasons why donor offspring search for donors and identifying curiosity as dominant motivation and observing that "For most people, searching for the donor . . . appears to be less about forming a relationship than allowing [them] to learn more about themselves.").

<sup>201</sup> See RENE ALMELING, *SEX CELLS: THE MEDICAL MARKET FOR EGGS AND SPERM* 145–49 (2011) (discussing that feelings of kinship with donor-conceived offspring occur even in men who donate anonymously, a feeling likely intensified when the donor gets to know the child); *But see* Janet L. Dolgin, *Biological Evaluations: Blood, Genes, and Family*, 41 AKRON L. REV. 347, 384–85 (2008) ("[m]ost anonymous donors have no interest in having social and/or legal children when they donate sperm, and they do not develop such an interest later.").

<sup>202</sup> Bernstein, *supra* note 161, at 14.

<sup>203</sup> See Bowe, *supra* note 187 (sharing stories of gay sperm providers comfortable with relinquishing parental rights, but concerned with forging significant relationships with the children and playing an active caretaking role).

<sup>204</sup> See Sacha Coupet, "Ain't I a Parent?": *The Exclusion of Kinship Caregivers from the Debate Over Expansions of Parenthood*, 34 N.Y.U. REV. L. & SOC. CHANGE 595, 644 (2010) ("[a]n attachment figure exists by virtue of conduct, not labels.").

<sup>205</sup> For a discussion of the difficulties lesbian couple-headed families face in choosing the right descriptor for the involved donor, see Kelly, *supra* note 19, at 205–07; Bowe, *supra* note 187; Bernstein, *supra* note 161, at 48 (describing Ry's understanding of "the importance of father in our culture" and the relationship she developed with "the man she knew to be her father" as "the key fact of the case.").

relationship with an aunt, but likely knows that the aunt occupies a non-parental category. How the child's parents talk about and treat the sperm provider will also impact the relationship that develops, as will intangible interpersonal factors. Even children raised by both biological parents often have different quality relationships with each. Ultimately, it is impossible to know or to predict the nature of the attachment a particular child may form with an active sperm provider. The best we can say is that a disruption of the child's relationship with the sperm provider may have negative consequences for some children that are worth trying to avoid.

Concerns about Carl Schneider's "expressive" function of family law may also counsel us to think carefully about the message our approach to active sperm providers will send. Perspectives differ about the underlying meaning expressed by gamete donation generally. Some view it as a message of commodification and commercialization, and decry the replacement of bonds of kinship with values of the marketplace.<sup>206</sup> Others recognize the altruistic aspect of the practice—that donors assist others in creating families.<sup>207</sup> At this point, most scholars generally accept the practice of gamete donation.<sup>208</sup> While some might have lingering concerns about the willingness of donors to sever their potential parental connection to genetic offspring, particularly in a commercial context, the ultimate consequence has been the creation of family by those who strongly desire it, and the birth of children who fare overall just as well as children conceived otherwise.<sup>209</sup> Moreover, studies of donors indicate their satisfaction with the process.<sup>210</sup> Thus, I would argue that whatever concerns we have about the meta-message of gamete donation—that donors can and should disconnect from their offspring—it has not had long-term negative consequences for the donors. Further, while the debate still rages about the child's desire to know about his or her genetic heritage, there is no indication of suffering by donor offspring because they have not been raised by one of their genetic parents.

With active known donors, though, we are asking something more. Now we are no longer seeking solely the ability to create a family. We are inviting the donor to be a part of that family, albeit in some less than parental way. Yet at the same time, we are expecting, indeed insisting, that the donor not actually develop what some might see as a normal and desirable attachment to the child *and vice versa*—that the child likewise not develop an attachment to a biological parent. I am not sure how successfully human beings can achieve that kind of compartmentalization, and more importantly, I am not sure we want to encourage them to.<sup>211</sup>

<sup>206</sup> See Abramowicz, *supra* note 186, at 124.

<sup>207</sup> Almeling, *supra* note 201 (discussing how agencies construct these differing narratives in how they recruit and market donors in a way that is strikingly gendered).

<sup>208</sup> Abramowicz, *supra* note 186, at 117 (“[r]elatively few [scholars] advocate prohibiting the sale of gametes altogether.”).

<sup>209</sup> Susan Golombok, et al., *Social Versus Biological Parenting: Family Functioning and the Socioemotional Development of Children Conceived by Egg or Sperm Donation*, 40 J. OF CHILD PSYCHOL. AND PSYCHIATRY 519, 525 (1999); Susan Golombok, et al., *Families with Children Conceived by Donor Insemination: A Follow-Up at Age Twelve*, 73 CHILD DEV. 952, 953, 965 (2002).

<sup>210</sup> Deborah L. Forman, *Embryo Disposition Divorce & Family Law Contracting: A Model for Enforceability*, 24 COLUM. J. GENDER & L. 378, 400 (2013).

<sup>211</sup> For a moving description of the difficulties faced by men in this position, see Bowe, *supra* note 187; See also Bernstein, *supra* note 161, at 26, 46–47 (suggesting sperm providers who have contact with the child may develop unexpected parental feelings, and discussing initial ambivalence of some gay donors that blossoms into deeper feeling).



Moreover, we would deny active sperm donors any ability to seek an ongoing relationship with the child even when he has invested labor in developing the relationship of a type that we normally would applaud as earning some kind of relationship with the child.<sup>212</sup> For example, in *Leckie v. Voorhies*, the trial court held that the sperm donor did not satisfy the third party visitation statute because he did not have unique relationship with children beyond that of “excellent child care provider.” Rather than viewing the donor’s actions as an investment in caring for his child, the court denigrated his role as merely that of a babysitter.<sup>213</sup>

I do not mean to suggest that providing a few hours of child care on an occasional basis makes a donor a father or even someone necessarily deserving of any rights to contact with the child. But, I do think we need to think about the message we are sending and be sensitive to the task we have undertaken. An analogy to surrogacy seems apt here. The practice of gestational surrogacy has gained a significant measure of acceptance, with states allowing surrogates to sever their potential parental rights prior to birth in favor of recognizing the intended parents as the child’s legal parents. We can accept the “gift of family” from gestational surrogates rather easily because they do not have the genetic connection to the child. By contrast, traditional surrogates engage in both the labor of parenting (gestation and delivery) and have a genetic connection to the child. In most places, a traditional surrogate will need to relinquish her rights to the child through adoption or at least a post-birth proceeding, which allows her to change her mind.<sup>214</sup> A pre-birth order will not suffice. This distinction undoubtedly recognizes the difference in ability to manage the emotional aspects of gestating a child who is not otherwise connected to the surrogate and doing so for one who is. Likewise, those who donate gametes anonymously or with no active involvement in the child’s life may have little difficulty maintaining distance from their offspring, but nurturing a relationship between the sperm provider and the child may transform that relationship in a way that will cause harm to both the child and the adult if the relationship is severed.

I have expressed trepidation about the conflicting message we send about men as parents in earlier work concerning unwed fathers and adoption.<sup>215</sup> There I ultimately concluded that while we need to recognize the complicated message conveyed by requiring more of men to assert their parentage, the differential treatment is justified by other competing needs and values. The same is true here. I do not think we need to elevate active sperm providers to full-fledged legal fathers to send a “better” message about attachment with one’s offspring, but we do need to give some recognition to the existence of that relationship as something worthy of preserving at least if such a relationship was promised. Failure to do so would work an injustice for those sperm providers. Thus concerns for both the sperm provider and most importantly the children who may develop a significant and singular relationship with him, as well as the larger message for society, support finding some way for the law to protect that relationship.

Critics will respond that the cost of preserving a valuable relationship for those children

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<sup>212</sup> See Murray, *supra* note 197, at 427 (arguing for legal recognition of caregiving and caregivers that does not hew to the parental template).

<sup>213</sup> *Leckie v. Voorhies*, No. 60-92-06326, at \*3-4 (Or. Lane County Cir. Ct. 1993) (cited in Polikoff, *supra* note 7, at 71).

<sup>214</sup> *Sees v. Baber*, 74 N.J. 201, 215 (N.J. 1977); *Matter of Baby M*, 109 N.J. 396, 432-433 (N.J. 1988).

<sup>215</sup> Deborah L. Forman, *Unwed Fathers and Adoption: A Theoretical Analysis in Context*, 72 TEX. L. REV. 967, 1043-45 (1994).

who may have one—allowing a sperm provider to litigate the claim—is too high. Litigation inevitably raises the level of conflict between the parties and subjects all parties to the judge’s determination of “best interests,” which may or may not “get it right.” Judges may be overly-inclined to find in favor of the sperm provider because they disapprove of single women or lesbian parents or simply because they have absorbed the sense of crisis about “fatherless families” that permeates our society.<sup>216</sup> Critics will further argue that taking custody claims off of the table does little to lessen the possibility of conflict over the sperm provider’s role. To the contrary, it may spark more disputes as sperm providers who clearly could not qualify as fathers via some other channel (e.g. presumed parents) will be emboldened to insist on their “right” to visitation, which is the crux of the dispute in the vast majority of the cases to date.<sup>217</sup>

These weighty concerns counsel against extending the law to allow active sperm providers to seek visitation based solely on conduct. This assertion reflects an attempt to balance the risks to all parties. Admittedly, from a theoretical standpoint, if the sperm provider has developed a relationship with the child, regardless of the initial intent, the relationship merits protection. As demonstrated, from the child’s and sperm provider’s perspective, the initial intent may matter not at all.<sup>218</sup> However, from a psychological (and financial) perspective, the potential harm to the child from disruption of the relationship with an active sperm provider is likely to be less than the loss of a parent. Moreover, as discussed earlier, the parents’ agreement regarding the active sperm provider serves an important constitutional function—to rebut the *Troxel* parental preference, while simultaneously reducing the potential harm to the child and her parents from instability, uncertainty and litigation. All parties would know from the outset the sperm provider’s expected role and the legal rights attached to it. Relying on mutual intent at the outset would also provide some security that the active sperm provider would get the opportunity to develop the promised relationship, as the parent(s) would not need to fear encroaching rights on the part of the sperm provider.

Fred Bernstein has proposed a presumption that visitation with an “involved” sperm donor approximating the time spent prior to litigation be in the child’s best interests.<sup>219</sup> He argues that limiting the sperm provider’s claim in this fashion would sufficiently curb the expansion of the sperm provider’s rights to protect the family created by the mothers, but I think he overstates the extent of that security. From the parents’ perspective, if the active sperm provider could convert his visits—granted at their discretion—into “rights,” they might well eschew any involvement between the child and him. Moreover, Bernstein’s article predated *Troxel*, and his presumption might not pass muster now.

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<sup>216</sup> See Fiser, *supra* note 139, at 19–20 (discussing potential for judicial bias when using the “best interest of the child” standard in assessing parental rights of gay individuals); cf. Kelly, *supra* note 19, at 201 (positioning debate about lesbian use of donor insemination in Canada as part of larger debate about the meaning of fatherhood, and in the context of “widespread moral panic about the prospect of ‘fatherless families.’”).

<sup>217</sup> The only exceptions are those cases where the mother or the state seeks to characterize the sperm provider as a parent to impose a child support obligation on him. See generally *Kansas ex rel. Sec’y Dep’t for Children & Families v. W.M.*, No. 12 D 2686 (Kan. Dist. Ct. filed Jan. 22, 2014); *Ferguson v. McKiernan*, 940 A.2d 1236 (Pa. 2007); *In re Paternity of M.F.*, 938 N.E.2d 1256 (Ind. Ct. App. 2010); *In re Parentage of J.M.K.*, 119 P.3d 840 (Wash. 2005); *Mintz v. Zoernig*, 198 P.3d 861 (N.M. Ct. App. 2008); cf. *E.E. v. O.M.G.R.*, 20 A.3d 1171 (N.J. Super. Ct. Ch. Div. 2011) (court refused to issue order terminating donor’s parental rights at mother’s and donor’s request).

<sup>218</sup> Bernstein, *supra* note 161, at 34–35, 47.

<sup>219</sup> *Id.* at 52.

Thus the better approach would limit standing to cases where the parents and sperm provider expressly agreed that the sperm provider would have visitation with the child or play an active role in the child's life.<sup>220</sup> In these circumstances, the parent has already conceded some of her parental autonomy<sup>221</sup> and, particularly if the agreement preceded the donation, induced the donor to provide sperm by promising him a role in the child's life. Fairness to the sperm provider dictates that such agreements be enforceable, always with the provision that the continued visitation be in the best interests of the child.

The question still remains whether we should require that a post-donation contact agreement be in writing.<sup>222</sup> In order to fully address this issue, we need to consider the fifth value I identified as significant for constructing our gamete donation legal regime: functionality. Before embarking on that task, two other family scenarios deserve attention.

### C. *The Law Should Make Room For Families Contemplating More Than Two Parents*

Some lesbian couples choose to co-parent with the sperm provider and sometimes the provider's partner as well.<sup>223</sup> For these families, existing legal structures deny one or more of the child's functional parents legal recognition. Either the father would be considered a donor without parental rights or one or both of the non-biological partners/parents would be considered at best a stepparent, if the couples were married. The law in some jurisdictions would recognize the lesbian or gay co-parent as a presumed parent if the child was conceived and born during the marriage<sup>224</sup> or if the parties intended the partner to act as a parent, and s/he did so.<sup>225</sup> However, the sperm provider who intended to parent might also qualify as a presumed parent. In that case, the courts would likely feel compelled to identify only one as a legal parent—the standard operating procedure when two or more individuals can claim presumed parent status.<sup>226</sup>

Yet good reasons support expanding the field of legal parenthood. Identifying three or even four adults committed financially and emotionally to the child's care and nurture would serve to enhance child well-being. Research indicates that children can form significant attachments to multiple people.<sup>227</sup> Children who have developed parental relationships with more

<sup>220</sup> Polikoff, *supra* note 7, at 82.

<sup>221</sup> Maldonado, *supra* note 192, at 917 (“[B]y allowing a third party to . . . function as a parent to their children, by virtue of their own actions, the parents’ expectation of privacy in their relationship with their children is reduced.”).

<sup>222</sup> See *infra* Part III.E.2.a.

<sup>223</sup> BALL, *supra* note 178, at 130; Deborah H. Wald, *The Parentage Puzzle: The Interplay Between Genetics, Procreative Intent, and Parental Conduct in Determining Legal Parentage*, 15 AM. U. J. GENDER SOC. POL’Y & L. 379, 398–99; MUNDY, *supra* note 21, at 97; Bernstein, *supra* note 161, at 17; BOWE, *supra* note 187 (describing one such family).

<sup>224</sup> See *In re Sebastian*, 879 N.Y.S.2d 677, 682–83 (N.Y. Surr. Ct. 2009) (declaring that child born to lesbian couple legally married in Netherlands would be child of both, but allowing adoption to protect family in other jurisdictions).

<sup>225</sup> See, e.g., *Elisa B. v. Super. Ct.*, 117 P.3d 660, 665 (Cal. 2005).

<sup>226</sup> *Scott v. Super. Ct.*, 89 Cal. Rptr. 3d 843, 847 (Cal. Ct. App. 2009) (“[In a UPA matter,] there can be only two parents, not three.”).

<sup>227</sup> Coupet, *supra* note 204, at 643.

than two adults may suffer harm from the loss of these relationships.<sup>228</sup> Where all of the adults have agreed on the arrangement and have accepted the role as intended, legal recognition would not infringe parental rights and would further the goal of pluralism. Indeed, recognition might provide critical support for these families, enabling them to embrace their parental roles without fear of loss of access to the child in the event of a change in the relationship among the adults.

There are two major interrelated risks of the arrangement. Multiple parent families may prove more fragile than two-parent or single parent households. Parenting can create considerable stress for parents, and reaching agreement on child-rearing questions can prove daunting even for two parents, let alone three or four.<sup>229</sup> These challenges may increase the odds that the relationship(s) will dissolve, creating the potential for conflict and, ultimately, litigation among the various parents.<sup>230</sup> A two-way struggle over a child can cause substantial harm; a three- or four-way struggle may heighten the tendency to treat the child as a piece of property to be fought over by the adults in her life.<sup>231</sup> Others worry about compromising parental accountability.<sup>232</sup>

These serious concerns should prompt caution but not foreclose the possibility altogether. Indeed, some municipalities have begun to recognize multiple parentage in their official records.<sup>233</sup> At least two courts have already approved an arrangement recognizing three parents. In *Jacob v. Shultz-Jacob*, a Pennsylvania appellate court gave shared custody to the mother, her same-sex partner co-parent, and the sperm provider.<sup>234</sup> The sperm provider had acted as an “integral part” of the children’s lives, and the partner acquired rights under *in loco parentis*, though the court did find the rights of the biological parent superior in the custody dispute.<sup>235</sup> The appellate court rejected the trial court’s concern about the difficulty of calculating child support with more than two parents.<sup>236</sup>

In *LaChapelle v. Mitten*, the biological mother, her same-sex partner, and the sperm provider (LaChapelle) and his partner had signed a contract granting the mothers legal and physical custody but providing the men with a “‘significant relationship’ with the child.”<sup>237</sup> When the arrangement broke down, the trial court granted physical custody to the mother and joint legal

<sup>228</sup> Cf. *Troxel v. Granville*, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting) (positing that child likely has a liberty interest “in preserving established familial or family-like bonds”); *Michael H. v. Gerald D.*, 491 U.S. 110, 115 (1989) (guardian ad litem and court-appointed psychologist supported visitation rights for biological father of child born to married woman).

<sup>229</sup> See Kelly, *supra* note 19, at 209 (relating concerns of lesbian mothers in study who supported expansion of two-parent model, namely potential for conflict and difficulty of decision-making with multiple parties).

<sup>230</sup> Murray, *supra* note 197, at 445.

<sup>231</sup> See, e.g., Baker, *supra* note 133, at 707–08.

<sup>232</sup> Murray, *supra* note 197, at 445 (citing Carbone); HUNTINGTON, *supra* note 139, at 171.

<sup>233</sup> See, e.g., Abigale Subdhan, *Vancouver Baby Becomes First Person to Have Three Parents Named on Birth Certificate in B.C.*, NAT’L POST, Feb. 10, 2014, [http://news.nationalpost.com/news/canada/vancouver-baby-becomes-first-person-to-have-three-parents-named-on-birth-certificate-in-b-c#\\_federated=1](http://news.nationalpost.com/news/canada/vancouver-baby-becomes-first-person-to-have-three-parents-named-on-birth-certificate-in-b-c#_federated=1).

<sup>234</sup> *Jacob v. Shultz-Jacob*, 923 A.2d 473, 479 (Pa. Super. Ct. 2007).

<sup>235</sup> *Id.* at 482.

<sup>236</sup> *Id.*

<sup>237</sup> *LaChapelle v. Mitten*, 607 N.W.2d 151, 157 (Minn. Ct. App. 2000).

custody and visitation to her partner. The court also adjudicated LaChapelle the father, ordering him to pay child support and providing for visitation. On appeal, the court affirmed the order, finding that it did not create an “impermissible ‘triumvirate’ parenting scheme,” as the mother argued, since the father was not designated a “joint . . . custodian.”<sup>238</sup> The court viewed its “‘paramount commitment’ in all matters involving court-established relationships” as the “best interests of the child.”<sup>239</sup>

California has taken the bold step of enacting legislation that explicitly contemplates recognition of a third legal parent under special circumstances.<sup>240</sup> These precedents suggest that legal recognition of multiple parents has a place in family law. I do not pretend here to undertake a comprehensive analysis of the perils and positives of that development in all contexts. But some form of acknowledgment in this situation seems warranted, as long as it is done with care.<sup>241</sup> Where the sperm provider and lesbian mothers contemplate his role as a co-equal parent from inception, and where the sperm provider actually fulfills that role, the law should acknowledge the existence of all parents. Concerns about dividing up time with the child or support obligations can be addressed by the trial court as always with the goal of furthering the child’s best interests.

*D. Intentions Are Important, But They Are Not Everything: Preserving Functional Parenthood*

Thus far I have argued for categorizing the sperm provider based on mutual intent. Our last scenario tests the limits of that approach and is perhaps the most challenging. In these cases, the parties may have contemplated that the sperm provider act solely as a donor, but the deliberate involvement of the donor in the child’s life creates a relationship between the donor and child that can take on a life of its own and that may itself deserve respect. The question then becomes whether the law should allow for parental recognition based on conduct when the child is conceived by directed sperm donation. In other words, can functional parenthood co-exist with intent-based parenthood?

These situations challenge the intent-based paradigm that underlies much of the law governing ART. A bedrock principle of the law of assisted reproduction is that rights and responsibilities of the participants, most especially the question of parentage, should be decided based on the parties’ preconception intention. A number of scholars have advocated this view,<sup>242</sup>

<sup>238</sup> *Id.* at 161.

<sup>239</sup> *Id.* at 158.

<sup>240</sup> CAL. FAM. CODE § 7612(c) (West 2015) (allows recognition where recognizing only two parents would cause detriment to the child). The ALI Principles also contemplates the possibility of more than two parents, though the restrictions on who would qualify makes the specifics challenging for lesbian couples co-parenting with the sperm provider. AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03 (2000).

<sup>241</sup> For a more in-depth analysis of accommodating multiple parents, see Jacobs, *supra* note 158; Boskey, *supra* note 182; Browne Lewis, *Two Fathers, One Dad: Allocating the Paternal Obligations Between the Men Involved in the Artificial Insemination Process*, 13 LEWIS & CLARK L. REV. 949, 970–72 (2009); M. Scott Serfozo, *Sperm Donor Child Support Obligations: How Courts and Legislatures Should Properly Weigh the Interests of Donor, Donee, and Child*, 77 U. CIN. L. REV. 715, 733–34 (2008); Lauren Gill, *Who’s Your Daddy? Defining Paternity Rights in the Context of Free, Private Sperm Donation*, 54 WM. & MARY L. REV. 1715, 1751 (2013).

<sup>242</sup> Storrow, *supra* note 7, at 643; Purvis, *supra* note 199, at 212; John A. Robertson, *Procreative Liberty and the Control of Concept, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 460–61 (1983); John Lawrence Hill, *What*

and laws governing surrogacy (where permitted and addressed) consider intent a critical component of determining parentage, although other characteristics may also come into play, such as marital status.<sup>243</sup> Moreover, all of the family configurations contemplated thus far have been defined by the parties' intent—whether to parent solo, with an opposite-sex or same sex co-parent, to include the donor as an active non-parent part of the child's life, or to expand parental status to more than two individuals who intended to fulfill that role.

Relying on intent in the directed gamete donation context at least partially serves all of the substantive values we have identified as salient. It embodies the notion of pluralism by leaving room for families to order their legal roles as they see fit. It honors the adults' autonomy and treats them fairly by allowing them to choose to conceive through assisted reproduction with agreed-on expectations about the roles the various participants will—or won't—play. And it serves the interests of children by promoting stability and certainty regarding the adult(s) who will be responsible for them. Finally, as Dara Purvis argues, if we consider the expressive and channeling functions of family law, using intent to define parentage promotes “responsible, nurturing, child-focused parenting.”<sup>244</sup>

Yet assigning parental roles based solely on intention does not serve these values in every instance.<sup>245</sup> In some situations, relying on intent disserves children, treats an adult unfairly, and ignores the pluralistic reality of how the family actually operates.<sup>246</sup> Nor is there inevitably a strong justification for ART exceptionalism—exempting “families conceived through assisted reproduction, specifically gamete donation—from the other rules of family law. Admittedly, a significant problem to date has been the awkward application of laws designed before the advent of assisted reproduction to resolve ART disputes. In many instances involving ART, most notably gestational surrogacy, laws drafted specifically to address that arrangement function much more effectively than pre-existing family law rules for everyone involved. But creating a legal regime that treats parentage of children conceived through ART wholly differently from parentage created through sexual reproduction, or outside that context, in every instance carries its own set of problems.

*Jason P. v. Danielle S.* is a case in point.<sup>247</sup> In that case, the parties had a long-term

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*Does It Mean to be a “Parent”? The Claims of Biology As the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 385–86 (1991); Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 323 (1990).

<sup>243</sup> See, e.g., *Johnson v. Calvert*, 19 Cal. Rptr. 2d 494, 517 (Cal. 1993) (intent as “tie-breaker” to determine maternity in gestational surrogacy case); *Raftopol v. Ramey*, 12 A.3d 783, 801 (Conn. 2011) (intended parent recognized as parent if valid gestational surrogacy agreement); CAL. FAM. CODE § 7962 (West 2015) (provides means for declaring intended parents legal parents in gestational surrogacy situation); FLA. STAT. ANN. § 742.15 (West 2015) (recognizes intended parents as legal parents in gestational surrogacy, but only for married couples); 750 ILL. COMP. STAT. ANN. 45/6 (West 2015) (recognizes parentage of intended parents of child born to gestational surrogate); UTAH CODE ANN. § 78B-15-801-03 (West 2015) (gestational surrogacy contract valid if intended parents are married).

<sup>244</sup> Purvis, *supra* note 199, at 221.

<sup>245</sup> Cf. *id.* at 229 (noting lack of consensus regarding interaction of intent with other understandings of parentage).

<sup>246</sup> Cf. Murray, *supra* note 197, at 390 (arguing that family law “be attentive to and responsive to the question of how families actually perform their caregiving”).

<sup>247</sup> *Jason P. v. Danielle S.*, 171 Cal. Rptr. 3d 789 (Cal. Ct. App. 2014).

romantic relationship for several years. According to Jason, they had pursued parenthood together, first by attempting to conceive naturally and then by fertility treatment: two rounds of IUI for Danielle and a surgical procedure for Jason.<sup>248</sup> A year later, Danielle moved out and began investigating single motherhood via anonymous sperm donation, though she later moved back into Jason's house during a remodel of her home. The parties disputed their intentions at the time of the IVF cycle that resulted in the birth of the child at issue—Gus. After Gus's birth, the parties continued to have contact. Gus called Jason "dada," and Danielle and Gus stayed with Jason on visits to New York, where he was residing.<sup>249</sup>

The evidence regarding their intent at the time of the IVF was a bit equivocal, with Jason authoring a letter some months prior plainly stating he did not want to be a father and yet signing standard consent forms identifying him as an "Intended Parent" at the time of treatment.<sup>250</sup> Although the trial court found that he was a "donor" under the California insemination statute, section 7613(b),<sup>251</sup> this ruling did not clearly rest on a factual determination regarding the intent of the parties,<sup>252</sup> since prior precedent interpreted section 7613(b) as a bright-line rule that a man who donated sperm used to inseminate a non-spouse under the supervision of a physician was a donor without regard to intent or subsequent conduct.<sup>253</sup> In *Steven S. v. Deborah D.*, the parties had engaged in a physical relationship over a period of months, though Steven was married to someone else at the time.<sup>254</sup> Steven attended Deborah's insemination and ultrasound appointments, as well as joint therapy to discuss issues related to the child, who apparently called him "Daddy." The child also had Steven's last name as his middle name. When the child was three, Steven filed for paternity. Deborah opposed the petition. The parties disputed whether the child was conceived via sexual intercourse or artificial insemination. The trial court found the latter, and the appellate court held that the artificial insemination statute cut off any rights Steven might have had because the sperm had been provided to a physician.<sup>255</sup>

In *Jason P.*, the court of appeals followed *Steven S.* insofar as it agreed that Jason was a "donor" under 7613(b).<sup>256</sup> However, the court departed from the harsh rule of *Steven S.* by reversing the nonsuit granted by the trial court and allowing Jason to attempt to prove to the trial court that he qualified as a father under California's presumed father statute, section 7611(d), because he received Gus into his home, and held him out as his own.<sup>257</sup> News reports indicate that

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<sup>248</sup> *Id.* at 791.

<sup>249</sup> *Id.* at 792.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> The trial court apparently did make factual findings that Jason did not intend to be a parent, but the appellate court did not expressly mention those findings in its analysis of 7613(b). However, its rejection of Jason's claim for equitable estoppel supports that inference, as the court found that he did not donate in reliance on promises by Danielle that he would be a parent. *Id.* at 797–98.

<sup>253</sup> *Id.* at 795.

<sup>254</sup> *Steven S. v. Deborah D.*, 25 Cal. Rptr. 3d 482, 484–85 (Cal. Ct. App. 2005).

<sup>255</sup> *Id.* at 488.

<sup>256</sup> *Jason P. v. Danielle S.*, 171 Cal. Rptr. 3d 789, 791 (Cal. Ct. App. 2014).

<sup>257</sup> *Id.* at 795. CAL. FAM. CODE § 7611(d) (West 2015).

he was successful in that endeavor.<sup>258</sup>

By allowing Jason to proceed through this avenue, the court in essence held that donor status created under 7613(b), regardless of intent at that time, was not sacrosanct. Subsequent conduct could change a “donor” into a “father.” The ruling provoked consternation, worry, and critique from various quarters of the ART community and understandably so.<sup>259</sup> It threatened to inject yet another vein of uncertainty into the use of donated gametes and violate the familial integrity and parental rights of single mothers and lesbian couples with donor-conceived children. While the reaction was understandable, *Jason P.* does not necessarily represent the assault on donor-conceived families and single mothers that critics fear.

Viewed from the broadest vantage point, the prior precedent, *Steven S.*, represented an approach that was likely doomed to failure in one way or another. As we saw in cases from other jurisdictions, statutes that operate as a complete bar to assertion of parental rights by men who provide sperm for insemination of a non-spouse in every circumstance are both unconstitutional and bad policy. Indeed, the California legislature implicitly recognized the problem by amending its statute (after Danielle conceived Gus) to allow a sperm provider who uses a physician to at least be considered a parent by written agreement.<sup>260</sup>

*Jason P.* goes further of course, in looking beyond intent to consider subsequent conduct of the parties. But *Jason P.* was not the first California case to look beyond intent *to parent*. In *K.M. v. E.G.*, the California Supreme Court decided a dispute between former lesbian partners over a child gestated by one, E.G., with an egg provided by the other, K.M.<sup>261</sup> The couple lived together until the child was five and acted as co-parents during that time. When they split, E.G. cut off K.M.’s access to the child. When K.M. sued to establish parentage, the women disputed their intentions at the time of the IVF. E.G. insisted she always intended to be a single mother; K.M. insisted she would not have donated unless she, too, would be considered the child’s mother. The trial court found E.G. more credible and ruled that K.M. had not intended to act as a parent at the time she donated. Analogizing to the artificial insemination statute (which did not address egg donation), the trial court thus classified K.M. as a donor with no parental status.<sup>262</sup>

On appeal, the California Supreme Court reversed. Although it did not disturb the trial court’s factual ruling regarding intent, the Court carved out an exception when the parties intend to raise the child in their joint home.<sup>263</sup> The Court acknowledged that the insemination statute was extended to allow unmarried women to avail themselves of artificial insemination, but concluded that the legislature could not have intended to “expand the reach of this provision so far that it would apply if a man provided semen to be used to impregnate his unmarried partner in order to produce a child that would be raised in their joint home. It would be surprising, to say the least, to

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<sup>258</sup> Michele Corrison, *Jason Patric Declared Legal Parent of His Son: Report*, PEOPLE (Nov. 03, 2014, 7:30 PM), <http://www.people.com/article/jason-patric-declared-legal-father-gus>.

<sup>259</sup> Amicus Curiae Letter to Chief Justice Tani Cantil-Sakauye & Associate Justices of the California Supreme Court from Reproductive Technology and Family Law Scholars in support of petition seeking review of *Jason P. v. Danielle S.* (on file with the author).

<sup>260</sup> CAL. FAM. CODE § 7613(b) (West 2015).

<sup>261</sup> *K.M. v. E.G.*, 33 Cal. Rptr. 3d 61, 63–64 (Cal. 2005).

<sup>262</sup> *Id.* at 66.

<sup>263</sup> *Id.* at 71-72.



conclude that the Legislature intended such a result.”<sup>264</sup>

*K.M.* is an odd opinion. It bolsters its conclusion by reference to *In Interest of R.C.*, which involved a man who provided sperm on the understanding that he would be a parent. Yet the *K.M.* court conceded that the intent in the case before it was disputed. It nonetheless found that the UPA should not apply if the women intended to raise the child in their joint home. Interestingly, the Court found the facts in *K.M.*’s favor even more compelling than those in *R.C.* because the sperm provider and mother in *R.C.* were merely “friends,” while *K.M.* and *E.G.* were “more than ‘friends’ . . . they lived together and were registered domestic partners.”<sup>265</sup> Yet the Court did *not* rely on the fact that the two women acted as co-parents after the child’s birth. To the contrary, the Court expressly rejected *K.M.*’s attempt to establish parentage by qualifying under 7611(d), not because gamete donors were ineligible to be considered presumed parents under that provision, but because *K.M.* had kept her genetic connection to the children secret, as she and *E.G.* had agreed.<sup>266</sup> Hence, although *K.M.* acted as a parent and openly held herself out as a “co-parent,” because she did not hold the children out as “her own” in a genetic sense, that avenue was closed to her.

The Court’s treatment of *K.M.*’s 7611(d) claim suggests that even where a donor did not initially intend to parent, conduct meeting 7611(d)’s requirement could form the basis for establishing parentage. It thus laid the groundwork for the *Jason P.* decision.<sup>267</sup> However, given the Court’s ruling on this point, it is hard to discern the Court’s rationale for relying on the parties’ plan to raise the child in their joint home as the determinant of parental status. The *K.M.* opinion never really explains *why* intent to raise a child in a joint home should determine parentage, if the parties agreed that only one of the women would be the parent. Did the Court on some level doubt the trial court’s ruling on intent to parent? It does seem strange that *K.M.* would have donated and done all that she did in terms of parenting after the child’s birth without an expectation that she would be a parent, but perhaps at the time of conception she was not concerned about the legalities of parenthood and was happy to reassure *E.G.* that she alone would be the “legal” parent. Or was the Court moved by the fact that their household resembled a traditional two-parent model? Both sides of the extended family viewed themselves as grandparents, aunts, and uncles; third parties, like the nanny, considered both women to be mothers. Or does the subtext of the opinion make a larger point—that a person cannot control legal parentage simply by declaring that she wants to be a single parent if she otherwise acts as if the child has two parents?

*E.G.* and, to a lesser degree perhaps, *Danielle S.*, wanted to have their parental cake and eat it too. They wanted to ensure exclusive legal control over their children, but they also wanted the other genetic parent to play a role in the child’s life. In *E.G.*’s case she worried about a custody battle if the couple broke up<sup>268</sup> and basically wanted to ensure that she would win because she was the only legal parent. But *E.G.* did not act like the only legal parent. From the moment of conception, she planned to raise the child with *K.M.*, and her actions after the birth were consistent with that plan.

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<sup>264</sup> *Id.* at 69.

<sup>265</sup> *Id.* at 70.

<sup>266</sup> *Id.* at 73.

<sup>267</sup> *Jason P. v. Danielle S.*, 171 Cal. Rptr. 3d 789, 795 (Cal. Ct. App. 2014).

<sup>268</sup> *K.M.*, 33 Cal. Rptr. 3d at 64; BALL, *supra* note 178, at 125.

The contradiction is less striking in Danielle's case, but nonetheless present. In Danielle's case, she may well have intended to act as a single parent at the time of the IVF cycle, but her actions after birth invited Jason to participate in her child's life and encouraged his relationship with Gus. Indeed, Jason alleged that when Gus was only two months old, Danielle sent an email to a cousin acknowledging the growing relationship between the two and Jason's developing attachment to Gus.<sup>269</sup> Moreover, the conflicting evidence of intent coupled with the romantic history of the couple and their earlier efforts to start a family together, cannot help but leave the reader—and perhaps the appellate court—with lingering doubts about the parties' actual intent and the nature of their relationship.<sup>270</sup> As far as post-birth conduct, neither the initial trial court nor the appellate opinion decided whether Jason's involvement rose to the level of parent as required by 7611(d). The media reported that he prevailed on remand, but without access to the factual findings of the trial court, it is difficult to evaluate whether, as the appellate court emphasized, his relationship with Gus rose to the level of a “demonstrated familial relationship.”<sup>271</sup>

The jurisprudence of section 7611(d) demonstrates a progressive broadening of the means of establishing parentage. Originally designed to provide a way to establish paternity that substituted for marriage to the mother and proof of genetic parenthood, cases over the last decade have interpreted section 7611(d) to encompass parental figures who would never be mistaken for a “natural” parent, including same sex partners and men who have been ruled out as biological fathers.<sup>272</sup> The focus in these cases has been on the assumption of the parental role and the existence of an actual, developed relationship with the child—in other words, legal recognition premised on functional parenthood.<sup>273</sup>

<sup>269</sup> Answer of Plaintiff and Appellant Jason P. to Petition for Review, *Jason P. v. Danielle S.*, 171 Cal. Rptr. 3d (2014) (No. S219507), 2014 WL 3900147, at \*12.

<sup>270</sup> See *Coupet*, *supra* note 204, at 618–22 (discussing dyadic/conjugal underpinnings of family law and parentage).

<sup>271</sup> *Jason P.*, 171 Cal. Rptr. 3d at 796–97. In a reply brief supporting her petition for review in the California Supreme Court, Danielle recited a litany of facts showing that Jason scrupulously avoided disclosure of his identity as the genetic father and provided little in the way of care for Gus prior to filing his action for paternity. Reply in Support of Petition for Review, *Jason P. v. Danielle S.*, 171 Cal. Rptr. 3d (2014) (No. S219507), 2014 WL 4408351. Not surprisingly, Jason's brief made contrary assertions: that Danielle spoke after Gus' birth of her hope that she and Jason might marry and that he join her family with Gus; that she identified Jason as Gus' father on a preschool application, which he jointly signed; and that he contributed financially to the cost of preschool and other expenses. Answer of Plaintiff and Appellant Jason P. to Petition for Review, *Jason P. v. Danielle S.*, 171 Cal. Rptr. 3d (2014) (No. S219507), 2014 WL 3900147, at \*12.

<sup>272</sup> See *In re Nicholas H.*, 120 Cal. Rptr. 2d 146, 151–52 (Cal. 2002) (holding man who admitted he was not biological father remains a presumed father under CAL. FAM. CODE § 7611(d)); *Elisa B. v. Super. Ct.*, 33 Cal. Rptr. 3d 46, 58 (Cal. 2005) (holding former same-sex partner was presumed parent under CAL. FAM. CODE § 7611(d) to child she co-parented).

<sup>273</sup> *Nicholas H.*, 120 Cal. Rptr. 2d at 152 (“The courts have repeatedly held, in applying paternity presumptions, that the extant father-child relationship is to be preserved at the cost of biological ties.”); *S.Y. v. S.B.*, 134 Cal. Rptr. 3d 1, 11–12 (Cal. Ct. App. 2011) (purpose is to distinguish fathers with familial relationship who have “demonstrated a commitment to the child and the child's welfare.”).

There have also been cases where presumed parenthood could be established by a demonstrated commitment to the parent that had been thwarted before an actual relationship with the child could ripen. See, e.g., *Adoption of Kelsey S.*, 4 Cal. Rptr. 2d 615, 619 (Cal. 1992) (en banc).

The “holding out” standard under 7611(d) does not resolve the question of parentage. It creates a rebuttable presumption in favor of parentage that can be defeated by clear and convincing evidence that the presumed parent is not the child’s biological parent, or that the presumed parent has not developed a father-child relationship with the child.<sup>274</sup> The problem with *Jason P.* is not that it offers the opportunity for some donors to prove that they are actually parents, but that section 7611(d) may provide too low a bar for donors to surmount and that the law offers only two options—parent or stranger. It might be easy to prove from the undisputed facts that Jason had some kind of family relationship with Gus. But “family” does not equal “parent.” Aunts, uncles, and cousins, after all, are family, but treated very differently by the law than parents.<sup>275</sup> Section 7611(d) should not grant Jason parentage as a man with a genetic tie to the child merely for claiming the child as his own and “receiving the child into his home,” unless he takes on the actual responsibilities of parenthood and proves he has developed a parental-type relationship with the child. Without such a stringent standard, a sperm donor could too easily renounce the terms of the donation simply by declaring to others that he was the biological father of the child and managing to convince the mother to let the child visit him in his home. However, if the sperm donor *does* assume the mantle of parenthood, and particularly if the child perceives him as such, our first value, fostering child well-being, argues for allowing legal recognition of the relationship that exists.<sup>276</sup> As Carlos Ball aptly reasoned in discussing *K.M.*, even if E.G. “held fast to the view that she was the only legal parent, the important point is that the twins, because of that permission, came to view [K.M.] as a parent.”<sup>277</sup>

Some will argue that the donor-now-parent legal recognition violates the values of parental rights and pluralism by attacking the mother’s right to parent exclusively. Single mothers may understandably fear that bias against single parent families or women will lead courts to favor the donor in assessing the nature of the relationship. Scholars have long noted the “double-standard” that too often emerges in family law matters, where men’s relatively minimal contribution to parenting are extolled, while women’s investment in work undermine their efforts to win custody.<sup>278</sup> On the other hand, we would be remiss if we did not acknowledge that when it comes to unwed fathers, in some contexts, the very structure of the law operates to marginalize

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<sup>274</sup> *Nicholas H.*, 46 P.3d at 938. The presumption can also be rebutted if the presumed parent has failed to show that she “actively participated in causing the [child] to be conceived with the understanding that she would raise the children as her own together with the birth mother; that she voluntarily accepted the rights and obligations of parenthood after the children were born; and that there are no competing claims to her being the children’s second parent.”; *Charisma R. v. Kristina S.*, 96 Cal. Rptr. 3d 26, 42 (Cal. Ct. App. 2009). This method of qualifying under CAL. FAM. CODE § 7611(d) would be inapplicable in a case such as *Jason P.*, where Jason and Danielle did not intend at the time of conception that Jason would raise the child as his own.

<sup>275</sup> *In re Spencer W.*, 56 Cal. Rptr. 2d 524, 528 (Cal. Ct. App. 1996) (finding that presumed father status requires showing “substantial familial relationship,” not merely “some” familial relationship).

<sup>276</sup> See BALL, *supra* note 178, at 140. (“The law should not allow a parent to rely on original intent to sever a later-established parental bond between her then partner and the children . . .”); Laufer-Ukeles & Blecher-Prigat, *supra* note 177, at 426 (arguing in favor of legal recognition for functional parents, though subordinate to formal parents’ rights).

<sup>277</sup> BALL, *supra* note 178, at 140.

<sup>278</sup> Cheri L. Wood, *Childless Mothers? - - The New Catch-22: You Can’t Have Your Kids and Work for Them Too*, 29 LOY. L.A. L. REV. 383, 384–85 (1995); Amy D. Ronner, *Women Who Dance on the Professional Track: Custody and the Red Shoes*, 23 HARV. WOMEN’S L.J. 173, 174 (2000) (citing *Young v. Hector*, 740 So. 2d 1153, 1153 (Fla. Dist. Ct. App. 1998), *rev’d en banc* (July 14, 1999)).

their parental status.<sup>279</sup>

The way to combat the potential for bias against the mother rests in the careful application of the standard. If the donor can truly show a parent-type relationship, it would be extremely unlikely, indeed virtually impossible, for a man to achieve that kind of relationship with the child without the mother's implicit consent. From a parental rights perspective then, the mother arguably has ceded her right to exclusivity. Recognizing the donor's parental rights in this likely unusual circumstance likewise serves the value of pluralism because it respects and protects the *actual* family relationship that has developed, rather than hewing to a fiction that the child only has one parent. We should also not confuse respecting single parent families or leveling the playing field with privileging them. Women who conceive via sexual intercourse have no ability to limit the involvement of the biological father. Indeed, the state can bring the father into the equation even when both the mother and father prefer his absence.<sup>280</sup>

Two California cases have had occasion to consider the limits of single parent exclusivity in a related context. In *L.M. v. M.G.*, M.G. had completed a single parent adoption of a child when she was living with L.M.<sup>281</sup> They had lived together as same-sex partners for five years and were raising children from prior relationships. The couple raised the child together until they separated, when the child was three. The partner remained involved in the child's life based on an informal arrangement for another six years, until the mother decided to move to Europe. At that point, L.M. sued to establish parentage. The trial court ruled that she was a presumed parent under section 7612, and the appellate court affirmed. M.G. argued that the single parent adoption decree established her exclusive right to parental status—that “the adoption decree constitutes a judicial determination that ‘this is not a two slot parent family. It is a one slot parent family . . . .’”<sup>282</sup> The court rejected the claim, reasoning that “there is no basis to characterize the adoption decree as establishing that, *regardless of future developments*, the Child should be limited to only one parent.”<sup>283</sup>

Another California appellate court reached a similar conclusion in an interesting twist on the usual donor case. In *R.M. v. T.A.*, the mother began a relationship with a man, R.M.<sup>284</sup> At the time, she intended to become a single parent through artificial insemination. She moved from Louisiana, where R.M. lived, to San Diego to pursue that goal on her own. The relationship with R.M., which ended on her move, resumed while she was pursuing artificial insemination. R.M. had provided sperm for this purpose to a San Diego sperm bank, but the mother instead used anonymously donated sperm. R.M. was unaware of this fact until the mother became pregnant. R.M. claimed that the mother asked him to be a father to the child, and he agreed, before she became pregnant. The mother vigorously denied this allegation, pointing to the years she had attempted to conceive via artificial insemination. Nonetheless, R.M. visited the mother several times during the pregnancy, was present at a sonogram and a birthing class, drove the mother to the hospital while in labor, was at the hospital when the child was born, and spent several nights

<sup>279</sup> See Forman, *supra* note 215, at 971; NANCY DOWD, REDEFINING FATHERHOOD 90–91 (2000).

<sup>280</sup> *Everett v. Everett*, 129 Cal. Rptr. 8 (Cal. Ct. App. 1976).

<sup>281</sup> *L.M. v. M.G.*, 145 Cal. Rptr. 3d 97, 100 (Cal. Ct. App. 2012).

<sup>282</sup> *Id.* at 105.

<sup>283</sup> *Id.* See also *S.Y. v. S.B.*, 134 Cal. Rptr. 3d 1, 13 (Cal. Ct. App. 2011) (holding that parenthood under CAL. FAM. CODE § 7611(d) need not arise simultaneously with biological or adoptive parenthood).

<sup>284</sup> *R.M. v. T.A.*, 182 Cal. Rptr. 3d 836, 845 (Cal. Ct. App. 2015).

in the hospital due to medical issues with the child. He did not sign a VAP (though he did for a second child he and the mother conceived naturally), claiming the hospital never offered him one. Nor did he object when the mother told the staff she had conceived via sperm donation and left “father” blank on the birth certificate.<sup>285</sup>

After the birth, the parties continued a long-distance relationship. The mother and child spent extended visits in Louisiana living with R.M. R.M. paid for many expenses related to the child, prepared his home to accommodate her and engaged in numerous activities and outings with the child and with the child and the mother. Cards and artwork received from the mother on behalf of the child identified him as father, and both the child and mother referred to him as “Daddy.”<sup>286</sup>

The parties subsequently had a child together. At that time, the relationship deteriorated, and the mother refused to let R.M. visit. The trial court acknowledged the mother’s “substantial emotional and financial investment . . . to become a single parent” of the first child, but nonetheless concluded that R.M. satisfied the presumed parent criteria.<sup>287</sup> The appellate court upheld the trial court’s ruling. In doing so, the court addressed each of the three substantive values I have identified. The court began by noting the mother’s fundamental constitutional right to parent, guaranteed by *Troxel v. Granville*.<sup>288</sup> The court went on to recognize that “a child’s best interests is a core public policy concern that underlies statutory enactments and judicial decisions in this arena,” as well as the constitutional rights of the parent, and further that “numerous statutes in a broad array of contexts . . . seek to ensure a child’s well-being while also protecting the liberty interests of parents to raise their children without undue interference by the state or third parties.”<sup>289</sup> In terms of pluralism, the court made clear that the parentage presumption did not “seek to *impose* a two-parent choice to the detriment of a single-parent choice,” but rather “to *further* a two-parent familial arrangement that has *already been developed* in the parenting of the child.”<sup>290</sup> For the same reason, the court rejected the mother’s claim that the parentage presumption infringed her “constitutional right to form a single-parent family.”<sup>291</sup> In the court’s view, once the child has developed a parent-child relationship with a second person, “the child’s welfare . . . trumps the claimed single-parent choice because a two-parent family relationship has already been established for the child.”<sup>292</sup> The court also clarified that when applying the parentage presumption, the court should only consider the law’s preference for two-parent

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<sup>285</sup> *Id.* at 841.

<sup>286</sup> *Id.* at 842–43.

<sup>287</sup> *Id.* at 844.

<sup>288</sup> *Id.* at 845 (citing *Troxel*, 530 U.S. 57, 65 (2000)).

<sup>289</sup> *Id.* at 846.

<sup>290</sup> *Id.* at 848.

<sup>291</sup> *Id.* at 849–51. Although not addressed by the court, it is worth noting that such a constitutional right has never been recognized and indeed, it is unlikely courts would find such a right, as women who conceive sexually have zero ability to maintain a single parent family. It is difficult to fathom a distinction sufficient to justify finding a fundamental constitutional right triggering strict scrutiny, as the mother argued. Finding that the parentage presumption or other family laws violated equal protection by burdening single women or single parents might prove more successful.

<sup>292</sup> *Id.*

families at the rebuttal stage, *after* it has determined that a presumed parent exists.<sup>293</sup>

The mother did make a couple of intriguing arguments worth noting. First, she argued that the law should draw an “‘articulable distinction’ between a presumed parent and other familial figures and caregivers . . . .”<sup>294</sup> She is correct: as I have argued in critiquing *Jason P.*, the “parentage” presumption *should* use criteria aimed at discerning true parental figures. The standard used by the courts seeks that end, but no legal rule achieves its ideal in application one hundred percent of the time. While the facts reported in the *Jason P* appellate opinion might give us pause regarding the sufficiency of the evidence to demonstrate a parent-child relationship, the case for R.M. seems very strong.

The mother also argues that the law should not deter single women from forming romantic attachments or marrying. But as the court pointed out, the mother’s behavior went far beyond mere dating. She lived with the father and fostered a parent-child relationship from the time the child was born. The presumption “incorporates mechanisms to ensure that a parent who makes a decision to be a single parent will not subsequently be required to share that parenting with another person *unless* the court is satisfied the parent permitted the person to engage with the child at a level that transforms the interaction into a full, openly acknowledged two-parent relationship.”<sup>295</sup>

To the extent that allowing a sperm provider to attempt to prove parentage this way undermines the mother’s choice to parent exclusively, that is the price of inviting someone to assume that role in the child’s life. The desire to respect single parent families must yield to the needs of the child—not based on an abstract preference for two-parent families, or even on the tangible financial gains that might accrue from identifying a second parent, but because of the prospect of emotional harm that may result from severing a parent-like emotional bond between the donor—now father—and child.<sup>296</sup> As one Florida judge put it, in evaluating a claim by a lesbian co-parent:

For the . . . parents, the facts of having engendered, borne, or given birth to a child produce an understandable sense of preparedness for proprietorship and possessionness. These considerations carry no weight with children who are emotionally unaware of the events leading to their births. What registers in their minds are the day-to-day interchanges with the adults who take care of them and who, on the strength of these, become the parent figures to whom they are attached.<sup>297</sup>

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<sup>293</sup> *Id.* at 848.

<sup>294</sup> *Id.* at 849.

<sup>295</sup> *Id.*

<sup>296</sup> Storrow, *supra* note 7, at 667 (citing Bartlett—criticizing exclusive parenthood/failure to recognize functional parents because of “the child’s need for continuity in intimate relationships.”). *See* Purvis, *supra* note 199, at 226 (“Functional theories [of parenthood] are premised explicitly on protecting the child’s emotional and psychological well-being.”); Laufer-Ukeles & Blecher-Prigat, *supra* note 177, at 439 (recognizing harm to children from breaking bond with functional parent); Coupet, *supra* note 204, at 645 (“The child’s perspective provides a . . . persuasive basis for extending parental status to those individuals whom the child regards as parents.”).

<sup>297</sup> *Wakeman v. Dixon*, 921 So. 2d 669, 676 (Fla. Dist. Ct. App. 2006) (Van Nortwick, J., concurring) (citing *JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD* 38 (1973); *See also* *W.R.L. v. A.H.*, No. 2014-CA-001240-ME, 2015 WL 1746240, at \*8 (Ky. Ct. App. 2015) (Maze, J., concurring) (pleading for recognition of

In evaluating the effect on the child, though, we must take into account the emotional cost of uncertainty and potential litigation to the child. We know from research on children of divorce that the adjustment of the primary parent, the level of instability in the child's life, and the level of conflict between the parents all can impact the child's well-being.<sup>298</sup> Indeed, it was precisely these concerns that led me to conclude that an active sperm provider should acquire limited rights to visit only where his active involvement was intended by all parties and not based on conduct alone. As a general matter, legal rules that minimize the opportunity for conflict serve children's interests.

However, the desire to avoid conflict among the adults in the child's life only goes so far. More than fifty years ago, child development experts Goldstein, Freud, and Solnit recommended a legal regime that would vest all authority over children in their custodial parent.<sup>299</sup> But that view has never held sway with policy makers in disputes between *parents*. Rather, a fundamental principle of custody law vests both parents with a right to seek custody, and presumes that except in very unusual circumstances, the other parent will either share custody or enjoy the privilege of visitation with the child.<sup>300</sup> Many states now have explicitly enunciated a policy in favor of continuing contact with both parents.<sup>301</sup> We know, from human experience as well as the extensive number of cases litigating rights of same-sex partners, that given the option of excluding the other parent from their child's life, some parents would exercise that option if the law did not require them to behave differently. Hence, while a regime that minimizes the need for judicial dispute resolution should be a goal, we cannot assume that the risk of conflict is so great that it must outweigh the harm that would result from cutting a child off from a parent.<sup>302</sup>

Nor again is there anything unique to the method of conception that dictates a more compelling need for certainty from the child's perspective. The adults using ART may feel a stronger claim to certainty because they sought out procreation by ART in order to ensure exclusive parenthood (or avoid parenthood) or because they relied on a particular understanding in deciding to procreate via gamete donation.<sup>303</sup> But if the parties themselves deviated from that understanding, the strength of their claims weakens significantly.

Ultimately, the concerns about introducing uncertainty into the family constellation—and the potential for conflict along with it—are inherent in any recognition of functional parenthood.<sup>304</sup> Yet scholars and advocates have made a strong case for expanding our definition

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child's interests in preserving family-like bonds).

<sup>298</sup> Paul R. Amato, *Life-Span Adjustment of Children to Their Parents' Divorce*, 4 THE FUTURE OF CHILD, 143, 150–51 (1994); See also Linda D. Elrod, *Reforming the System to Protect Children in High Conflict Custody Cases*, 28 WM. MITCHELL L. REV. 495, 496–97 (referencing thirty years of research demonstrating detriment caused to children from high-conflict custody battles); Baker, *supra* note 133, at 684–85 (children often hurt by conflict and animosity of divorce).

<sup>299</sup> GOLDSTEIN, *supra* note 297 at 38.

<sup>300</sup> DOUGLAS ABRAMS, ET AL., CONTEMPORARY FAMILY LAW 775 (3d ed. 2012).

<sup>301</sup> J. Herbie DiFonzo, *From the Rule of One to Shared Parenting: Custody Presumptions in Law and Policy*, 52 FAM. CT. REV. 213, 217 (2014).

<sup>302</sup> Garrison, *supra* note 24, at 909.

<sup>303</sup> See *supra* note 134–36 and accompanying text.

<sup>304</sup> DiFonzo & Stern, *supra* note 140, at 106 (“As our legal framework is rebuilt with functional materials replacing biological ones, much is gained, much is lost. Fairness and accuracy are the winners . . . But the move to

of parentage, and the law has increasingly responded. Not all states have been persuaded.<sup>305</sup> But where a state *does* recognize functional parenthood, no justification exists for excluding sperm donors who become functional parents from that recognition. While I argued earlier that the risk of litigation was too great to allow an active sperm provider to seek visitation based solely on conduct,<sup>306</sup> the balance of risks plays out differently here. Loss of someone who acted as a parent is likely to prove more harmful to the child than the lost connection to someone who played a less central role in the child's life. Moreover, the difficulty of establishing functional parenthood, as compared to active involvement by a sperm provider, should deter sperm providers from pursuing litigation without a strong basis for making the claim.<sup>307</sup> We may also find that providing limited rights to active sperm providers, as I have advocated, may effectively decrease claims based on functional parentage as this option may prove popular among men who do not at the outset contemplate parenthood.

From a theoretical standpoint, allowing this change in status does not inevitably signify an abandonment of intent as a critical marker for establishing legal rights at birth. To the contrary, some would argue that intent-based parenthood and functional parenthood are merely variations on a theme. For Katharine Baker, contract does and should explain parentage. Her definition of contract is expansive. It encompasses not just express written contracts like we find in some assisted reproduction cases, but also parentage created through implied contract,<sup>308</sup> by which some non-biological fathers have acquired legal status, and parenthood created by contracts in practice.<sup>309</sup> Baker relies in part on relational contract theory, which posits that the relationship of the parties, in this case the mother and sperm provider, yields the existence and terms of the contract.<sup>310</sup> In her words, “[i]f the written agreement looks obviously different than the lived relationship, then the written agreement will have limited importance. In such a case one would look to the relationship itself to find terms.”<sup>311</sup>

Richard Storrow advances a different perspective, but one that likewise bridges the seeming divide between “intent” and functional parenthood. He sees intent as an element of parental functioning.<sup>312</sup> Dara Purvis, as well as Pamela Laufer-Ukeles and Ayelet Blecher-Prigat, similarly reject a categorical distinction between intent and functional parenting, finding that

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practical, ‘as-designed-and-lived’ blueprints to resolve core family issues sacrifices simplicity and certainty, and these are not inconsequential losses”).

<sup>305</sup> See *W.R.L. v. A.H.*, No. 2014-CA-001240-ME, 2015 WL 1746240, at \*8 (Ky. Ct. App. 2015) (denying same sex co-parent who raised child with mother for four years and two additional years after separation standing to intervene in stepparent adoption by mother's new husband).

<sup>306</sup> See *supra* notes 296-98 and accompanying text.

<sup>307</sup> See *infra* Part III.E for further discussion of safeguards designed to weed out weak challenges by sperm providers.

<sup>308</sup> Katharine K. Baker, *Bargaining or Biology – The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL'Y 1, 31–32 (2004) [hereinafter *Bargaining*].

<sup>309</sup> *Id.* at 35.

<sup>310</sup> *Id.* at 41.

<sup>311</sup> *Id.*

<sup>312</sup> Storrow, *supra* note 7, at 665.



intent evidenced by post-birth caretaking equates to functional parenting.<sup>313</sup> Thus neither theory nor doctrine inexorably supports prohibiting sperm donors from ascending to parental status based on functional parenting.

Would any of the above analysis change if the case involved a sperm donor who had provided sperm to a woman to conceive a child to be raised with her lesbian partner? In certain respects, yes. From an empirical standpoint, it may be less likely that the sperm donor would actually assume the role of a true parent after the birth, given that the child already has a second parent—the partner. For this reason, we might expect even fewer cases where a sperm donor might colorably claim that contrary to the parties’ initial intent, he deserves to earn parental status.<sup>314</sup> In the event he did assume such a role, a court would have to consider whether recognition would impact the mother’s partner’s parental status.<sup>315</sup>

#### *E. The Law Should Be Functional*

1. The law should provide clear and comprehensive rules governing the rights and responsibilities of parties using sperm from known providers

As we have seen, many states lack any laws governing directed sperm donation outside the opposite-sex marriage context.<sup>316</sup> This legislative and judicial vacuum leaves these families in legal limbo, creating uncertainty and rendering them prone to litigation to resolve any disputes that arise. This lack of clarity disserves children by injecting instability into their family arrangement and subjecting them to the high-conflict environment of litigation. If we know anything about child well-being, we know conflict over access by the adults in their lives does not promote it and can actively cause harm.<sup>317</sup> The uncertainty of legal status likewise impairs the parental rights values of adult autonomy and fairness by subjecting the parties to a state-imposed status determination that may be at odds with their intentions and lives.

Of course, no system can eliminate all uncertainty or completely prevent state interference. Any system of rules will require interpretation, and conflicts that require judicial (or other) dispute resolution will inevitably arise. Nonetheless, well-thought out and well-crafted statutes, combined with the option of contract and clear default rules, can bolster the stability of these families by protecting the parties’ expectations, enhancing certainty and predictability, and helping to minimize the need for litigation.

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<sup>313</sup> Laufer-Ukeles & Blecher-Prigat, *supra* note 177, at 437 (aligning the use of intent with “allocating functional parenthood based on care”); Purvis, *supra* note 199, at 230 (describing *K.M.* as a case of assigning parentage based on “post-birth intent”).

<sup>314</sup> We need to distinguish this scenario from another more realistic possibility—that the sperm provider and the couple intended that all act as parents to the child, perhaps even along with the sperm provider’s partner. This possibility prompts the question whether the law should recognize three parents, a question considered *infra* in Part IV.

<sup>315</sup> See *infra* note 353 and accompanying text.

<sup>316</sup> See *supra* notes 12-16 and accompanying text.

<sup>317</sup> Amato, *supra* note 298, at 150–51; see also Baker, *supra* note 133, at 684–85 (explaining that children are often hurt by the actual conflict and animosity of divorce); Elrod, *supra* note 298, at 496–97 (referencing thirty years of research demonstrating detriment caused to children from high-conflict custody battles).

## 2. The law should promote clear statements of intent

To this point, we have identified several specific principles that further the values of enhancing child well-being, respecting parental rights, and protecting pluralistic family forms. First, the law should provide clear rules delineating the parentage of children born through use of artificial insemination or IVF with gametes from someone known to the mother. Second, the law should not discriminate against unmarried individuals or couples. Third, the law should accommodate the variety of family forms as they actually operate—including recognizing special status for active sperm providers who do not function as parents but nonetheless can play a significant role in the child's life, and identifying multiple legal parents in those circumstances where recognition is warranted.

We know from the previous sections that in most situations, all of these values will be fostered by determining the rights and responsibilities of the parties based on their intent at the time of conception. Although I have argued that in certain unusual cases, a party should have the opportunity to establish that the donor has assumed parental status through conduct facilitated by the mother(s), the initial intent should be dispositive in most instances. An intent-based pre-conception or pre-birth designation of parentage fosters child well-being by creating certainty and stability; serves parental rights and adult autonomy and privacy by clarifying and honoring the roles the participants expect to play in the child's life; and allows families of various kinds to flourish.<sup>318</sup> To incorporate functionality into our assessment, we need to start with how to craft rules that honor and encourage reliable expressions of intent.

We also need to ensure that whatever rules we devise are known to and accessible by those using assisted reproduction to create their families. Too frequently, as we have seen, men and women proceed without comprehending the legal ramifications of their procreative choices.<sup>319</sup> While no system can ensure that all those subject to the laws will know and understand them, we can and must do considerably better in this realm for the sake of all parties involved. Finally, we need to clarify the default rules in the event families proceed without clear expressions of intent. To do that requires a comprehensive solution that addresses assisted reproduction that takes place both within and outside a clinical setting.

### a. *Written agreements should be enforceable*

The gold standard for expressing intent would rely on written agreements, ideally negotiated with the assistance of legal counsel. Written agreements can clarify the parties' intention, reducing disputes about the roles and rights of the parties. They can also provide an important signaling effect, making the parties' aware of the seriousness of the endeavor and, where lawyers are involved, ensuring that the parties enter into these arrangements thoughtfully and knowledgeably.<sup>320</sup>

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<sup>318</sup> See Abramowicz, *supra* note 186, at 120 (noting “scholarly consensus” that “children and parents alike will be better off if parents are permitted to clarify parental status *ex ante*”); Zalesne, *supra* note 139, at 1030 (arguing that the goals of family law and contract law do not always conflict; contract law can expand the notion of family and protect family relationships).

<sup>319</sup> *In re K.M.H.*, 169 P.3d 1025, 1029 (Kan. 2007); *Bruce v. Boardwine*, 770 S.E.2d 774, 775 (Va. Ct. App. 2015).

<sup>320</sup> *Lane v. Lane*, 912 P.2d 290, 295 (N.M. Ct. App. 1996) (purpose of written agreement for insemination is both evidentiary – as to avoid disputes over consent – and cautionary: “One who pauses to sign a document can be

The use of written contracts between the donor and the intended parents is already considered essential in the egg donation context.<sup>321</sup> As we saw, some parties using sperm for artificial insemination or IVF have also chosen to enter into written donor or co-parenting agreements, but the practice is not comparably well-established. Nonetheless, for those who choose to do so, the law should make clear that such agreements are enforceable and not considered against public policy.<sup>322</sup> Given that sperm banks have long operated based on contractual relinquishment of parental rights largely without incident,<sup>323</sup> no reason exists not to enforce donor agreements between known donors and their recipients that give up any claim to parentage by the donor. The Pennsylvania Supreme Court recognized this similarity in *Ferguson*, where it upheld the donor agreement against a claim for child support. The court could find no “legally sustainable distinction between the negotiated, clinical arrangement that closely mimics the trappings of anonymous sperm donation . . . and institutional sperm donation, itself.”<sup>324</sup>

Of course, allowing men to relieve themselves of parental responsibility for children conceived by artificial insemination does stand in sharp contrast to the laws governing coital reproduction. Contracts purporting to waive a right to support for children conceived naturally have been routinely and universally invalidated.<sup>325</sup> The value of coherence suggests that we treat coital reproduction and assisted reproduction the same way unless we can discern sufficient reasons to distinguish them. Here I would argue that this discrepancy does not support a rule prohibiting enforcement of donor agreements; rather, it may call for a reconsideration of the limitation on enforceability of prior written agreements between those reproducing naturally.<sup>326</sup>

Scholars have questioned why biological paternity should automatically trigger a child

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expected to give more thought to the consequences of consent than one who gives consent in a less formal setting”); see also Fiser, *supra* note 139, at 27 (noting that “[m]ost often, a great amount of thought. . . has occurred in AI cases,” leading some courts to “recognize[e] the intent of the parties in enforcing these parentage rights” and thus legitimizing the practice). For a discussion of the benefits, including signaling, of lawyer involvement in drafting ART-related documents, see Forman, *supra* note 210, at 434.

<sup>321</sup> See, e.g., *Egg Donors and Legal Contracts*, AM. ACAD. OF ASSISTED REPROD. TECH. ATTY’S., <http://www.aaarta.org/aaarta/gametesembryo-donation/egg-donors-and-legal-contracts> (last visited October 15, 2015).

<sup>322</sup> Commentators generally agree on this point. See, e.g., Gill, *supra* note 241, at 1749; Polikoff, *supra* note 7, at 72; Jennifer Nadraus, Note, *Dodging the Donor Daddy Drama: Creating a Model Statute for Determining Parental Status of Known Sperm Donors*, 53 FAM. CT. REV. 180, 187 (2015).

<sup>323</sup> Abramowicz, *supra* note 186, at 95 (noting “widespread consensus” that an agreement by an anonymous donor to give up parental status is “binding and enforceable”).

<sup>324</sup> *Ferguson v. McKiernan*, 940 A.2d 1236, 1247 (Pa. 2007). See also Fiser, *supra* note 139, at 24 (characterizing contracts as contracts for donation of sperm, not paternity).

<sup>325</sup> See, e.g., *Budnick v. Silverman*, 805 So. 2d 1112, 1113 (Fla. Dist. Ct. App. 2002) (contract relieving man of child support and parental responsibilities unenforceable where child conceived naturally); *Straub v. B.M.T.*, 626 N.E.2d 848, 853 (Ind. Ct. App. 1993) (court holds handwritten agreement relieving man of child support obligation and promising anonymity is against public policy and unenforceable where child is conceived naturally); *Kesler v. Weniger*, 744 A.2d 794, 796 (Pa. Super. Ct. 2000) (parties cannot bargain away support if child is conceived by intercourse); *Baker*, *supra* note 133, at 701–02. Courts have likewise rejected attempts to avoid child support by men who were duped into thinking the woman was on birth control. See *Piatt v. Schultz*, No. 03-97-00142-CV, 1998 WL 476725, at \*4 (Tex. App. 1998).

<sup>326</sup> Polikoff, *supra* note 7, at 59 (advocating creation of single parent or same sex couple-headed families regardless of method of conception).

support obligation.<sup>327</sup> Some have argued that the legal system should uncouple support for children from parentage—at least to a degree. Instead, the primary obligation for ensuring adequate financial support could reside in the state, as it does in many other developed nations.<sup>328</sup> However, such a system has its drawbacks as well, and, more importantly is far from the system currently operating here. In the absence of such a regime, a compelling reason exists to assume that men who father children sexually are legally responsible for them, regardless of intent at the time of conception—to protect the many children who will need support, particularly those unplanned. Nonetheless, if the law is willing to relieve some biological progenitors of their support obligation, as it clearly has through the widespread acceptance of sperm donation, perhaps the law should allow those who conceive naturally to do the same when he and the mother(s) decide prior to conception that she will be a single parent or co-parent with a lesbian partner, as long as they reduce that agreement to a valid, written contract.<sup>329</sup>

My intent here is merely to raise the question, not to advocate for the change, which requires further exploration. Moreover, the rule against enforcement of this kind of contract is so well entrenched that any change in this direction seems highly unlikely.<sup>330</sup> Regardless, failure to achieve consistency with sexual reproduction on this point does not justify refusing to enforce donor agreements, as doing so would violate the other core precepts and deprive the parties of a very effective tool for safeguarding their families.

Although some courts may resist allowing abdication of parental responsibility by contract, courts should have few qualms about enforcing an agreement that the sperm provider will act as a parent. Though co-parenting agreements by same-sex couples have proved controversial because they create parental rights in someone with no biological tie to the child or marital tie to the mother, and the family differs from the heterosexual norm,<sup>331</sup> a co-parenting agreement between two biological parents simply clarifies that both parties intend the man to be a legal parent. If a man can acquire parental status by conceiving a child sexually, there is no reason to deny him the right to do so by artificial insemination. The court need not actually “enforce” the contract. It need only determine that the contract establishes his status as a parent.<sup>332</sup>

<sup>327</sup> See, e.g., Appleton, *supra* note 157, at 365 (describing child support as a “‘tax’ on heterosexual intercourse that does not apply to conception by non-sexual means”); Baker, *supra* note 133, at 16–17 (questioning the benefits of positive paternity laws, given an “unwilling parent”).

<sup>328</sup> See NANCY E. DOWD, IN DEFENSE OF SINGLE-PARENT FAMILIES 130–32 (1997); Appleton, *supra* note 157, at 363–64; Baker, *supra* note 133, at 692.

<sup>329</sup> Women choosing to conceive sexually with someone who will have no parental rights may include single women as well as lesbian couples. See case discussed in Fiser, *supra* note 139, at note 7. I would not be in favor of allowing pre-conception extinguishment of parental rights for men conceiving naturally based only on a form. The risk of casual action seems too great.

<sup>330</sup> One judge has gone on record supporting this approach. In an unusual opinion, the dissent in *Straub v. B.M.T.* argued that where the mother could fully support the child, the court should find the contract valid and enforceable. *Straub v. B.M.T.*, 626 N.E.2d 848, 856 (Ind. Ct. App. 1993) (Conover, J., dissenting).

<sup>331</sup> See Forman, *supra* note 210, at 417 (discussing mixed results in cases concerning co-parenting agreements between same-sex partners); Abramowicz, *supra* note 186, at 93 (“[S]tates vary widely in their response to co-parenting agreements.”).

<sup>332</sup> See, e.g. *L.F. v. Breit*, 736 S.E.2d 711, 718 (Va. 2013) (relying on contract and VAP to establish intent to parent, removing father from application of insemination statute); Forman, *supra* note 210, at 416–17, *supra* note 133, at 700-01 (noting controversy over enforcing contract versus using contract to establish intent). Cf. Abramowicz, *supra*

Providing limited rights to visitation or contact for the active sperm provider based on contract or some other written indicia of intent breaks newer ground, as no state expressly provides an opportunity for an active gamete provider to seek visitation. Although family law has enforced premarital agreements governing property and support and some “all-or-nothing” agreements in the assisted reproduction context, long-standing family principles hold that parents cannot contract in advance of a child’s birth about custody or visitation.<sup>333</sup> However, the proposed contracts, like post-adoption contact agreements, would only be enforceable if they were deemed to be in the best interests of the child. Thus, these agreements would give standing to the active sperm provider, who otherwise would have none, to petition for visitation, and, as previously discussed, they might level the *Troxel* playing field.<sup>334</sup> But the court would retain the right to deny visitation if it were not in the best interests of the child.<sup>335</sup>

In most of the cases that involved an active sperm provider, the parties had no written agreement. Thus, a rule requiring a written contract for legal recognition would have left these active sperm providers without recourse. That troubles me greatly. Nonetheless, because such an agreement deviates significantly from both the ART and family law binary norm,<sup>336</sup> and because the recipient would be ceding some quantum of constitutionally protected parental autonomy, the law should require the formality of a written agreement.<sup>337</sup> A written document, clearly stating agreed-upon expectations of the role the sperm provider will play, increases the odds that the intended parents understand that they are yielding some of their rights and that the sperm provider understands that he will not acquire parental status. It also addresses the concern raised earlier that opening the door to claims by active sperm providers will invite attacks on family integrity or parental rights too readily. In time, experience may manifest the need for more flexibility on this issue in compelling cases, but at this point, insisting on a writing seems advisable.

Similarly, any effort to vest more than two parents with parental rights must be premised on a written agreement of all parties, clearly expressing the expectation of co-equal parental rights and responsibilities. Otherwise, we risk obscuring the demarcation between “active sperm providers” and parents. Indeed, in the two cases recognizing a third parent, *LaChapelle* and *Jacob*, the courts may have overstepped in granting parental recognition to the sperm provider. In

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note 186, at 94 (“In most of the states that take co-parenting agreements into account in allocating parental rights, courts do not enforce the agreements, but instead consider them as a factor relevant to assessing parental rights under a theory of de facto parentage.”); *In re Sullivan*, 157 S.W.3d 911, 920–21 (Tex. App. 2005) (court did not “enforce” contract but contract gave standing to bring paternity action).

<sup>333</sup> Abramowicz, *supra* note 186, at 73–76. Indeed, the rule extends much further in many states, allowing a court to deny enforcement of custody or visitation agreements even after divorce or separation, unless they are in the best interests of the child. *Id.* at 80–81.

<sup>334</sup> Cf. *Frazier v. Goudschaal*, 295 P.3d 542, 556–57 (Kan. 2013) (upholding co-parenting contract between same-sex partners and determining that biological mother had “waived” constitutional parental preference by agreeing to share custody). Cf. Maldonado, *supra* note 192, at 894 (arguing that proof of “quasi-parental” relationship should overcome the *Troxel* presumption that the parent is acting in the child’s best interest).

<sup>335</sup> For an argument in favor of enforcing custody and visitation contracts between parents without reference to the best interests of the child, see Abramowicz, *supra* note 186, at 129–42.

<sup>336</sup> See Zalesne, *supra* note 139, at 1081 (arguing that a contract can “fill the gap” for non-traditional families).

<sup>337</sup> *But see* Polikoff, *supra* note 7, at 89 (arguing that sperm donor should have an opportunity to try to prove the right to visitation without a writing as long as terms are sufficiently definite).

*LaChapelle*, the contract at issue clearly demarcated the two lesbian partners as parents, assigning a “significant relationship” to the sperm provider.<sup>338</sup> This language suggests that the parties intended *LaChapelle* to be an active sperm provider but not a co-equal parent.<sup>339</sup> Similarly, Carlos Ball’s review of the trial transcript in *Jacob* led him to question whether the sperm provider deserved parental status.<sup>340</sup> The mothers claimed they agreed prior to conception that he would *not* assume a parental role; his visits occurred monthly; and the mothers and child viewed him as an “uncle [or] friend.”<sup>341</sup> Moreover, the courts’ decision in each of these cases to order the sperm provider to pay child support raises the specter of imposing an additional parent on single women or lesbian-headed families to satisfy gendered norms about the family that require a man.<sup>342</sup>

The lines between “active sperm providers” and parents may well blur in both intent and in functional reality. To one person, a “significant relationship” may equate with parenthood; to another, it may signify a relationship of a different character. Careful drafting can help to ameliorate this problem.

*b. Using forms to define status*

While a written agreement should suffice to establish parental status, the law should also accept other clear written expressions of intent. Not all parties have the financial means or ability to access qualified legal counsel to assist them in drafting a customized donor or co-parenting agreement.<sup>343</sup> Requiring the parties to draft an agreement would almost certainly increase the cost and burden imposed by the transaction. By contrast, a system of state-generated forms would add very little to the parties’ burden.

States already have familiarity with using a form to designate parental status. As required by federal regulations, all states have created a form to allow a voluntary acknowledgment of paternity (VAP).<sup>344</sup> A man can acquire presumed parental status merely by signing this form, as long as the mother signs as well and neither party rescinds within sixty days of the child’s birth.<sup>345</sup> VAPs do not depend on genetic fatherhood, so they present an easy way for a man who has no biological connection to the child to establish paternity, with the crucial caveat that the mother agrees.<sup>346</sup> As we have seen, in several cases, courts gave significant weight to a fully executed

<sup>338</sup> See generally, *LaChapelle v. Mitten*, 607 N.W.2d 151, 157 (Minn. Ct. App. 2000).

<sup>339</sup> But see *Jacobs*, *supra* note 158, at 327 (stating that “[a]ll three adults specifically contemplated a multiple-parenting arrangement”). See also *Boskey*, *supra* note 182, at 845–46, 853 (allowing acquisition of parental status based on post-birth conduct).

<sup>340</sup> BALL, *supra* note 178, at 130.

<sup>341</sup> *Id.*

<sup>342</sup> Nancy E. Dowd, *Multiple Parents/Multiple Fathers*, 9 J. L. & FAM. STUD. 231, 244 (2007).

<sup>343</sup> Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177, 1221 (2010) (discussed in *Abramowicz supra* note 186, at 114).

<sup>344</sup> Leslie Joan Harris, *A New Paternity Law for the Twenty-First Century: Of Biology, Social Function, Children’s Interests, and Betrayal*, 44 WILLAMETTE L. REV. 297, 313 (2007).

<sup>345</sup> *Id.* (noting after 60 days, a party wishing to rescind must show fraud, duress, or material mistake of fact).

<sup>346</sup> *Id.* at 329.

VAP in finding that the sperm provider was a legal parent.<sup>347</sup>

However, California expressly invalidates voluntary declarations of paternity signed by sperm donors who provide sperm under the supervision of a physician.<sup>348</sup> In light of constitutional concerns with such complete-bar statutes, the provision prohibiting sperm donors from validating a voluntary declaration of paternity seems at first glance ill advised. Since VAPs require both parents to sign, they would provide an easy mechanism for a couple intending to parent together to document that intent, regardless of whether they used a physician. Interestingly, the VAP exclusion was adopted when the legislature amended § 7613(b) to allow a sperm provider to avoid donor status if the mother and sperm provider agree in writing.<sup>349</sup> The drafters may have wanted to prohibit acquisition of parental status by the donor after the child was conceived, as the amended insemination statute requires that the agreement avoiding donor status precede the child's conception.<sup>350</sup> By contrast, VAPs can be signed at any time, including after the child's birth.<sup>351</sup>

If the parties agree after conception, why should the law not honor that change of intention, at least when it expands the universe of persons committed to and responsible for the child? Doing so might cause problems where another person already occupies the "second parent" role, particularly for lesbian couples. If the couple splits up, the biological mother might convince the donor to sign a VAP in an effort to shut out the former partner. Existing law provides a partial safeguard against this turn of events: VAPs signed by a father are invalid if a presumed parent already exists.<sup>352</sup> However, this protection does not extend to presumed parents under § 7611(d)—those who qualify because they received the child into their home and held him out as their own. A same-sex partner who has neither married nor entered into a registered domestic partnership with the mother nor been named on the birth certificate would thus be vulnerable to challenge of her parental status if the mother and sperm provider signed a VAP.<sup>353</sup> We would hope that a judge evaluating the "competing presumptions" created by 7611(d) and a late-in-the-day VAP would find that the presumption in favor of the partner (assuming she had acted as the parent, while the donor had not) was "weightier" in terms of "policy and logic," the standard used by the court to resolve conflicting parenting presumptions.<sup>354</sup> But allowing use of the VAP would open the door to a challenge of this sort, subjecting the co-parent to possible loss of parental status or at least the cost of defending her parental rights.

The VAP thus provides at best an imperfect vehicle for determining the status of the sperm provider. A better approach would tailor the form to the circumstances. Indeed, California had already taken a step in this direction by approving the use of forms to satisfy its "agree in writing" requirement to establish parentage when used by a sperm provider who donates under

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<sup>347</sup> See *supra* note 48-52 and accompanying text.

<sup>348</sup> CAL. FAM. CODE § 7612(d) (West 2015).

<sup>349</sup> CAL. FAM. CODE § 7613(b) (West 2015).

<sup>350</sup> *Id.*

<sup>351</sup> CAL. FAM. CODE § 7613(b) (West 2015).

<sup>352</sup> *Id.*

<sup>353</sup> *Id.* at § 7612.

<sup>354</sup> *Id.* at § 7612(b).

physician supervision.<sup>355</sup> Unfortunately, the forms, like the underlying statute, only applied to sperm provided under physician supervision.<sup>356</sup> They did not reach those opting for in-home insemination, leaving those families with a sperm provider who could claim parental status at any time, regardless of the parties' intent or conduct.<sup>357</sup>

Recently passed legislation in California that revised the state's artificial insemination statute remedied this flaw by clarifying the rights of the parties in both situations.<sup>358</sup> Providing the semen to a licensed physician is no longer the only way to ensure donor status. The next section considers the advisability of such a rule change and what role, if any, physicians should play in sorting out the legal status of the parties.

*c. Physicians are useful but not essential*

As we have seen, a number of states have statutes that define the rights of parties using gamete donation only if the procedure occurs under the supervision of a physician. This approach makes sense for those using assisted reproduction in whole or in part because of fertility problems. A woman who needs intrauterine insemination or IVF to conceive will of necessity involve a physician. However, even for those individuals transferring gametes in a clinical setting, some existing statutes define the rights and responsibilities of the parties too narrowly—classifying all those providing sperm for insemination of a non-spouse as donors. As this has proved problematic, any rules tied to a clinic setting must offer options for those giving gametes to another with the intent to parent as well as those intending to extinguish any potential parental rights.

Moreover, for artificial insemination, we know that many choose not to engage a physician. In some cases, the women may not have a choice where physicians and clinics continue to discriminate against unmarried women and lesbians.<sup>359</sup> Others may not have the financial means to engage a physician for insemination, which can run thousands of dollars if multiple attempts are necessary and will not likely be covered by insurance.<sup>360</sup>

Some may argue for rules that discourage in-home insemination, as a clinical setting offers certain advantages. Physician involvement serves an important function in screening the

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<sup>355</sup> *Id.* at § 7613.5. California has considerable experience using forms for other aspects of assisted reproduction. Under the California Probate Code, to be considered the legal father of posthumously-conceived children, a man must have made a specific, written declaration permitting use of his gametes for posthumous reproduction. CAL. PROB. CODE § 249.5 (West 2015). California has generated forms containing the requisite language. WEST'S CAL. CODE FORMS, PROBATE § 249.5 Form 1 (7th ed.).

<sup>356</sup> CAL. FAM. CODE § 7613.5 (“WARNING: Signing this form does not terminate the parentage claim of a sperm donor. A sperm donor’s claim to parentage is terminated if the sperm is provided to a licensed physician or surgeon or to a licensed sperm bank prior to insemination as required by Section 7613(b) of the Family Code.”).

<sup>357</sup> *See* Jhordan C. v. Mary K., 224 Cal. Rptr. 530, 537–38 (Cal. Ct. App. 1986) (holding donor is legal father because semen not provided to physician per statute).

<sup>358</sup> CA Assemb. B. No. 960, Reg. Sess. (Ca. 2015-16).

<sup>359</sup> Daar, *supra* note 151, at 43–46; Fiser, *supra* note 139, at 5; Justyn Lezin, *(Mis)Conceptions: Unjust Limitations on Legally Unmarried Women’s Access to Reproductive Technology and Their Use of Known Donors*, 14 HASTINGS WOMEN’S L.J. 185, 208–10 (2003).

<sup>360</sup> Nadraus, *supra* note 322, at 188–89.



semen sample for transmissible diseases and can offer other services, such as genetic testing, that may prove beneficial.<sup>361</sup> A physician also acts as a point of contact, as we will see, that can provide important record keeping.<sup>362</sup> The choice to use a physician may also signal that the parties have given due consideration to the decision to procreate in this fashion.<sup>363</sup>

Performing artificial insemination in a clinical setting undoubtedly has the potential to offer these benefits, but the advantages are not compelling enough to mandate that those using assisted reproduction procreate under the care of a physician or risk family law limbo. Individuals who procreate sexually expose themselves to sexually transmitted diseases and might benefit from genetic testing, but we leave those matters to their discretion. The “point of contact” and signaling arguments better reflect the unique challenges of assisted reproduction, but they cannot outweigh the infringement of the individuals’ procreative autonomy. A requirement of physician involvement would also exacerbate, rather than ameliorate, barriers to access to treatment by single women and lesbians including cost and discrimination based on marital status or sexual orientation.

Moreover, as the cases demonstrate, use of a physician does not guarantee that conflict regarding familial intentions will not arise. To the contrary, features of the doctor-patient relationship may contribute to confusion, rather than prevent it. In some of the cases, the parties signed clinic consent forms that one party later challenged as a basis for discerning his or her intent.<sup>364</sup> The courts have viewed these forms with some ambivalence, and rightly so.<sup>365</sup> Drafted by or on behalf of physicians, clinic consent forms aim to fulfill doctors’ legal obligation to obtain informed consent from their patients. They typically contain detailed information about the medical procedure and its risks and may say little or nothing about the family law ramifications of

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<sup>361</sup> *Jordan C. v. Mary K.*, 224 Cal. Rptr. 530, 534 (Cal. Ct. App. 1986) (stating screening for hereditary or communicable diseases as one justification for requiring a physician’s involvement).

<sup>362</sup> *Id.* at 535 (stating involvement of third-party such as doctor can create “formal, documented structure for the donor-recipient relationship, without which . . . misunderstandings between the parties . . . would be more likely to occur.”).

<sup>363</sup> *See In re Paternity of M.F.*, 938 N.E.2d 1256, 1261 (Ind. Ct. App. 2010) (noting that physician involvement “goes a long way toward preventing last-minute decisions[,]” which might reflect “spur-of-the-moment” decision to relieve donor of parental responsibility). From a traditional standpoint, the physician requirement may also serve a symbolic function. Transporting the act of conception from the interpersonal realm to a clinical setting may make it easier to extinguish the “donor’s” parental rights.

<sup>364</sup> *Jason P. v. Danielle S.*, 171 Cal. Rptr. 3d 789, 798 (Cal. Ct. App. 2014) (sperm provider claimed consent form identifying him as “intended parent” demonstrated intent to parent; mother disagreed); *K.M. v. E.G.*, 33 Cal. Rptr. 3d 61, 72 (Cal. 2005) (woman who provided egg for child carried to term by partner disputed applicability of “egg donor” form she signed).

<sup>365</sup> *Jason P.*, 171 Cal. Rptr. 3d at 798 (court gives no weight to consent form identifying sperm provider and mother as “intended parents;” holds form would not meet “agreed to in a writing” requirement under amended California statute); *K.M.*, 33 Cal. Rptr. 3d at 72 (finding consent form identifying egg provider as donor invalid in this situation because she intended to raise child with partner in joint home); *D.M.T. v. T.M.H.*, 129 So. 3d 320, 347 (Fla. 2013) (court holds genetic mother who provided egg to partner who gave birth to child is legal parent despite consent form); *In re Adoption of Sebastian*, 879 N.Y.S.2d 677, 689 (N.Y. Surr. Ct. 2009) (egg provider who intends to co-parent with recipient birth mother not barred from establishing parentage by signing clinic waiver required to obtain treatment); *Herman v. Lennon*, 776 N.Y.S.2d 778, 779–80 (N.Y. Sup. Ct. 2004) (clinic consent signed by boyfriend of mother inseminated with sperm from anonymous donor not a contract and inapplicable to establish boyfriend’s parentage).

the treatment.<sup>366</sup> Moreover, doctors cannot offer legal advice. Without guidance, patients may believe that these forms settle the matter of parentage.

Perhaps more importantly, there is no practical way to prevent women from performing the insemination outside the doctor's office. As some women prefer this method, their procreative choices merit respect and their families deserve appropriate legal rules. Moreover, the men who donate may have no knowledge of the method of conception used by the women or no ability to control it, as was apparently the case with William Marotta.<sup>367</sup> Thus any functional regime must encompass rules that address the rights of the parties regardless of where the procedure took place or by what non-coital means, whether IVF, IUI or turkey baster.

That is not to say, though, that the rules cannot vary or that physicians do not have a meaningful role to play. On the plus side, for those who choose to use them, physicians have a unique opportunity to serve as a conduit for information, not by acting as lawyers themselves or through their consent forms, but by connecting their patients to resources. They can make the state forms available and can, and should, encourage their patients to seek legal advice, as the forms themselves do. Precedent already exists for enlisting physicians in this kind of task. California Health & Safety Code § 1644.7 requires any entity receiving genetic material for conception to provide the depositor with a form that would satisfy the Probate Code's condition for posthumous use of the material.<sup>368</sup> A similar provision could effectively minimize disputes about the parties' intentions at the time of conception, a significant source of later conflict. Once use of the forms becomes common practice, we could expect that conflicts between gamete providers and recipients who used a physician would greatly diminish. In the (hopefully) rare event that patients did not sign a form (or other writing) indicating their intent, courts would have to consider other means of divining the parties' intent and determining parentage, a subject discussed next.

*d. Rules for in-home insemination*

A set of forms denominating the intent of the parties should prove equally binding for those choosing to inseminate outside a clinical setting who do not want to incur the cost of a customized negotiated agreement. However, without the physician as point of contact, women opting for the "do-it-yourself" approach—and the men they recruit to donate or co-parent—might remain unaware of the forms. To ameliorate this problem, they could be made available in places where women are likely to seek information. Most women choosing to conceive via artificial

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<sup>366</sup> See *Jason P.*, 171 Cal. Rptr. 3d at 798. For a comprehensive discussion of the problems inherent in using medical consent forms to resolve legal issues in assisted reproduction, see generally, Forman, *supra* note 210.

<sup>367</sup> Nadraus, *supra* note 322, at 189. Uncertainty about the method of conception was observed in several of the cases. See, e.g., *C.O. v. W.S.*, 639 N.E.2d 523, 524 (Ohio Misc. 1994) (parties disputed whether AI was conducted under supervision of physician); *R.M. v. T.A.*, 182 Cal. Rptr. 3d 836, 840 (Cal. Ct. App. 2015) (sperm provider was under the impression that woman used his sample to conceive when she actually used an anonymous donation).

<sup>368</sup> CAL. HEALTH & SAFETY CODE § 1644.7 (West 2015). I have been sharply critical of relying on *physician-generated* consent forms regarding embryo disposition. See, e.g., Forman, *supra* note 210 at 379, 442-43. Thus I am advocating use of a state-generated form, separate and distinct from any medical consent forms signed by the parties in connection with undergoing treatment. In my work on embryo disposition, I also argued for a number of procedural safeguards as a prerequisite to enforcement of embryo disposition contracts. Features unique to that context make those protections critical. By contrast, in this context, the need for clarity from the time of conception elevates ease of use in balancing the various concerns.

insemination likely engage in some kind of research prior to embarking on the process, even if “research” means a Google search.<sup>369</sup> As many of those choosing in-home insemination are lesbians, LGBT advocacy and support groups could provide links to the forms, as could organizations offering information and support for non-traditional families and those struggling with infertility, such as Path2Parenthood and Resolve.<sup>370</sup> States that adopted an approved form could also make it available on their family law self-help websites, which typically contain information about establishing parentage and child support.<sup>371</sup> The American Bar Association and state and local bar associations might also help to educate the public.<sup>372</sup> Hopefully, well-crafted state-generated documents would obviate the use of poorly drafted “contracts” floating through cyberspace.

### 3. Default rules in the absence of a written statement of intent

Despite these efforts, some sperm providers and recipients undoubtedly will fail to use the forms or any other written agreement, whether through ignorance, carelessness or intentionally. Even those using a physician may end up conceiving without having executed their intent in writing. Physicians may not feel comfortable conditioning treatment on providing a written declaration of intent (outside of their consent forms), though best practices require them to do so for other types of assisted reproduction, such as surrogacy. Even if physicians are required to offer the form to their patients, physicians, like all, are fallible. Some patients will simply fall through the cracks. How then should the law determine parentage in the absence of a writing declaring the parties’ intent? What default rules should govern in the event that the parties do not provide written evidence of their intent?

Some would argue that the default rule should presume that the sperm provider is the father. This rule has the benefit of consistency with the rules governing coital reproduction. A man who conceives a child sexually is generally considered the father based on biology alone, certainly for child support purposes, even if he had no ongoing relationship with the mother. The law strongly favors identifying two parents who will take responsibility for the child, so this rule arguably furthers our value of maximizing child welfare as well.<sup>373</sup>

However, in many of the home insemination cases, the child had two parents—the mother and her same-sex partner. Presumably if the two were married at the time the child was conceived, the sperm provider could be treated as any other biological father seeking to assert

<sup>369</sup> A simple Google search, “sperm donor forms,” pulled up a link to the California sperm donor form on the first page of results.

<sup>370</sup> See, e.g., *LGBT Family Building*, PATH2PARENTHOOD, <http://www.path2parenthood.org/family-building/lgbt-family-building/> (last visited May 25, 2015), and *Family Building Options*, RESOLVE: THE NAT’L INFERTILITY ASS’N, <http://www.resolve.org/family-building-options/> (last visited May 25, 2015).

<sup>371</sup> See, e.g., California Courts, *Families & Children*, JUDICIAL COUNCIL OF CALIFORNIA, <http://www.courts.ca.gov/selfhelp-family.htm> (last visited May 25, 2015), *Court Help*, N.Y. ST. UNIFIED COURT SYS. (last visited Apr. 10, 2015), <https://www.nycourts.gov/courthelp/>, and *Family Law & Self Help Information*, FLA. COURTS, <http://www.flcourts.org/resources-and-services/family-courts/family-law-self-help-information/> (last visited May 25, 2015).

<sup>372</sup> Nadraus, *supra* note 322, at 191.

<sup>373</sup> See, e.g., Lewis, *supra* note 241, at 953 (arguing that law should ensure that donor-conceived children have two parents for inheritance purposes).

parental rights when the child is born into an existing marriage. In such a case, the husband (or spouse) would typically be presumed to be the child's legal father and the biological father (sperm provider in this situation) would have no parental rights or responsibilities.<sup>374</sup> However, many states now permit the biological father to rebut the marital presumption under certain circumstances.<sup>375</sup> Moreover, the marital presumption obviously would not protect in any way a same-sex co-parent who was not married to the mother, thus undermining our goal of promoting pluralism.

Likewise, for single women intending to parent solo, using a default rule in favor of parentage arguably denigrates their choice of family structure by imposing a societal norm at odds with their intent and with our goal of promoting pluralism. Single parents can and do raise children and do it well. Given that the right to procreate extends to single persons as well as unmarried individuals, a refusal to allow single parent status for a woman using a known donor might raise constitutional concerns.<sup>376</sup> However, men providing sperm with the intent to parent or who have assumed that role might just as easily argue that the opposite default rule—that they are merely donors—violates *their* choice to procreate as an unmarried man and potentially infringes their constitutional right to parent. Hence the pluralism argument does not help us resolve this stalemate when single women are involved.

In deciding which rule to prefer, it might be helpful to have data on which arrangement is more common—single women hoping to parent alone, or two individuals—whether romantically involved or not—expecting to parent together. With such information, we might choose a default rule that aligns most closely with the more common arrangement, thus protecting children from the negative consequences of unnecessary litigation and preserving parental rights. However, no such data exists. Nor does any data exist about the intentions of lesbian couples using known donors, though we might reasonably surmise that in many cases they intend to parent exclusively.<sup>377</sup> Although a significant number of the lesbian couple cases contemplated sperm provider involvement as a non-parent, the incidence of lesbian couples who truly intend to enter into a multi-parent arrangement with both the partner and the sperm provider having parental status is likely much rarer. Perhaps if there were some precedent for recognition of three (or more) parents, this arrangement would proliferate, but at this point, single or dual parent households likely dominate the demographic landscape. Beyond this conclusion, we should exercise caution in making assumptions about which arrangements are more likely. As for the sperm provider serving as role model, we have already addressed the need for that status to be established based on written agreement.

Existing law can provide some help in choosing between these presumptions. To perfect

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<sup>374</sup> See *supra* note 8-10 and accompanying text. *But see* Q.M. v. B.C., 995 N.Y.S.2d 470, 474 (N.Y. Fam. Ct. 2014) (holding marital presumption was not applicable to a lesbian married couple where the spouse could not be biological parent and biological father was seeking paternity).

<sup>375</sup> See *supra* note 8-10 and accompanying text.

<sup>376</sup> Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); Charles W. Adamson, *Assisted Reproductive Techniques: When Is Sperm Donor A Dad?*, 8 WHITTIER J. CHILD & FAM. ADVOC. 279, 293-94 (2009).

<sup>377</sup> See Polikoff, *supra* note 7, at 63 (an “overwhelming number of lesbians choosing known donors do not expect to share parental rights with the donor.”); *Id.* at 88 (discussing anthropological and psychological insights regarding lesbian families); Kelly, *supra* note 19, at 204 (ten of twelve lesbian couple families in Canadian study envisioned donor role as something other than parent; two of twelve had “donors” acting as parents, but without legal status and with mothers considered “primary parents.”).

a constitutional claim to parentage, the sperm provider would need to demonstrate that he had come forward to fully accept the responsibilities of parenthood.<sup>378</sup> Moreover, we know that biology will not suffice to establish legal parentage for unwed fathers in certain contexts. As we saw above, a man who fathers a child with a woman already married to someone else may not acquire parental status because the woman's husband is presumed to be the legal father.<sup>379</sup> Also, if a mother wishes to relinquish the child for adoption, a biological father's consent will not automatically be required. Usually, the father has to take some affirmative action, such as filing with a putative father's registry, demonstrating a commitment to parenting, or bringing an action to establish paternity, before he will be considered a full legal father.<sup>380</sup> So even if we accept that a man who provides sperm with the intent to parent should have an avenue to earn that status, the law need not presume that he acquires parentage just by virtue of donating his sperm. The question is what the law should require.

Some would argue that all that is constitutionally required is to allow a man some method of demonstrating intent to parent,<sup>381</sup> and a state could insist that the man agree in writing to that method. The Kansas Supreme Court took this view in *In re K.M.H.*<sup>382</sup> Kansas' insemination statute provides that a donor of semen to a licensed physician for use by someone other than his wife is not a parent "unless agreed to in writing by the donor and the woman."<sup>383</sup> The Kansas Supreme Court upheld the statute in the face of a constitutional challenge brought by a man who claimed he provided sperm to a friend based on an oral agreement that granted him parental rights.<sup>384</sup> The sperm provider, D.H., alleged violations both of equal protection and due process. As the court acknowledged, men and women are treated differently under the statute. Men have to act affirmatively (executing a writing with the agreement of the woman) to establish parentage, while women are parents under all circumstances. Applying heightened scrutiny, the court found that the law nonetheless did not violate equal protection. The court first opined that biological differences between men and women related to child bearing rendered them not similarly situated. However, even assuming that they were, the court found that the distinction served several important state objectives and that the law was substantially related to achieving those ends. Specifically, a "requirement that any such agreement be in writing enhances predictability, clarity, and enforceability."<sup>385</sup> The court also saw benefit in the design of the statute, which "implicitly encourages early resolution of the elemental question of whether a donor will have parental rights," even though it does not expressly address the timing "of entry

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<sup>378</sup> *Lehr v. Robertson*, 436 U.S. 248, 261 (1983).

<sup>379</sup> *See supra* notes 8, 374 and accompanying text.

<sup>380</sup> Forman, *supra* note 215, at 1001–08.

<sup>381</sup> *See supra* notes 56–58, 97–103, 155–56 and accompanying text for cases holding a complete statutory ban on claiming parentage based on artificial insemination unconstitutional where men intended to parent.

<sup>382</sup> *In re K.M.H.*, 169 P.3d 1025, 1038, 1040–41 (Kan. 2007).

<sup>383</sup> KAN. STAT. ANN. § 38-1114(f) (2007) (current version at §23-2208(f)). For examples of other state statutes containing a similar provision, see WEST'S ANN CAL. FAM. CODE § 7613(b); WEST'S D.C. CODE ANN. § 16-909(e)(2); 750 ILL. COMP. STAT. ANN. 40/3(b); N.J. STAT. ANN. §9:17-44(b); VERNON'S TEX. CODE ANN., FAM. CODE § 160-7031; WEST'S WASH. REV. CODE ANN. § 26.26.705.

<sup>384</sup> *K.M.H.*, 169 P.3d at 1040–41.

<sup>385</sup> *Id.* at 1039.

into a written agreement.”<sup>386</sup> As the court observed, “[e]ffectively, the parties must decide whether they will enter into a written agreement before any donation is made, while there is still balanced bargaining power on both sides of the parenting equation.”<sup>387</sup> This structure served the “admirable” goal of “[e]ncouraging careful consideration of entry into parenthood” and the “worthy” goal of avoiding the “legal limbo” experienced by D.H.<sup>388</sup>

Of course the option of a written agreement varying the default rule of non-parentage did not actually prevent D.H. from landing in legal limbo because he ostensibly did not know about it. Indeed, the mother in this case was a lawyer while D.H. was not, suggesting unequal bargaining power, at least in terms of knowledge of the law. The court nonetheless held that D.H.’s ignorance of the law did not render the statute violative of his due process rights.<sup>389</sup> However, even if the court was correct on this constitutional point, it does highlight an issue that needs to be carefully considered in formulating rules governing use of gametes from known providers if we hope to further the value of functionality.<sup>390</sup>

Although the Kansas Supreme Court concluded that the requirement of a written agreement to assume parental status in this context was constitutional, it did question the scheme as a policy matter, noting the desirability of maximizing a child’s chance of having two parents—and the resources that go with them.<sup>391</sup> The court also noted the desire of donor offspring to know their roots and the trend in other countries toward prohibiting anonymous donation, but concluded that the weighing and balancing of these concerns rested with the legislature.<sup>392</sup>

Two judges dissented. Justice Caplinger argued that the statute allowed men to lose their parental rights through inaction, and that waivers of fundamental constitutional rights require affirmative conduct.<sup>393</sup> He also objected to the majority’s failure to attach legal significance to D.H.’s ignorance of the law, distinguishing *Lehr* because it involved an adoption proceeding where the parental status determination takes on an urgency not present here.<sup>394</sup> In Justice Caplinger’s view, D.H. had “come forward to participate in the rearing of his children,” and thus met the *Lehr* standard for asserting parental rights.<sup>395</sup> The state’s desire for clarity and certainty cannot justify infringing the sperm provider’s constitutional rights.<sup>396</sup> Justice Hill chimed in to inquire about the interests of the children: “None of the elaborate and meticulous safeguards our Kansas laws afford parents *and children* in proceedings before our courts when confronted with

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<sup>386</sup> *Id.*

<sup>387</sup> *Id.*

<sup>388</sup> *Id.*

<sup>389</sup> *Id.* at 1033, 1040–41. *Cf. Lehr v. Robertson*, 463 U.S. 248, 264 (1983) (father’s failure to register with putative father registry due to ignorance of law does not make statute unconstitutional).

<sup>390</sup> *See supra* notes 145, 316–17 and accompanying text.

<sup>391</sup> *K.M.H.* at 1041.

<sup>392</sup> *K.M.H.*, 169 P.3d at 1041–42.

<sup>393</sup> *Id.* at 1046 (Caplinger, J., dissenting).

<sup>394</sup> *Id.* at 1048 (Caplinger, J., dissenting).

<sup>395</sup> *Id.* at 1049 (Caplinger, J., dissenting).

<sup>396</sup> *Id.* at 1050 (Caplinger, J., dissenting).

questions of parentage have been extended to these children.”<sup>397</sup>

The *K.M.H.* majority likely has the better argument than the dissent on the constitutionality of the written requirement to establish parental rights.<sup>398</sup> Unmarried men have virtually never been similarly situated with unmarried women when it comes to establishing parental rights. Since *Lehr*, the mere biological connection of the man with his offspring has not sufficed to establish his fundamental constitutional right to parent, though it has more than sufficed to recognize his parental responsibilities.<sup>399</sup> Perfecting that right requires affirmative conduct demonstrating the man’s commitment to parent, and the state can require that the man assert his commitment in a particular way, such as by sending a postcard to a putative father’s registry, as in *Lehr*, or signing a written agreement, as in *K.M.H.* Nonetheless, constitutional does not necessarily equate with wise, as even the *K.M.H.* majority conceded.<sup>400</sup>

To insist on a writing to establish parental status risks injustice in too many cases. Recall that in a number of cases, the parties alleged oral agreements, backed up by conduct, to assert a claim for parent status. Rather, the law would establish a rebuttable presumption that the sperm provider is a donor unless he can prove that he donated with the intent to parent by clear and convincing evidence, or that he has developed an actual father-child relationship, as discussed in connection with *Jason P.* Some may attack the proposed rule for disadvantaging men who intend to parent, by imposing a difficult barrier to surmount.<sup>401</sup> Nonetheless, the heightened burden of proof provides necessary protection from frivolous claims. Once we move beyond the realm of written understanding, it becomes perilously easy for one party to simply claim that the sperm provider intended to parent, compelling the other party to defend against the claim, even if the party seeking to classify the sperm provider as parent does not have sufficient evidence to prevail.

Critics from the opposite perspective may contend that allowing sperm providers to attempt to establish parentage based on anything other than written agreement invites challenges to the mother’s rights and threatens the integrity of non-traditional families and the child’s well-being by promoting uncertainty and litigation. There are several responses to this claim. First, if the sperm provider truly intended to parent from the time of conception or assumed the role of parent with the mother’s consent, denying him the opportunity to prove that fact only protects one parent’s rights and a false version of the “non-traditional” family. As for the child’s well-being, unfortunately the law must balance the perils of conflict between the parents against the benefit that will accrue to the child from a continued relationship with or support by her father. Lastly, viewed as a whole, the legal structure proposed here is designed to minimize the number of cases that involve such disputes by encouraging and facilitating written statements of intent.

### III. CONCLUSION

My goal here has been to shine a light on existing problems in the states’ approaches to

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<sup>397</sup> *Id.* at 1051 (Hill, J., dissenting).

<sup>398</sup> See Polikoff, *supra* note 7, at 68 (requiring written contract to establish donor as father would be constitutional).

<sup>399</sup> *Lehr v. Robertson*, 463 U.S. 248 (1983).

<sup>400</sup> *K.M.H.*, 169 P.3d at 1041.

<sup>401</sup> For a discussion of the differential burdens imposed on gay men seeking to parent, see Levy, *supra* note 179 and accompanying text.

families created through artificial insemination or other assisted reproductive technologies using gametes provided by others, and to develop a set of guiding values and essential principles to shape the law's approach to these challenging issues. The current treatment of directed donation varies widely from state to state and often leaves the parties without clear guidance about their respective roles, rights, and responsibilities. No state currently has a statutory scheme that encompasses all the features of the proposed regime. As we know, many states have no statutory law addressing gamete donation. Of the more than half that do, most address only the rights of opposite-sex married couples using sperm donation. Fewer have expanded coverage to address the needs of single parents. Only one state has enabled by statute a third person to claim parental status. Moreover, the vast majority contemplate use of a physician either explicitly or by defining assisted reproduction in terms of use of medical technology.<sup>402</sup>

Thus existing statutory schemes have a considerable way to go to meet the principles outlined here. While case law has at times filled in the gap, in many cases, the parties were left with a legal determination that failed to reflect either the intent of the participants or the reality of their family life. To serve the values of promoting child well-being, parental rights, and adult autonomy and pluralism, the law must start by clarifying who is a donor and who is a parent based on the parties' intent, not whether the parties used a physician or a medical procedure to conceive. The practice of in-home insemination is simply too easy and too common to leave those families and gamete providers operating in a legal vacuum. In addition, existing statutes often limit the familial options even for those who do use medical assistance, defining all providers of gametes to unmarried recipients as "donors," regardless of the parties' intent. These restrictive laws lead to litigation and constitutional challenges. The revised Uniform Parentage Act ("UPA") seemingly addressed these problems. Section 703 classifies a man who provides sperm for assisted reproduction with the intent to be a parent as a parent. Thus intent, rather than marital status, determines parentage. The comments further explain that the revised UPA eliminates the physician requirement. However, the revised UPA requires that the consent to parent be in writing, unless the man lives with the woman and child for the first two years of the child's life. These restrictions would leave no room for an oral agreement or parental conduct short of cohabitation to establish intent. More importantly, although a number of states now have provisions similar to these, in several, they have defined "assisted reproduction" in a way that reinserts the physician requirement or leaves the question ambiguous.

A recently adopted amendment to California's gamete donation law does a better job of accomplishing these goals. California Assembly Bill No. 960 covers use of either eggs or sperm.<sup>403</sup> Although I do not agree with all of its particulars, it represents a move in the right direction. The statute clarifies that the intended parents will be considered the legal parents and that a donor providing sperm through a physician will not be considered a parent unless he and the mother agree otherwise in writing.<sup>404</sup> Critically, the law also contains a provision stating that if semen is not provided to a physician or sperm bank, the sperm provider is nonetheless still considered a donor with no parental rights if the parties agree in writing or the court finds by clear and convincing evidence that prior to conception, the sperm provider and woman had an oral

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<sup>402</sup> See *supra* notes 8, 18, 146 and accompanying text. See also *In re Paternity of M.F.*, 938 N.E.2d 1256, 1260–61 (Pa. 2010) (court required physician involvement for donor status in absence of statute).

<sup>403</sup> Assemb. B. 960, 2015-16 Leg., Reg. Sess. (Cal. 2015) (amending sections 7613 and 7613.5 of the California Family Code).

<sup>404</sup> *Id.* at § 7613(a).



agreement that he would not be a parent.<sup>405</sup> Thus the statute would retain the default rule that the man was a parent if the child was conceived by artificial insemination outside a clinical setting. I have argued for the opposite default rule, but at least the California law provides clarity for the parties undertaking in-home insemination. It offers a set of forms to facilitate written expressions of intent.<sup>406</sup>

However, the California bill does not create a space for a reservation of rights by the active sperm provider. The law must expand its options for those gamete providers who agree to donate based on an understanding that they will play a continued, but non-parental role in the child's. This change may go against the post-*Troxel* trend toward restricting third-party visitation, but it is neither precluded by that case nor inconsistent with all existing third-party visitation statutes. Fixing the boundaries defining the active sperm provider has proven particularly vexing. We may find that we need a more expansive approach that moves beyond intent or allows other non-written indicia of intent to suffice. Until such time arrives (if it does), recognition of the active sperm provider under the terms presented would mark a significant improvement over the current binary regime.

Likewise, some families may contemplate that both the sperm provider and a spouse or partner will take on a parental role, along with the other biological parent. The law should honor these intentions if the parties have agreed in writing. Specific decisions regarding custody, visitation, and child support responsibilities would be decided in accordance with the best interests of the child. Allowing limited rights for the active sperm provider and opening the door to multiple legal parents surely require the greatest legal leap of the suggested reforms, and even the less controversial proposals would require significant change in many jurisdictions. Yet these families deserve a legal regime that meets their needs. Finally, a designation of donor status at the time of conception, whether established by written declaration or through operation of the default rules, should not preclude a finding that the donor has achieved the status of parent by truly functioning as such.

Many of the suggested changes have required a difficult and delicate balancing of serious concerns at stake for all parties, and which can and should be debated. No legal scheme can achieve perfection or prevent the need for dispute resolution for all cases, but the law can create rules that allow families of various configurations to thrive, that provide considerably more certainty of legal status, and that allow access to dispute resolution when necessary. We should strive to accomplish those goals.

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<sup>405</sup> *Id.* at § 7613(2).

<sup>406</sup> *Id.* at § 7613.5. The bill contains one sample form for those intending to be donors and one for those intending to be parents. These forms, like the VAP, would require both parties to sign. By the terms of the statute, these forms would satisfy the requirement that the parties' state their intent regarding parentage in writing, though the statute does not mandate their use.