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*The Craigslist Father: Uncertain Law and Outcomes for Known Sperm Donors*

by

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**Submitted in partial fulfillment of the requirements of the  
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Professor Jacobs  
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## INTRODUCTION

Each month Craigslist users post over 100 million classified advertisements onto the website.<sup>1</sup> In the United States alone, there are 60 million people that use Craigslist.<sup>2</sup> Many of these postings are for run-of-the-mill items such as televisions, cars, and appliances.<sup>3</sup> In 2009, Angie Bauer and Jennifer Schreiner were among those 60 million users; however, the women's ad was not to sell a used appliance.<sup>4</sup> Their ad was for a sperm donor.<sup>5</sup> Bauer and Schreiner, a lesbian couple, wanted to have a child of their own.<sup>6</sup> Despite successfully raising some foster and adopted children together, the women's Kansas doctor refused to sign a document deeming the women fit to be parents.<sup>7</sup> Consequently, the women were unable to use a conventional sperm bank and receive sperm from an unknown sperm donor.

William Marotta eventually answered the women's ad and provided his sperm.<sup>8</sup> The parties' intentions and expectations were clear: Marotta would only be a donor and would not have any parental rights or responsibilities.<sup>9</sup> To evidence their intention, the parties entered into a written agreement wherein Marotta's parental rights and responsibilities were explicitly waived.<sup>10</sup> Three years after the child was born using Marotta's sperm, to Marotta's great

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<sup>1</sup> *Craigslist Factsheet*, CRAIGSLIST.ORG, <http://www.craigslist.org/about/factsheet> (last visited March 3, 2013).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> Aly Van Dye, *Topeka Mothers Support Sperm Donor in Child Support Battle with Kansas DCF*, TOPEKA CAP. J., Dec. 29, 2013, <http://cjonline.com/news/2012-12-29/Topeka-mothers-support-sperm-donor-child-support-battle-kansas-dcf.html>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> William Saletan, *Who's the Mother in Kansas*, SLATE (Jan. 8, 2013, 9:23 AM), [http://www.slate.com/articles/health\\_and\\_science/human\\_nature/2013/01/the\\_the\\_kansas\\_sperm\\_donor\\_fiasco\\_gay\\_marriage\\_adoption\\_and\\_parental\\_responsibility.html](http://www.slate.com/articles/health_and_science/human_nature/2013/01/the_the_kansas_sperm_donor_fiasco_gay_marriage_adoption_and_parental_responsibility.html).

<sup>8</sup> Elizabeth Chuck, *Hey, Sperm Donor, Don't Answer that Craigslist Ad!*, NBC NEWS, (Jan. 26, 2013, 8:50 AM), [http://usnews.nbcnews.com/\\_news/2013/01/03/16326826-hey-sperm-donor-dont-answer-that-craigslist-ad?lite.html](http://usnews.nbcnews.com/_news/2013/01/03/16326826-hey-sperm-donor-dont-answer-that-craigslist-ad?lite.html).

<sup>9</sup> *Id.*

<sup>10</sup> *Sperm Donor Contract*, TOPEKA CAP. J., <http://www.cjo-cdn/sites/default/files/Petitioners%20Surreply.recd%201.2.2013.PDF> (last visited March 3, 2013).

surprise, the state of Kansas filed a lawsuit against him seeking child support payments totaling over \$6,000.<sup>11</sup>

Kansas's artificial insemination statute is based on the 1973 Uniform Parentage Act. Pursuant to the statute, "[t]he donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the birth father of a child thereby conceived, unless agreed to in writing by the donor and the woman."<sup>12</sup> Nineteen other states have adopted some version of the 1973 Uniform Parentage Act.<sup>13</sup> Unfortunately for Marotta, to avoid having parental responsibilities under the Kansas statute, a licensed physician must perform the artificial insemination.<sup>14</sup> Marotta donated his sperm directly to Bauer and Schreiner, who in-turn performed the procedure without the assistance of a licensed physician.<sup>15</sup> Accordingly, Marotta cannot take advantage of the protection granted by the Kansas donor statute to avoid paternity and may be found liable for child support payments.

While the factual circumstances are interesting, Marotta's situation is not necessarily unique.<sup>16</sup> An estimated 30,000 to 60,000 children are conceived each year by use of sperm donors.<sup>17</sup> Faced with this new reality, a standard is needed to effectively set the parameters of when known sperm donors may disclaim parental rights and responsibilities. This Comment focuses on when, and if, courts should allow known sperm donors to disclaim parental rights and responsibilities. Part I explores the 1973 and 2002 versions of the Uniform Parentage Act. Part II

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<sup>11</sup> Van Dye, *supra* note 4.

<sup>12</sup> KAN. STAT. ANN. § 23-2208 (f) (West).

<sup>13</sup> *Why States Should Adopt UPA*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/Narrative.aspx?title=Why%20States%20Should%20Adopt%20UPA> (last visited March 9, 2013). In 2002, a revised version of the Uniform Parentage Act was created, but the revised version has only been adopted in nine states. *Parentage Act*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/Act.aspx?title=Parentage%20Act> (last visited March 9, 2013).

<sup>14</sup> KAN. STAT. ANN. § 23-2208 (f) (West).

<sup>15</sup> Van Dye, *supra* note 4.

<sup>16</sup> See also PARKS AND RECREATION (NBC Studios 2013) (depicting a woman struggling to ask her male friend to be her sperm donor).

<sup>17</sup> Jacqueline Mroz, *One Sperm Donor, 150 Offspring*, N.Y. TIMES, Sept. 5, 2011, [www.nytimes.com/2011/09/06/health/06donor.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/09/06/health/06donor.html?pagewanted=all&_r=0).

examines the idea of intentional parentage and how that concept can be incorporated in determining parentage for known sperm donors. Part III looks at various state court decisions determining whether a known sperm donor had parental rights and responsibilities. Finally, Part IV argues that agreements disclaiming parental rights and responsibilities between known sperm donors and the prospective parent or parents should be upheld, utilizing intent based analysis.

#### I. STATUTORY INTRODUCTION: THE UNIFORM PARENTAGE ACT

The Uniform Parentage Act (UPA) is “the most comprehensive set of laws proposed regarding the delineation of rights in AI cases.”<sup>18</sup> First proposed in 1973, the UPA was revised in 2000 and again amended in 2002.<sup>19</sup> Unlike other Uniform Acts, however, such as the Adult Guardianship and Protective Proceedings Jurisdiction Act,<sup>20</sup> only a minority of the states have adopted the most recent version of the UPA.<sup>21</sup> Many states lack any statutory authority dealing with the parental status of sperm donors.<sup>22</sup> Those states have to rely “on common law principles and statutes that were created when a family still consisted of one man, one woman, and their child.”<sup>23</sup> Irrespective of a state’s adoption of a version of the UPA, it has been a touchstone for courts’ analysis concerning the parental status of sperm donors.<sup>24</sup>

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<sup>18</sup> Harvey L. Fiser & Paula 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 Partners*, 15 CARDOZO J. L. & GENDER 1, 8 (2008).

<sup>19</sup> *Parentage Act*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/Act.aspx?title=Parentage%20Act> (last visited March 9, 2013).

<sup>20</sup> *Adult Guardianship and Protective Proceedings Jurisdiction Act*, UNIFORM LAW COMMISSION, <http://www.uniformlaws.org/Act.aspx?title=Adult%20Guardianship%20and%20Protective%20Proceedings%20Jurisdiction%20Act> (last visited March 9, 2013).

<sup>21</sup> See *supra* note 13 and accompanying text.

<sup>22</sup> Browne Lewis, *Two Fathers, One Dad: Allocating the Paternal Obligations Between Men Involved in the Artificial Insemination Process*, 13 LEWIS & CLARK L. REV. 949, 988-89 (2009).

<sup>23</sup> *Id.*

<sup>24</sup> See *infra* Part III.A-B.

## A. The 1973 Uniform Parentage Act

As originally drafted, the 1973 Uniform Parentage Act is an “antiquated provision[] to modern scenarios.”<sup>25</sup> In its entirety, section 5 states

(a) If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband's consent must be in writing and signed by him and his wife. The physician shall certify their signatures and the date of the insemination, and file the husband's consent with the [State Department of Health], where it shall be kept confidential and in a sealed file. However, the physician's failure to do so does not affect the father and child relationship. All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising physician or elsewhere, are subject to inspection only upon an order of the court for good cause shown.

(b) The donor of semen provided to a licensed physician for use in artificial insemination of a married woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.<sup>26</sup>

### Section 5 of the 1973 UPA only

resolves the specific legal conflict between a sperm donor and the recipient's husband by providing that the recipient's father ‘is treated in law as if he were the natural father of a child thereby conceived’ and by providing that the donor ‘is treated in law as if he were not the natural father of a child thereby conceived.’<sup>27</sup>

Many states that adopted a version of the model act amended the statutory language.<sup>28</sup> The most common alteration of the model act text was omitting the word married.<sup>29</sup> No proviso is included in the model act addressing the rights of unmarried women or lesbian couples seeking children.<sup>30</sup>

Outside of its limited focus, one of the most problematic aspects of the model act is the requirement that a “licensed physician” is used in the insemination process.<sup>31</sup> Requiring the use

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<sup>25</sup> Fiser, *supra* note 18, at 11.

<sup>26</sup> UNIFORM PARENTAGE ACT § 5 (1973).

<sup>27</sup> *In re R.C.*, 775 P.2d 27, 32 (Colo. 1989).

<sup>28</sup> *See, e.g., supra* note 12 and accompanying text.

<sup>29</sup> *In re K.M.H.*, 285 P.3d 53, 72 (Kan. 2007).

<sup>30</sup> Fiser, *supra* note 18, at 13-14.

<sup>31</sup> *See* UNIFORM PARENTAGE ACT § 5 (1973) (“The donor of a semen provided to a licensed physician . . .”).

of a licensed physician serves no medical purpose.<sup>32</sup> Getting pregnant through use of artificial insemination is “not a medical procedure that can only be safely performed by a licensed physician. Therefore, the statutory mandate with regards to the involvement of a licensed physician is superfluous.”<sup>33</sup> Forcing women to go to a licensed physician also “offend[s] a woman’s sense of privacy and reproductive autonomy.”<sup>34</sup> Moreover, the licensed physician requirement disproportionately harms lower income individuals and lesbian couples.<sup>35</sup> “Many hospitals or clinics have strict policies against aiding ‘unwed’ women with fertility.”<sup>36</sup> Finally, the most fundamentally flawed aspect of requiring the use of a licensed physician is that pregnancy rates are significantly higher when fresh sperm is used versus frozen sperm from a sperm bank.<sup>37</sup>

#### B. The 2002 Uniform Parentage Act

If the 1973 UPA provision was hampered by its limited focus and unnecessary requirement that a licensed physician is used, then the 2002 UPA provision represents a substantial improvement in the law governing parentage and artificial insemination. Under section 702, “[a] donor is not a parent of a child conceived by means of assisted reproduction.”<sup>38</sup> No distinction is made between known and unknown sperm donors. Section 703 further protects the parties’ intentions by holding that “[a] man who provides sperm for, or consents to, assisted reproduction by a woman . . . with the intent to be the parent of her child, is a parent of the

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<sup>32</sup> Lewis, *supra* note 22, at 975-76.

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

<sup>34</sup> Jhordan C. v Mary K., 179 Cal. App. 3d 386, 394 (1986).

<sup>35</sup> See Lewis, *supra* note 22, at 976. (“[T]he requirement that a licensed physician perform the procedure makes the process cost prohibitive to some couples.”).

<sup>36</sup> Fiser, *supra* note 18, at 5.

<sup>37</sup> Lewis, *supra* note 22, at 1004.

<sup>38</sup> UNIFORM PARENTAGE ACT § 702 (amended 2002); see also *id.* Comment (“In sum, donors are eliminated from the parental equation.”).

resulting child.”<sup>39</sup> Such intent must be evidenced by writing.<sup>40</sup> Moreover, the requirement that a licensed physician must be used in the artificial insemination process is eliminated.<sup>41</sup>

While representing a substantial improvement over the 1973 UPA, the 2002 UPA is still lacking in a few respects. Chiefly, the most problematic aspect of the 2002 UPA is that so few states have adopted the Act.<sup>42</sup> Even in the few states adopting some version of the 2002 UPA, “courts continue to struggle” in its application.<sup>43</sup> Similar to the 1973 UPA, the 2002 version is limited to heterosexual relationships.<sup>44</sup> The plain language of section 703 states that “[a] *man* who provides sperm . . .” can enter an agreement to be the father.<sup>45</sup> Parentage issues concerning lesbians and their sperm donors are left unaddressed. Consequently, while the 2002 UPA does provide greater protection for known sperm donors, the operation of the statute does not fully protect parties’ intentions and expectations.<sup>46</sup>

## II. INTENT BASED PARENTAGE: A SOLUTION TO A DIFFICULT PROBLEM

Biology and adoption have been the primary means through which to establish parentage.<sup>47</sup> Establishing parentage through intention is a relatively recent phenomenon.<sup>48</sup> Modern technology, however, “has greatly enhanced the potential for intention in procreative

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<sup>39</sup> UNIFORM PARENTAGE ACT § 703 (amended 2002).

<sup>40</sup> UNIFORM PARENTAGE ACT § 704 (amended 2002). The writing must be signed by the woman and the man. *Id.*

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

<sup>42</sup> *See supra* note 13 and accompanying text.

<sup>43</sup> Fiser, *supra* note 18, at 11.

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

<sup>45</sup> UNIFORM PARENTAGE ACT § 703 (amended 2002).

<sup>46</sup> Fiser, *supra* note 18, at 14-15.

<sup>47</sup> Melanie B. Jacobs, *Applying Intent-Based Parentage Principles to Nonlegal Lesbian Coparents*, 25 N. ILL. U. L. REV. 433, 434 (2005).

<sup>48</sup> Majorie Maguire Shultz, *Reproductive Technology and Intent Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WISC. L. REV. 297, 304 (1990) (“Through most of history, biological procreation was more a matter of fate than intention.”).



activities.”<sup>49</sup> As a result, “intent is playing an ever-increasing role in parentage determinations.”<sup>50</sup>

#### A. *Johnson v. Calvert*: The Introduction of Intent Based Parentage

*Johnson v. Calvert* was one of the first cases to address intent based parentage.<sup>51</sup> In *Johnson*, there were three parties involved.<sup>52</sup> Mark and Crispina were a married couple who were unable to conceive.<sup>53</sup> After hearing about the couple’s trouble, Anna approached the couple and offered to act as their surrogate.<sup>54</sup> The couple agreed and a contract was signed, which provided that the sperm of Mark and egg of Crispina would be implanted in Anna.<sup>55</sup> Further, Anna would be compensated, but in return she would “relinquish ‘all parental rights’ to the child.”<sup>56</sup>

The relationship deteriorated between the parties to the point that Anna filed a lawsuit to be named the child’s mother.<sup>57</sup> Both woman “presented acceptable proof of maternity” under the relevant California statute.<sup>58</sup> Crispina was the genetic mother and Anna was the birth mother.<sup>59</sup> Facing such an intractable problem, the court inquired “into the parties’ intentions as manifested in the surrogacy agreement.”<sup>60</sup> What the surrogacy agreement revealed was that if Mark and Anna had not acted on their intention to have a child through use of a surrogate, the child would have never existed.<sup>61</sup> Therefore, “she who intended to procreate the child—that is, she who intended to bring about the birth of a child that she intended to raise as her own—is the natural

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

<sup>50</sup> Melanie B. Jacobs, *Intentional Parenthood’s Influence: Rethinking Procreative Autonomy and Paternity Establishment Policy*, 20 AM. U. J. GENDER SOC. POL’Y & L. 489, 492 (2012).

<sup>51</sup> Jacobs, *supra* note 47, at 438.

<sup>52</sup> 851 P.2d 776, 778 (Cal. 1993).

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

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

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 782.

<sup>59</sup> *Id.*

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

<sup>61</sup> *Id.*

mother under California law.”<sup>62</sup> One notable limitation emerging from the *Johnson* court’s intent based test is that “intent was not used as the sole means of establishing maternity; rather, as between two competing options, the court used intent as a tie-breaker to choose one mother.”<sup>63</sup> Some later courts have applied the intention doctrine narrowly.<sup>64</sup>

## B. Further Development of Intent Based Parentage

Following *Johnson*, “intent has been used as a proxy for biology to establish legal parentage.”<sup>65</sup> Attendant with the increased use of intent in determining parentage has been the rise in use of assistive reproductive technologies.<sup>66</sup> Intent based determinations of parentage are uniquely suited for artificial insemination cases.<sup>67</sup> Unlike ordinary sexual relations, where procreation might be “a goal or a by-product, or anything in between,” when parties decide to use artificial insemination, procreation is clearly the goal.<sup>68</sup> Intention both “conveys the directness, specificity and lack of ambiguity with which voluntary behavior is linked to outcome by purpose” and “connotes choice, or selection among available courses of action.”<sup>69</sup>

Resulting from the close relationship between intention and the use of artificial insemination, many scholars now argue that parties’ intentions regarding parental rights and responsibilities should be respected.<sup>70</sup> In fact, Professor Shultz stated that “within the context of artificial reproductive techniques, intentions that are voluntarily chosen, deliberate, express and

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<sup>62</sup> *Id.*

<sup>63</sup> Jacobs, *supra* note 47, at 439.

<sup>64</sup> *See id.* at 437-439 (describing cases in which *Johnson*’s intent doctrine was narrowly applied).

<sup>65</sup> Jacobs, *supra* note 50, at 489.

<sup>66</sup> Shultz, *supra* note 48, at 307 (“Modern reproductive technology has greatly enhanced the potential for intention in procreative behavior.”).

<sup>67</sup> *Id.* at 308. (“Procreating by ordinary coital means necessarily includes a degree of ambiguity regarding purpose.”).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 307.

<sup>70</sup> *See e.g.*, Jacobs, *supra* note 50, at 492 (stating that one court’s approach “recognizes the importance of intent within procreative liberty, regarding both the right to choose to parent and the right to choose not parent.”); Fiser, *supra* note 18, at 27 (“Informed parties—whether gay, lesbian, or straight—should be allowed to make their own decisions about their rights and abilities to procreate.”); Lewis, *supra* note 22, at 975-76 (discussing how the primary goal of artificial insemination statutes should be to protect the parties’ intentions).

bargained-for ought presumptively to determine legal parenthood.”<sup>71</sup> There has been some recognition in statutes of intent based parentage.<sup>72</sup> In the 2002 UPA, “parentage may be established by something other than biology or adoption.”<sup>73</sup> However, as will be demonstrated in Part III, many court decisions directly contradict parties’ intentions.<sup>74</sup> Moreover, in the context of federal law governing child support and paternity determination, an unwary sperm donor can be adjudged liable for support despite the parties’ intentions to the contrary.<sup>75</sup>

### III. POINT AND SHOOT: THE INCONSISTENT APPROACH OF STATE COURT DECISIONS INVOLVING KNOWN SPERM DONORS

State court decisions concerning the parental rights and responsibilities for known sperm donors are inconsistent.<sup>76</sup> Different outcomes can be found even for factual scenarios that are similar.<sup>77</sup> Many states lack of applicable artificial insemination statutes compound the problem of inconsistent outcomes,<sup>78</sup> as do public policy decisions between a party’s right to contract and a child’s best interest.<sup>79</sup>

#### A. Misaligned or Unclear Intentions: Possible Problem with Intent Based Standard

Having a child is a life-altering decision. In a best case scenario, the prospective parents should presumably have clear intentions regarding becoming parents; however, parties often have different intentions and expectations. These misaligned or unclear intentions can cause problems for courts when one party brings suit to establish or terminate parental rights. The

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<sup>71</sup> Shultz, *supra* note 48, at 323.

<sup>72</sup> See Jacobs, *supra* note 47, at 435.

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

<sup>74</sup> See *infra* Part III.A-B.

<sup>75</sup> Jacobs, *supra* note 50, at 504 (“A women who receives public assistance is required to comply with the state IV-D agency and name the person (or persons) she believes might be the father of the child, and the state then pursues a paternity order for the purpose of obtaining a support order.”).

<sup>76</sup> See *infra* Part III.A-B.

<sup>77</sup> Compare, *E.E. v. O.M.G.R.*, 420 N.J. Super. 283 (2011) (refusing to enforce written agreement disclaiming known sperm donor’s parental rights and responsibilities), with *Ferguson v. McKiernan*, 596 Pa. 78 (2007) (enforcing an oral agreement disclaiming known sperm donor’s parental rights and responsibilities).

<sup>78</sup> See *supra* note 13 and accompanying text.

<sup>79</sup> See *Ferguson*, 596 Pa. at 100-01 (Eakin, J., dissenting) (arguing that a child’s best interest should be elevated over the right to contract).

outcomes courts are forced to make necessarily leave one party's parental rights and responsibilities impacted in an unintended manner.<sup>80</sup>

### 1. *Donor Has Parental Rights and Responsibilities*

One of the first cases to address the parental rights and responsibilities of a known sperm donor was *C.M. v. C.C.*<sup>81</sup> In the case, CM, the eventual sperm donor, and CC, the biological mother, were friends who agreed that CM would provide CC with his sperm.<sup>82</sup> The artificial insemination was completed without the assistance of a physician and after several unsuccessful attempts CC was able to get pregnant.<sup>83</sup> After the child was conceived, CM initiated a suit to get visitation rights.<sup>84</sup> New Jersey had no statute addressing the parental rights of a known sperm donor. The parties' intentions were misaligned: CM contended that the pair agreed he would assume the responsibilities of being the father and CC contended that CM waived his parental rights.<sup>85</sup> Between the two positions, the court held that CM's "consent and active participation in the procedure leading to conception should place upon him the responsibilities of fatherhood."<sup>86</sup>

Similar to the parties in *C.M. v. C.C.*, the parties in *Jhordan C. v. Mary K.* had misaligned intentions.<sup>87</sup> Mary and Jhordan were acquaintances who agreed, after an interview, that Jhordan would provide Mary with his sperm to use for artificial insemination.<sup>88</sup> Mary was in a relationship at the time with Victoria; the two women wanted to raise a child together.<sup>89</sup> No

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<sup>80</sup> See *infra* Part III.A-B.

<sup>81</sup> 152 N.J. Super. 160 (1977).

<sup>82</sup> *Id.* at 161.

<sup>83</sup> *Id.* ("C.C. learned, as a result of her conversation with the doctor, of a procedure for artificial insemination using a glass syringe and a glass jar.")

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 167.

<sup>86</sup> *Id.*

<sup>87</sup> 179 Cal. App. 3d 386, 389 (1986).

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

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

written agreement was drafted evidencing the parties' intentions.<sup>90</sup> Mary performed the insemination process without the assistance of a physician.<sup>91</sup> Up to the child's birth, and for some time following the child's birth, Jhordan was involved as a parent.<sup>92</sup> Eventually, Mary decided to terminate Jhordan's involvement as a parent, and even asked Jhordan to "sign a contract indicating he would not seek" to be the child's father.<sup>93</sup> This request was refused and litigation ensued.<sup>94</sup>

At trial, the parties' testimony was significantly divergent regarding the role Jhordan was expected to play in the child's life.<sup>95</sup> Mary testified that Jhordan's role was simply that of a donor.<sup>96</sup> Jhordan testified that "he would have ongoing contact with the child, and he would care for the child as much as two or three times per week."<sup>97</sup> Unlike in *C.C.*, in *Jhordan C.*, the California legislature had adopted a version of the UPA.<sup>98</sup> Under the clear text of the statute, Mary could have precluded Jhordan's involvement by "obtaining the semen . . . from a chosen donor through a licensed physician."<sup>99</sup> Further bolstering the court's decision to award Jhordan parental rights, outside of the clear statutory text, was the fact that "[t]he record demonstrates no clear understanding that Jhordan's role would be limited to the provision of semen and that he would have no relationship with [the child]; indeed, the parties' conduct indicates otherwise."<sup>100</sup>

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<sup>90</sup> *Id.* at 390.

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

<sup>92</sup> *Id.* at 396. ("The semen donor here was permitted to develop a social relationship with Mary and Devin as the child's father. During Mary's pregnancy Jhordan maintained contact with her. They visited each other several times, and Mary did not object to Jhordan's collection of baby equipment or the creation of a trust fund for the child. Mary permitted Jhordan to visit Devin on the day after the child's birth and allowed monthly visits thereafter.")

<sup>93</sup> *Id.* at 390.

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

<sup>95</sup> *Id.* at 389.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* Under CAL. CIV. CODE § 7005 (West 1979), "[t]he donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived."

<sup>99</sup> *Jhordan*, 179 Cal. App. 3d at 394.

<sup>100</sup> *Id.* at 396.

The outcomes in *C.C.* and *Jhordan C.* demonstrate the limits of a strictly intent based test. If the parties' intentions are misaligned or unclear, courts are forced to make decisions that invariably cause an undesired outcome for one party. *C.O. v. W.S.* is one of the more recent decisions to grant a known sperm donor parental rights and responsibilities against the wishes of the child's mother.<sup>101</sup> Unlike the previous cases, in *C.O.*, the mother and known sperm donor were not friends or acquaintances, but in a relationship.<sup>102</sup> Another difference from the earlier cases is that the parties had an oral agreement that W.S., the sperm donor, would be a "male role model."<sup>103</sup> The oral agreement was ultimately insufficient, however, because the parties still disputed whether W.S. would "have all the rights and responsibilities of fatherhood."<sup>104</sup> Similar to the California legislature in *Jhordan*, the Ohio legislature in *C.O.* had adopted a version of the 1973 UPA.<sup>105</sup>

In awarding W.S. parental rights and responsibilities, the court held that W.S. was not precluded from attempting to seek parental rights because a licensed physician was not used in the artificial insemination process.<sup>106</sup> Lockstep adherence to the statutory text and the parties' unclear intentions prevented the court from reaching any other outcome. The court stated that even if a licensed physician was used, "[t]he statute does not prevent a paternity adjudication where an unmarried woman solicits the participation of the donor, who was known to her, and

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<sup>101</sup> 64 Ohio Misc. 2d 9, 10 (1994).

<sup>102</sup> *Id.* at 10.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 11. ("If a woman is the subject of a non-spousal artificial insemination, the donor shall not be treated in law or regarded as the natural father of a child conceived as a result of the artificial insemination, and a child so conceived shall not be treated in law or regarded as the natural child of the donor. No action under sections 3111.01 to 3111.19 of the Revised Code shall affect these consequences.").

<sup>106</sup> *Id.* at 12.

where the donor and woman agree that there would be a relationship between the donor and child.”<sup>107</sup>

## 2. Donor Has No Parental Rights and Responsibilities

In direct contrast to the outcomes in *C.M.*, *Jhordan*, and *C.O.*, in *In re K.M.H.*, the Kansas Supreme Court held that a known sperm donor did not have any parental rights or responsibilities.<sup>108</sup> S.H., the biological mother of the contested twins, instituted a suit to terminate the parental rights of D.H., the known sperm donor.<sup>109</sup> In a familiar refrain, S.H. and D.H. were friends who agreed that D.H. would provide S.H. with his sperm.<sup>110</sup> Little evidence is presented in the case about the extent of D.H.’s involvement in the pregnancy, other than that he accompanied D.H. to one clinic visit.<sup>111</sup> Clearly stated by the court, however, was that there “was no formal written contract . . . concerning . . . the expectations of the parties with regard to D.H.’s parental rights or lack thereof.”<sup>112</sup>

In deciding the case, the court was able to rely on a version of the 1973 UPA.<sup>113</sup> Of special import to the court was the writing requirement in the statute. Under the statute, “the male will never be a potential or actual parent unless there is a written agreement to that effect with the female.”<sup>114</sup> The writing requirement served two purposes. First, “it encourages men who are able and willing to donate sperm to such women by protecting the men from later unwanted claims for support from the mothers or the children.”<sup>115</sup> Second, requiring a written agreement “protects women recipients as well, preventing potential claims of donors to parental rights and

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<sup>107</sup> *Id.*

<sup>108</sup> 285 P.3d 1025, 1044 (Kan. 2007).

<sup>109</sup> *Id.* at 1029.

<sup>110</sup> *Id.*

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

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 1038. See KAN. STAT. ANN. § 23-2208 (f) (West).

<sup>114</sup> *In re K.M.H.*, 285 P.3d at 1039.

<sup>115</sup> *Id.*

responsibilities, in the absence of an agreement.”<sup>116</sup> Other commentators have opined that a written agreement “protects intent because it sets out clear directions for parties who wish to provide for a parenting situation outside of the statutory default.”<sup>117</sup> Moreover, allowing parties to enter into contracts that delineate rights enforcing the wishes of those parties would “remove the prejudice and bias of certain judges in AI cases.”<sup>118</sup> Finally, written agreements “encourag[e] careful consideration of entry into parenthood.”<sup>119</sup>

In the case, however, there was no written agreement and the parties’ intentions were not clear; therefore, the court relied on another element of the statute: the licensed physician requirement.<sup>120</sup> D.H.’s sperm was provided to a licensed physician.<sup>121</sup> Without an agreement to the contrary, the default position of the Kansas statute precluded D.H. from seeking parental rights.<sup>122</sup> The court was clear that “the statute tells [the sperm donor] how to opt out, how to become and remain a parent.”<sup>123</sup>

### 3. Donor Might Have Parental Rights and Responsibilities

In *In re R.C.*, the lack of written agreement and uncertain meaning of Colorado’s artificial insemination statute so flummoxed the court that it eventually remanded the case for a rehearing to determine the parties’ intentions.<sup>124</sup> The suit was brought by J.R., the known sperm donor, to establish his paternity.<sup>125</sup> J.R. and E.C., the biological mother, were either friends or

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

<sup>117</sup> Elizabeth E. McDonald, Student Note, *Sperm Donor or Thwarted Father? How Written Agreement Statutes are Changing the Way Courts Resolve Legal Parentage Issues in Assisted Reproduction Cases*, 47 FAM. CT. REV. 340, 350 (2009).

<sup>118</sup> Fiser, *supra* note 18, at 27.

<sup>119</sup> *In re K.M.H.*, 285 P.3d at 1040.

<sup>120</sup> *Id.* at 1042.

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

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> 775 P.2d 27, 35 (Colo. 1989).

<sup>125</sup> *Id.* at 28.



acquaintances, depending on whose characterization of the relationship was to be believed.<sup>126</sup> J.R. provided his sperm to a licensed physician, and using his sperm, E.C. was able to give birth.<sup>127</sup> There was not a written agreement between the parties, but J.R. stated that “E.C. promised that [he] would be treated as the father of any child conceived by the artificial insemination.”<sup>128</sup> Moreover, he opened a trust fund, started a college fund, created a nursery at his home, attended birthing classes, attended E.C.’s baby showers, and cared for the child when he was first born.<sup>129</sup> All of J.R.’s assertions concerning the parties’ intentions were disputed by E.C.<sup>130</sup>

Similar to most states that have adopted an artificial insemination statute, Colorado’s version was based off of the 1973 UPA.<sup>131</sup> However, the court concluded that the statute was “ambiguous with respect to the rights and duties of known sperm donors and unmarried recipients.”<sup>132</sup> Further, the court found that “the intent of the known donor and unmarried recipient is relevant to a determination of parental rights under the model UPA.”<sup>133</sup> If the parties’ intentions were aligned regarding whether J.R. would have his parental rights and responsibilities preserved, then the parties’ intentions should control the result.<sup>134</sup> Unfortunately, the lack of written agreement meant that the court was unable to make a final decision because “a factual

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<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 29-30. Under COLO. REV. STAT. ANN. § 19-4-105(b) (1986), “[t]he donor of semen provided to a licensed physician for use in artificial insemination of a woman other than the donor’s wife is treated in law as if he were not the natural father of a child thereby conceived.”

<sup>132</sup> *In re R.C.*, 775 P.2d at 34.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 35; *see also* *McIntyre v. Crouch*, 98 Or. App. 462, 470 (1989) (stating donor can attempt to establish parental rights “if he can establish that he and respondent agreed he should have the rights and responsibilities of fatherhood.”). Another interesting aspect of *McIntyre*, is that even though the statute required a licensed physician to be used, the court ignored that requirement because artificial insemination was defined in another part of the statute “without reference to whether a physician performs the insemination.” *Id.* at 467.

dispute remain[ed] as to whether J.R. and E.C. at the time of insemination agreed that J.R. would be the natural father.”<sup>135</sup>

## B. Aligned Intentions: Interference with Private Family Ordering Caused by Statutes, Judges, and Changed Intentions

Directly contrasting those situations where the parties’ intentions are misaligned are factual situations where the parties’ intentions regarding the parental rights and responsibilities of the known donor are aligned. However, even when the parties reach an agreement concerning parental rights and responsibilities, courts still struggle to effectuate the parties’ intentions.<sup>136</sup> In some cases the court refused to honor the parties’ intentions for statutory reasons and in other cases the court refused to honor the parties’ intentions because of a lack of a written agreement.<sup>137</sup> Regardless of the reasons, even where parties’ intentions are aligned, court decisions have impacted the parental rights and responsibilities of known sperm donors in undesired ways.<sup>138</sup>

### 1. *Donor Has Parental Rights and Responsibilities*

In *Mintz v. Zoernig*, the court was confronted with the problem of what to do when the parties change their intention.<sup>139</sup> The biological mother was a longtime friend of the eventual sperm donor.<sup>140</sup> Living with her partner, the biological mother ultimately convinced her friend to provide his sperm with the understanding that “the women would be the primary parents.”<sup>141</sup> Without using a licensed physician, the biological mother impregnated herself.<sup>142</sup> After the child was born, the donor, biological mother, and the mother’s partner “reduced their agreement into

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<sup>135</sup> *In re R.C.*, 775 P.2d at 35.

<sup>136</sup> See *infra* Part III.

<sup>137</sup> See *infra* Part III.B.1-3.

<sup>138</sup> See *infra* Part III.B.1-3.

<sup>139</sup> 145 N.M. 362 (Ct. App. 2008).

<sup>140</sup> *Id.* at 363.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

writing.”<sup>143</sup> Soon after, the relationship between the two women ended.<sup>144</sup> By comparison, the relationship between the known sperm donor and the biological mother continued.<sup>145</sup> One more child would be conceived using the same donor’s sperm; however, instead of a written agreement, the parties orally agreed that the donor would not be financially responsible for the child, but would act as a “male role model.”<sup>146</sup>

For nearly five years after the birth of the first child, the parties “acted in accordance with the agreement[s].”<sup>147</sup> Eventually, however, the mother sought child support from the known sperm donor.<sup>148</sup> Before each of the two children were born the parties’ intentions were clear: the donor father would not have any financial responsibilities towards the children and would only be minimally involved as a male role model. The court, however, held that because a licensed physician was not used in the insemination process, the protections offered for known sperm donors in the New Mexico artificial insemination statute were inapplicable.<sup>149</sup> Moreover, the donor acted like more than a male role model. He held “himself out as the children’s father” and “enjoyed regular visitation with each child.”<sup>150</sup> The parties’ agreement intended one outcome, but the parties’ actions were not in line with those intentions.

## 2. Donor Has No Parental Rights and Responsibilities

Like the parties in *Mintz*, the parties in *Ferguson v. McKiernan* had aligned intentions and an agreement evidencing their aligned intention, concerning the known sperm donor’s parental rights and responsibilities.<sup>151</sup> *Ferguson*, the biological mother, and McKiernan, the

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<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 364.

<sup>150</sup> *Id.* at 365.

<sup>151</sup> 596 Pa. 78 (2007).

known sperm donor, were formerly in a relationship together.<sup>152</sup> Ferguson attempted on multiple occasions to convince McKiernan to donate his sperm.<sup>153</sup> Finally relenting, McKiernan donated his sperm on the condition that he would not seek any parental rights and Ferguson would not attempt to impose any parental responsibilities.<sup>154</sup> McKiernan provided his sperm to a licensed physician and Ferguson was eventually able to get pregnant.<sup>155</sup> Unlike the known donor in *Mintz*, during and after the pregnancy, McKiernan had almost no further involvement with Ferguson. Years following the birth of the children Ferguson attempted to secure child support.<sup>156</sup>

Pennsylvania, like many other states, had no artificial insemination statute.<sup>157</sup> The court struggled in reaching its conclusion. Despite a lower court ruling to the contrary, McKiernan was not responsible for child support because

they negotiated an agreement outside the context of a romantic relationship; they agreed to terms; they sought clinical assistance to effectuate IVF and implantation of the consequent embryos, taking sexual intercourse out of the equation; they attempted to hide Sperm Donor's paternity from medical personnel, friends, and family; and for approximately five years following the birth of the twins both parties behaved in every regard consistently with the intentions they expressed at the outset of their arrangement, Sperm Donor not seeking to serve as a father to the twins, and Mother not demanding his support, financial or otherwise.<sup>158</sup>

If Ferguson were allowed to disregard her clear initial intention and vitiate the parties' agreement, then Ferguson would not only be harming McKiernan, but also future women and future known sperm donors.<sup>159</sup> The dissent, however, strongly objected to the majority's decision

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<sup>152</sup> *Id.* at 81.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

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

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 95.

<sup>159</sup> *Id.* at 96-97.

[A] would-be mother would have no choice but to resort to anonymous donation or abandon her desire to be a biological mother, notwithstanding her considered personal preference to conceive using the sperm of someone familiar, whose background, traits, and medical history are not shrouded in mystery. To much the same end, where a would-be donor cannot trust that he is safe

on the basis that it failed to protect the best interests of the child.<sup>160</sup> To counteract the dissent's concern, the court noted that, "[a]bsent the parties' agreement . . . the twins would not have been born at all."<sup>161</sup> Denying a source of support for the children was troubling; however, a contrary result would have harmed the procreative liberty of all parties involved and future potential parents.<sup>162</sup> Interestingly, the result in the case would likely have been the same had Pennsylvania adopted either version of the UPA.<sup>163</sup>

### *3. Donor Might Have Parental Rights and Responsibilities*

A case of more recent vintage addressing the parental rights and responsibilities of known sperm donors is *E.E. v. O.M.G.R.*<sup>164</sup> The decision in *E.E.* fully demonstrates courts' rigid adherence to statutory provisions.<sup>165</sup> O.M.G.R., the known donor, was a friend of E.E.<sup>166</sup> No licensed physician was used in the artificial insemination process.<sup>167</sup> However, the parties did enter into a written agreement "whereby [O.M.G.R.] contracted to surrender and terminate all future rights and responsibilities to the child and [E.E.] assumed all financial responsibility for the child."<sup>168</sup> After the child's birth, both parties attempted to get the court to enter a consent

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from a future support action, he will be considerably less likely to provide his sperm to a friend or acquaintance who asks, significantly limiting a would-be mother's reproductive prerogatives.

<sup>160</sup> *See id.* at 100-01 (Eakin, J., dissenting) (arguing that a child's best interest should be elevated over the right to contract).

<sup>161</sup> *Id.* at 97 (majority opinion).

<sup>162</sup> *Id.*

<sup>163</sup> *See* UNIFORM PARENTAGE ACT §§ 702-704 (amended 2002); *see also* UNIFORM PARENTAGE ACT §5 (1973).

<sup>164</sup> 420 N.J. Super. 283 (2011).

<sup>165</sup> *See id.* at 289 (discussing the various requirements under the statute).

<sup>166</sup> *Id.* at 285. The court's clerk must not have researched many cases, because the court stated "[t]he facts of this case are unusual." *Id.*

<sup>167</sup> *Id.* at 286.

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

order reflecting the parties' agreement and intentions to terminate O.M.G.R.'s parental rights.<sup>169</sup> The court refused.<sup>170</sup>

Unlike the court in *Ferguson*, the court in *E.E.* elevated statutory miasma over the parties' clear intentions as evidenced by a written agreement.<sup>171</sup> Under the New Jersey artificial insemination statute, in order for a known sperm donor to not have parental rights and responsibilities a licensed physician must be used.<sup>172</sup> The court refused "to ignore a portion of the statute because of the parties' intent."<sup>173</sup> While the court failed to terminate O.M.G.R.'s parental rights, it did hold that the parties themselves were free to follow the agreement.<sup>174</sup> No child support or visitation was ordered.<sup>175</sup> Presumably, O.M.G.R. could still be liable in the future for child support if E.E. or the state of New Jersey sought such support.<sup>176</sup>

#### IV. UTILIZING AN INTENT BASED ANALYSIS, AGREEMENTS DISCLAIMING PARENTAL RIGHTS AND RESPONSIBILITIES BETWEEN KNOWN SPERM DONORS AND THE PROSPECTIVE PARENT OR PARENTS SHOULD BE UPHELD

The court in *E.E. v. O.M.G.R.* described the fact situation it was presented with as "unusual."<sup>177</sup> In cases from across the country, however, courts have been forced to determine the parental rights and responsibilities of known sperm donors.<sup>178</sup> This has compelled courts to look at statutes predating the exploding use of the artificial insemination process, or even more problematically to look at inapplicable common law rules.<sup>179</sup> Elevating irrelevant statutory requirements, like mandating the use of a licensed physician, over the parties' clear intentions

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

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

<sup>171</sup> *Id.* at 292-93.

<sup>172</sup> *Id.* at 289.

<sup>173</sup> *Id.* at 293.

<sup>174</sup> *Id.*

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

<sup>176</sup> *See id.* at 293. ("The existence of parental rights and the exercise of those rights are different.")

<sup>177</sup> 420 N.J. Super. 283, 285 (2011).

<sup>178</sup> *See supra* Part III.A-B.

<sup>179</sup> *See Lewis, supra* note 22, at 988-89.

has led to problematic outcomes.<sup>180</sup> A new standard for determining the parental rights and responsibilities of known sperm donors must incorporate and respect the idea of intentional parentage.<sup>181</sup> Under an intent based analysis, written agreements disclaiming the parental rights and responsibilities of a known sperm donor should be enforced. Courts should limit their involvement in private family ordering when consenting parties reach a written agreement concerning the parental rights and responsibilities of a known sperm donor.

#### A. A Powerful Combination: Intent Based Parentage Combined with a Written Agreement

Modern private family ordering presents a seemingly intractable problem area for courts. Since the advent of the common law system, biology and adoption have been the primary means through which to establish parentage.<sup>182</sup> In cases involving known sperm donors, however, biology is ill-suited to determine parental rights and responsibilities. As evidenced in the Marotta case, many times the donor's only contribution is limited to genetic material.<sup>183</sup> Ignoring the obvious limitations of the donor's involvement, courts still find it incumbent to impose parental responsibilities on parties.<sup>184</sup>

An intent based approach, by comparison, is not so limited. While, “[p]rocreating by ordinary coital means necessarily includes a degree of ambiguity regarding purpose,” the advent of “[m]odern reproductive technology has greatly enhanced the potential for intention in procreative behavior.”<sup>185</sup> Intention “connotes choice, or selection among available courses of action” and those intentions should be respected by courts.<sup>186</sup> Therefore, “intentions that are

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<sup>180</sup> See, e.g., *E.E.*, 420 N.J. Super. at 173 (refusing to enforce a written agreement because no licensed physician was used).

<sup>181</sup> See *supra* note 70 and accompanying text.

<sup>182</sup> Jacobs, *supra* note 47, at 434.

<sup>183</sup> Saletan, *supra* note 7.

<sup>184</sup> See *supra* Part III.A-B and accompanying text.

<sup>185</sup> Shultz, *supra* note 48, at 307-08.

<sup>186</sup> *Id.* at 307.

voluntarily chosen, deliberate, express and bargained-for ought presumptively to determine legal parenthood.”<sup>187</sup>

One of the main concerns with adopting an intent based approach to determining the parental rights and responsibilities of known sperm donors is that identifying parties’ intentions can often be difficult.<sup>188</sup> Intentions can be unclear or parties can change their intentions. Ambiguity problems are solved by written agreements. Clear evidence of parties’ intentions is provided by written agreements.<sup>189</sup> Written agreements also eliminate the need for a court to engage in an often futile attempt to divine parties’ intentions.<sup>190</sup> Moreover, written agreements protect both the persons desiring to become parents and the known sperm donor willing to donate his sperm.<sup>191</sup>

Current statutory approaches are riddled with shortcomings. Requiring the use of a licensed physician, for example, discriminates against low-income individuals, unwed women, and lesbians.<sup>192</sup> Yet strict adherence to these statutory requirements is endemic in court decisions delineating the parental rights and responsibilities of known sperm donors.<sup>193</sup> Even the most recent UPA provisions covering sperm donation, which eliminate the licensed physician requirement, are limited to heterosexual couples.<sup>194</sup> As noted forcefully by one commentator, “[i]nformed parties—whether gay, lesbian or straight—should be allowed to make their own decisions about their rights and abilities to procreate. Allowing parties to enter into contracts that delineate rights enforcing the wishes of those parties would remove the prejudice and bias of

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<sup>187</sup> *Id.* at 323.

<sup>188</sup> *See supra* Part III.A.1-3.

<sup>189</sup> Lewis, *supra* note 22, at 1004.

<sup>190</sup> *See supra* Part III.A.1-3.

<sup>191</sup> McDonald, *supra* note 116, at 350.

<sup>192</sup> Lewis, *supra* note 22, at 976.

<sup>193</sup> *See supra* Part III.A.-B.

<sup>194</sup> Fiser, *supra* note 18, at 11.



certain judges in AI cases.”<sup>195</sup> Written agreements clearly evidencing parties’ intentions regarding the parental rights and responsibilities of known sperm donors should be enforced. Other approaches have proven futile, and have led to wildly different outcomes, which are dependent on courts’ biases and interpretation of ineffective statutes.

Arguments can be made to the contrary. One argument is that known sperm donors should be treated no differently from a man who has sexual intercourse with a woman.<sup>196</sup> Such an argument was made by the dissent in *Ferguson*, who noted forcefully that for children resulting from normal sexual intercourse “[a] parent cannot bargain away the children’s right to support.”<sup>197</sup> In the case of a known sperm donor, “[the] only difference in this case and any other contraception [i.e., sexual intercourse] is the intervention of hardware between one identifiable parent and another.”<sup>198</sup> However, there are two poles on the continuum of procreative techniques. On one end of the continuum is a sexual encounter, which “requires both parents to provide support.”<sup>199</sup> On the other end of the continuum is an anonymous sperm donation, for which there is a near consensus “neither imposes obligations nor confers privileges upon the sperm donor.”<sup>200</sup> No “principled basis” exists for a distinction between known and unknown sperm donors.<sup>201</sup> When parties have a shared intention evidenced by a writing regarding the parental rights and responsibilities of a known sperm donor, the fact that the donor is known should not change the outcome.<sup>202</sup> Therefore, on the continuum, known sperm donors are more akin to unknown sperm donors, who do not have parental rights and responsibilities imposed on them.

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<sup>195</sup> *Id.* at 27.

<sup>196</sup> *See Ferguson v. McKiernan*, 596 Pa. 78, 100-01 (2007) (Eakin, J., dissenting).

<sup>197</sup> *Id.* at 103.

<sup>198</sup> *Id.* at 101.

<sup>199</sup> *Id.* at 94 (majority opinion).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 96.

<sup>202</sup> *Id.* at 95.

Another argument made against enforcing parties' clearly evidenced intentions regarding the parental rights and responsibilities of known sperm donors is such agreements are not in a child's best interest because the child loses a possible source of support.<sup>203</sup> There are many strong countervailing reasons not to impose parental rights and responsibilities on known sperm donors contrary to parties' clear intentions, especially the procreative liberty of prospective parents.<sup>204</sup> Further, in many cases there already were two parents available, but one parent was the biological mother's lesbian partner.<sup>205</sup> If courts would overcome their own biases against certain potential parents, then the courts would not be forced to impose parental rights and responsibilities on known sperm donors against parties' clear intentions. Moreover, courts are arguably misinterpreting the nature of a contract between a known sperm donor and a potential parent. One scholar argues that

the contracts between sperm recipient and sperm donor are not contracts for paternity or contracts necessarily delineating the rights of the child; these contracts are drawn up prior to insemination and are contracts for the donation of sperm, not necessarily about the custody or creation of a child. At most, these are contracts for potential children. The donor is not donating a child, he is donating sperm that may or may not result in the recipient's impregnation.<sup>206</sup>

If there was no agreement in place "no child would exist in the first place, no child whose 'best interest' trump the intents of the donor and donee."<sup>207</sup> Resultantly, clearly evidenced intentions disclaiming the parental rights and responsibilities of a known sperm donor should be enforced.

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<sup>203</sup> *Id.* at 100-01 (2007) (Eakin, J., dissenting).

<sup>204</sup> *See supra* note 159.

<sup>205</sup> *See e.g.*, Saletan *supra* note 7 (noting that Bauer and Schreiner already successfully raised children together); *Jhordan C. v. Mary K.*, 179 Cal. App. 3d 386, 389 (1986) (two women in a lesbian relationship.)

<sup>206</sup> Fiser, *supra* note 18, at 24-25

<sup>207</sup> *Id.* at 25. At some point in the future, any genetic material from any body part might be sufficient to create a child. *Id.*

## B. Predicting Outcomes for the Craigslist Father

Unfortunately for William Marotta, the state of Kansas has adopted a version of the 1973 UPA.<sup>208</sup> Pursuant to the statute, the only way for a known sperm donor to avoid having parental rights and responsibilities is to use a licensed physician.<sup>209</sup> Marotta did not provide his sperm to a licensed physician.<sup>210</sup> Forcing parties to use a licensed physician is problematic on a number of levels.<sup>211</sup> In Marotta's case, however, it is particularly odious because Angie Bauer and Jennifer Schreiner's doctor refused to deem them fit parents.<sup>212</sup> Therefore, if Marotta refused to donate his sperm, the women would have been completely prevented from being parents despite a long-history of raising children.<sup>213</sup> Stuck between undesirable outcomes—Marotta forced to have parental rights and responsibilities or the women prevented from having a child—the parties reached a sensible solution. The parties entered into an explicit written contract clearly evidencing their intentions.<sup>214</sup>

Factually, Marotta's case is most similar to the donors in *Ferguson* and *E.E.*<sup>215</sup> For Marotta, and the known sperm donors in *Ferguson* and *E.E.*, there was an agreement evidencing the parties' aligned intentions: the known donor would have no parental rights or responsibilities.<sup>216</sup> In *Ferguson*, the court correctly respected the parties' agreement; in *E.E.*, the court refused to enforce the parties' written agreement.<sup>217</sup> Marotta, however, also committed the

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<sup>208</sup> KAN. STAT. ANN. § 23-2208 (f) (West).

<sup>209</sup> *Id.*

<sup>210</sup> Van Dye, *supra* note 4.

<sup>211</sup> *See supra* Part I.A.

<sup>212</sup> Saletan, *supra* note 7.

<sup>213</sup> *Id.*

<sup>214</sup> Chuck, *supra* note 8.

<sup>215</sup> *Compare*, *E.E. v. O.M.G.R.*, 420 N.J. Super. 283 (2011) (refusing to enforce written agreement disclaiming known sperm donor's parental rights and responsibilities), *and Ferguson v. McKiernan*, 596 Pa. 78 (2007) (enforcing an oral agreement disclaiming known sperm donor's parental rights and responsibilities).

<sup>216</sup> *See Ferguson*, 596 Pa. at 81 (describing oral agreement); *E.E.*, 420 N.J. Super. at 286 (describing written agreement).

<sup>217</sup> *Ferguson*, 596 Pa. at 95; *E.E.*, 420 N.J. Super. at 285.

devastating error, in many courts' view, of not using a licensed physician.<sup>218</sup> In *Jhordan C. v. Mary K., C.O. v. W.S., Mintz v. Zoernig*, and *E.E.*, the parties also failed to use a licensed physician.<sup>219</sup> Failure to use a licensed physician allowed the court in each referenced case to reach a conclusion that frustrated the intentions of one or both parties.<sup>220</sup> Therefore, in Marotta's case the court might have an avenue to disregard the parties' aligned intentions. The court, however, should not; not only were the parties' intentions aligned, but the parties evidenced those clear intentions in a written agreement. Adherence to a statute formulated before the rise in use of artificial insemination should not take precedence over intentions so clearly evidenced.

Additionally, there is case law in Kansas that directly undercuts arguments the state might make against Marotta. In *In re K.M.H.*, the Kansas Supreme Court held that a known sperm had no parental rights or responsibilities.<sup>221</sup> The basis for the suit against Marotta is that the Kansas is seeking a source of support for a child.<sup>222</sup> Notice, however, that in *K.M.H.*, the court closed off one avenue for potential child support. Moreover, before making its holding, the court also stated that under the applicable artificial insemination statute, "the male will never be a potential or actual parent unless there is a written agreement to that affect with the female."<sup>223</sup> The only difference for possible outcomes in *K.M.H.* and Marotta's case, therefore, is that Marotta failed to provide his semen to a licensed physician.<sup>224</sup> Effectively, the state's argument is based off an unnecessary and problematic portion of an outdated statute.

Kansas's argument cannot be based off of the desire to find a source of support for a child because that concern was completely ignored in *K.M.H.* Holding Marotta responsible for

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<sup>218</sup> Van Dye, *supra* note 4.

<sup>219</sup> See *supra* Part III and accompanying text.

<sup>220</sup> See *supra* Part III and accompanying text.

<sup>221</sup> 285 P.3d 1025, 1044 (Kan. 2007).

<sup>222</sup> See Van Dye, *supra* note 4.

<sup>223</sup> *In re K.M.H.*, 285 P.3d at 1039.

<sup>224</sup> See Van Dye, *supra* note 4.

support payments would lead to very harmful consequences for women’s procreative liberty. Women with means will be able to choose their sperm donors without fear because such women will be able to afford to use a licensed physician. Poor women and their sperm donors will have no such peace of mind, even if they clearly evidence their intentions in writing, because poor women are unable to afford using a licensed physician.<sup>225</sup> It is a dangerous precedent to imbue a fundamental liberty interest,<sup>226</sup> “with a sliding scale of wealth.”<sup>227</sup> Courts should enforce parties’ intentions regarding the parental rights and responsibilities of known sperm as evidenced in written agreements.

#### CONCLUSION

“[M]ore than one-percent of children born in the United States annually,” are the result of assisted reproductive technology procedures, including artificial insemination.<sup>228</sup> Despite the increased use of artificial insemination, courts have still been unable to develop a clear and consistent test for determining paternity. Most states lack statutes addressing paternity for known sperm donors.<sup>229</sup> The minority of states that have statutes have created statutory schemes based on the 1973 Uniform Parentage Act that do not protect parties’ intentions. Written agreements either creating or terminating parental rights and responsibilities of known sperm donors should be enforced. Written agreements are clear expressions of parties’ intentions and protect all involved in the artificial insemination process. Only in the absence of written agreements

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<sup>225</sup> See Lewis, *supra* note 22, at 976. (“[T]he requirement that a licensed physician perform the procedure makes the process cost prohibitive to some couples.”).

<sup>226</sup> See Eisenstadt v. Baird, 405 U.S. 438, 453 (noting that the fundamental right of procreative liberty applies to unmarried and married individuals).

<sup>227</sup> See State v. Oakley, 629 N.W.2d 200, 219 (Wisc. 2001) (Bradley, J., dissenting) (“[B]y allowing the right to procreate to be subjected to financial qualifications, the majority imbues a fundamental liberty interest with a sliding scale of wealth.”).

<sup>228</sup> M. Scott Serfozo, *Sperm Donor Support Obligations: How Courts and Legislatures Should Properly Weight the Interests of Donor, Donee, and Child*, 77 U. CIN. L. REV. 715 (2008).

<sup>229</sup> See *supra* note 13.

evidencing parties' intent should courts resort to the default mechanisms in statutes or consider other issues such as public policy.