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ARTICLE

IS WHAT WE WANT WHAT WE NEED, AND CAN WE GET IT IN WRITING? THE THIRD-WAVE OF FEMINISM HITS THE BEACH OF MODERN PARENTAGE PRESUMPTIONS

By: Justice Carol A. Beier and Larkin E. Walsh

Modern statutes on parentage regarding artificial insemination and the cases that have interpreted them reflect the explosion of family gender roles by second-wave feminism. Although a natural father now is generally expected to share the rights and obligations of parentage with a natural mother, this is not so if he is a mere contributor of biological material. Are the modern presumptions underlying such statutes, what we used to want, what we have come to need? Or, is current law too much a reflection of the essentialism for which the second-wave is sometimes justly criticized?

*Third-wave individualism and resistance to inflexible doctrine supply interesting lenses for an examination of the developing law in this area. Particularly, a recent Kansas case, *In the Interest of K.M.H.*,¹ is the first to evaluate a statute designed to give power to individual choice by making a parentage presumption secondary to an agreement between a woman and a sperm donor that the donor will be treated as a parent.*

This paper explores the context and outcome of this case and whether we have exhausted the limits of legal reform that can be achieved through the creation of — even progressive — presumptions about parentage. Given the changes wrought under the influence of the second-wave, do such presumptions retain vitality and usefulness? Or, do they produce only a different, but not necessarily better, set of obstacles to formation and preservation of individual families and their informed choices?

¹ 169 P.3d 1025 (Kan. 2007).

THE SETTING FOR *K.M.H.*

The primary parentage presumption common in American law before the advent of second-wave feminism in the 1960s was based on Victorian separate spheres ideology and concurrent relative ignorance of the science of human reproduction.² Separate spheres mandated that women and men occupy distinct cultural sectors: women — at least those of a certain race and class — were destined by biology to keep house and bear and rear children. Men were likewise destined by biology; but their lot was to control everything extrafamilial, *i.e.*, all other social, political, and commercial human interactions.³

The nuclear family on which this ideology was built received reinforcement from law while science developed. Motherhood was an observable, verifiable fact. Fatherhood was not. Discriminating blood typing and DNA tests that would make a man's responsibility for a pregnancy certain were many years in the future. In the meantime, identification of fathers must be accomplished in another way.

Lord Mansfield's rule fit the bill nicely.⁴ The rule established a legal presumption that a woman's husband was the father of any child born during the couple's marriage, regardless of evidence to the contrary, and guaranteed the child's legitimacy.⁵ This met polite society's demand for legal certainty when no biological certainty was yet possible. Like all legal fictions, the presumption relied on the unspoken premises that pattern what was possible and desirable and that its general usefulness and predictability trumped any specific and potentially messy inaccuracy. True enough or often enough would be good enough.

The second-wave of the American feminist movement — and the legal reform designed to undermine and further it — had its inadequacies and sometimes painful internal divisions, but it succeeded in at least one dramatic and overdue way: it identified the rigid gender roles of separate spheres ideology as the potential — and choice-throttling oppressions they were. As it happened, it did so at roughly the same time that scientific advances rendered traditional

² See, *e.g.*, Nadine Taub & Elizabeth M. Schneider, *Perspectives on Women's Subordination and the Role of Law*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE*, 117, 118 (David Kairys ed., 1982).

³ See, *e.g.*, *id.* at 117-24.

⁴ Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family*, 1 *UTAH L. REV.* 93, 117 n.86 (1996).

⁵ See *Goodright v. Moss*, 98 Eng. Rep. 1257 (1777) (neither spouse's testimony can be admitted to "bastardize the issue born after marriage"); see also Brashier, *supra* note 4, at 117 nn.85-87.

sexual intercourse unnecessary for human procreation.⁶ One of those advances, artificial insemination, initially used almost exclusively to treat infertility in married heterosexual couples,⁷ has now moved far beyond that limitation. Of course, the law has had to move with it.

One of the earliest of those moves came from the National Conference of Commissioners on Uniform State Laws when, in 1973, it promulgated the Uniform Parentage Act (UPA).⁸ Containing a provision specifically designed to address the parentage of children born through artificial insemination, 1973 UPA incorporated two rigid presumptions, one old and one new: paternity of a husband and non-paternity of a sperm donor. Section 5 read:

(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.⁹

The majority of states that have adopted similar legislation have based their language directly on 1973 UPA and its two presumptions.¹⁰ The husband of an artificially inseminated married woman bears all rights and obligations of paternity as to any child conceived, regardless of whether the sperm used was his own or a donor's.¹¹

⁶ See Brashier, *supra* note 4, at 181 n.288 and accompanying text (citing WILFRED J. FEINGOLD, *ARTIFICIAL INSEMINATION* 59, 63 (2d ed. 1976)); Vern L. Bullough, *Artificial Insemination* (2004), http://www.glbtc.com/socialsciences/artificial_insemination.html.

⁷ Bullough, *supra* note 6.

⁸ See UNIF. PARENTAGE ACT § 5, (amended 2000), 9B U.L.A. 407, 407-08 (2001).

⁹ *Id.*

¹⁰ See ALA. CODE § 26-17-21 (1992) (identical); MINN. STAT. ANN. § 257.56 (West 2007) (same); MO. ANN. STAT. § 210.824 (West 2004) (same); MONT. CODE ANN. § 40-6-106 (2007) (same); NEV. REV. STAT. ANN. § 126.061 (LexisNexis 2004) (same); see also OR. REV. STAT. § 109.239 (2007). Other states still have no legislation in this area, including Hawaii, Indiana, Iowa, Kentucky, Maine, Michigan, Mississippi, Nebraska, Pennsylvania, Rhode Island, South Carolina, South Dakota, Vermont, and West Virginia.

¹¹ ALASKA STAT. § 25.20.045 (2006); ARK. CODE ANN. §§ 28-9-201, 202, 209 (2004); FLA. STAT. ANN. § 742.11 (West 2005); GA. CODE ANN. § 19-7-21 (2004) (requires husband's consent); LA. CIV. CODE ANN. art. 188 (2007) (prevents husband's disavowal); MD. CODE ANN., EST. & TRUSTS § 1-206 (LexisNexis 2001); MASS. GEN. LAWS ANN. ch. 46, § 4B (West

Meanwhile, a sperm donor for artificial insemination of a married woman will not be treated in law as if he were the father of her child, if he is not the woman's husband.¹² This design, according to 1973 UPA's drafters, was intended to protect the expectations of married couples, the expectations of sperm donors, and the best interests of any children conceived.¹³ Conspicuously absent from 1973 UPA's language and the drafters' concerns were unmarried women.

The earliest case to address this gap, although post-1973 UPA, arose in a state with, at the time, no legislation regarding artificial insemination. In that case, *C.M. v. C.C.*,¹⁴ a known donor brought an action to obtain visitation with the child that resulted when an unmarried woman artificially inseminated herself with his sperm. The court ruled in his favor, effectively extending Lord Mansfield's rule to this new type of unmarried "couple." In its view, the donor was the "natural father" of the "illegitimate child," because evidence established that the donor and the woman had intended to act as parents together.

The National Conference ultimately undertook revision of its model statute, resulting in the 2000 UPA. The revised version of 1973 UPA's § 5, now denominated § 702, states simply: "A donor is not a parent of a child conceived by means of assisted reproduction."¹⁵ The influence of second-wave feminism can be seen in at least two of four policy choices — actually, implicit presumptions — underlying the 2000 UPA language. First, the language reflects relaxation of previously harsh societal judgment of single motherhood by choice; § 702 no longer differentiates between married and unmarried women who undergo artificial insemination. Second, the statute is silent on the biological sex of the donor, meaning it may be applied to a donor of eggs as well as sperm; this gender neutrality, although the subject of no small amount of criticism, is the calling card of one branch of second-wave feminism and law reform. The second and third policy choices are inherent in the statute's absence of a legal distinction

1994); N.Y. DOM. REL. LAW § 73 (McKinney 1999); N.C. GEN. STAT. ANN. § 49A-1 (West 2007) (requires husband's consent); OKLA. STAT. ANN. tit. 10, §§ 551-56 (West 2007) (does not contemplate unmarried recipient); TENN. CODE ANN. § 68-3-306 (2006) (requires husband's consent). *But see* *Hernandez v. Robles*, 805 N.Y.S.2d 354, 390 (2005); *Hernandez v. Robles*, 794 N.Y.S.2d 579, 587 (2005).

¹² See, e.g., CONN. GEN. STAT. ANN. § 45a-771 (West 2004); IDAHO CODE ANN. § 39-5405 (2002); OHIO REV. CODE ANN. § 3111.95 (LexisNexis 2003); OR. REV. STAT. § 109.239 (2007).

¹³ See, e.g., UNIF. PARENTAGE ACT, *supra* note 8, cmt.; Michael J. Yaworsky, Annotation, *Rights and Obligations Resulting from Human Artificial Insemination*, 83 A.L.R. 4th 295, 301-04, 321-22 (1991).

¹⁴ 377 A.2d 821 (N.J. 1977).

¹⁵ See UNIF. PARENTAGE ACT, *supra* note 8, § 702.

between known and anonymous donors and its lack of an escape clause to enable an agreement to share parenting rights and responsibilities.¹⁶

Even before the 2000 UPA amendment, the states had begun to catch on to the presumption's failure to account for unmarried women. Several modified their statutes to remove the requirement that an artificially inseminated woman be married to someone other than the sperm donor before the presumption of donor non-paternity would apply.¹⁷

In addition, courts in four states decided cases interpreting artificial insemination statutes containing absolute bars to donor paternity. Each of these cases arose after a known donor alleged that he had agreed to share parenting with the unmarried woman who conceived through insemination with his sperm.

In the first of these cases, *Jhordan C. v. Mary K.*,¹⁸ a California donor provided semen to a woman who planned to raise any child conceived with a female partner. The statute required involvement by a physician in the procedure, but the woman did not use one. The court relied on this deviation from statutory procedure to rule that the presumption of donor non-fatherhood would not apply and awarded the donor visitation rights. The court also held that the physician involvement requirement did not infringe on the woman's rights, and it concluded it was not necessary to reach the donor's constitutional claims.

The Court of Appeals of Oregon and the Supreme Court of Colorado each decided an artificial insemination case in 1989. In the Oregon case, *McIntyre v. Crouch*,¹⁹ the donor sought to establish paternity based on an agreement with the woman inseminated, but she argued that any agreement between them was irrelevant because of the statute's absolute bar to donor paternity. The court ruled in the donor's favor. In its view, the statute raised no equal protection problem but would violate due process as applied to the donor if he could establish the existence of an agreement to share in parenting.

¹⁶ As of March 2008, four states have adopted the 2000 UPA language. See DEL. CODE ANN. tit. 13, § 8-702 (2006); N.D. CENT. CODE § 14-20-60 (2007); TEX. FAM. CODE ANN. § 160.702 (Vernon 2002); UTAH CODE ANN. § 78B-15-702 (2008).

¹⁷ See, e.g., CAL. FAM. CODE § 7613(b) (West 2004); 750 ILL. COMP. STAT. ANN. 40/3(b) (LexisNexis 1999); WIS. STAT. ANN. § 891.40(2) (West 1997) (same); see also COLO. REV. STAT. ANN. § 19-4-106(2) (West 2005) (substantially similar); CONN. GEN. STAT. ANN. § 45a-775 (West 2007) (similar); IDAHO CODE ANN. § 39-5405 (2002) (similar); OHIO REV. CODE ANN. § 3111.95(B) (LexisNexis 2003) (same); VA. CODE ANN. § 20-158(A)(3) (West 2004) (substantially similar).

¹⁸ 224 Cal. Rptr. 530 (1986).

¹⁹ 780 P.2d 239, rev. denied, 308 Or. 593, cert. denied 495 U.S. 905 (1989).

In the Colorado decision, *In the Interest of R.C.*,²⁰ the court was less specific about the theory underlying its ruling, but it also held that an absolute bar statute could not apply constitutionally if a known donor had reached an agreement to parent with the woman to be inseminated. It remanded for evidence on whether such an agreement existed in that case.

The fourth case arising before the 2000 UPA amendment, *C.O. v. W.S.*,²¹ out of Ohio, also resulted in a holding that an artificial insemination statute absolutely barring donor paternity would be unconstitutional if applied to a situation in which the donor and the artificially inseminated woman agreed he would act as a parent.²²

The last case to enrich the setting for *K.M.H.* arose after the 2000 amendment to UPA in California. That case, *Steven S. v. Deborah D.*,²³ involved an unmarried woman and a known donor married to another woman. The woman and the donor were unsuccessful at their first effort at artificial insemination. They then attempted to conceive through sexual intercourse, again unsuccessfully. A second artificial insemination was successful. There was no evidence of an agreement between the woman and the donor concerning the donor's role in the resulting child's life. The court rejected the donor's equitable estoppel argument and did not reach his equal protection and due process challenges, applying the absolute bar of the statute, fully engaging the presumption of donor non-paternity.

As the law shifted, so did feminism. The emergence of a third, distinct feminist "wave" is frequently associated temporally with the fall 1991 spectacle of now-Associate Justice Clarence Thomas' confirmation hearings before the United States Senate, which examined Professor Anita Hill's allegations of sexual harrassment. The tone of the hearings made it painfully clear that the second-wave had yet to make the workplace generally, or Capitol Hill in particular, places where equal treatment was assured.²⁴ This was a shock to

²⁰ 775 P.2d 27 (Colo. 1989).

²¹ 639 N.E.2d 523 (Ohio Ct. Com. Pl. 1994).

²² Since the 2000 UPA amendment, one state has decided two more cases addressing a statute with an absolute bar to donor paternity; but the cases added little to the legal landscape because their resolutions hinged only on standing. See *In re H.C.S.*, 219 S.W.3d 33 (Tex. App. 2006) (known donor lacked standing to pursue parentage adjudication; child conceived through assisted reproduction by unmarried donor's sister's same-sex partner using donor's sperm); see also *In re Sullivan*, 157 S.W.3d 911 (Tex. App. 2005) (known donor had standing to maintain paternity action; parties had signed preinsemination agreement stating donor would be treated as if he and the child's mother were married).

²³ 25 Cal. Rptr. 3d 482 (2005).

²⁴ DEBORAH SEIGEL, *SISTERHOOD, INTERRUPTED: FROM RADICAL WOMEN TO GRRLS GONE WILD* 110-15, 127-28 (2007); see also ASTRID HENRY, *NOT MY MOTHER'S SISTER: GENERATIONAL CONFLICT AND THIRD-WAVE FEMINISM* 16-23 (2004).

young women who had grown up with feminism “in the water.”²⁵ With all of the work of the second-wave, and many of its initiatives in place, it was clear there was more to be done. Rebecca Walker’s 1992 *Ms.* essay discussing the Thomas-Hill events, narrated the disconnect. She declared, “I am not a post-feminism feminist; I am the third-wave.”²⁶

Academic and other discourse from without and within the women’s movement, always lively and sometimes sharply critical,²⁷ became so pointed as to qualify as incendiary. Some argued that feminists of the second-wave had betrayed women.²⁸ From their perspective, the movement had become too abstract, too intellectual, too removed from real life struggles and everyday concerns.²⁹ It had assumed and perpetuated essentialist views of women and their concerns, a new but nevertheless destructive set of stereotypes. A woman who truly and fundamentally embraced the notion of equality, should not align herself with this reformulated institution of “feminism — the f-word.” As a classification, it was ultimately damaging, undermining, artificial, unnecessary, unhelpful³⁰ and psychologically, at least, oppressive.³¹ The daughters of the second-wave — this third-wave — balked at being ushered across any threshold based on their gender alone.³² The ushering felt more like a push, regardless of their desire to move in the direction mapped by their mothers. They rejected any assumption that their sex or their identity as feminists

²⁵ SEIGEL, *supra* note 24, at 98; JENNIFER BAUMGARDNER & AMY RICHARDS, MANIFESTA: YOUNG WOMEN, FEMINISM, AND THE FUTURE 83 (2000) (referring to Marlo Thomas’ 1973 album, video, and book, *Free to Be . . . You and Me*).

²⁶ See HENRY, *supra* note 24, at 23. Other significant events raised cultural awareness of the persistent and pervasive problem of domestic violence, marital rape, forced abortion, such as the 1993 trial and acquittal of Lorena Bobbitt, who in 1993, severed her husband’s penis after he raped her; the 1991 confession of serial killer Aileen Wuornos; and Mike Tyson’s 1991 arrest for the rape of Miss Black America.

²⁷ See, e.g., Nadine Taub, *Thoughts on Living and Moving with the Recurring Divide*, 24 GA. L. REV. 965, 965-69 (1990).

²⁸ See generally KATIE ROIPHE, *THE MORNING AFTER: SEX, FEAR, AND FEMINISM ON CAMPUS* (1993) (accusing second-wave rape-crisis activists of perpetuating an ideology of women as passive, victimized, helpless innocents); see also NAOMI WOLF, *FIRE WITH FIRE: THE NEW FEMALE POWER AND HOW IT WILL CHANGE THE 21ST CENTURY* (1993) (rejecting “victim feminism”); RENE DENFELD, *THE NEW VICTORIANS: A YOUNG WOMAN’S CHALLENGE TO THE OLD FEMINIST ORDER* (1995) (rejecting Victorian notions advocating political helplessness); CHRISTINA HOFF SOMMERS, *WHO STOLE FEMINISM? HOW WOMEN HAVE BETRAYED WOMEN* (1994); SEIGEL, *supra* note 24, at 100-01, 121, 130; BAUMGARDNER, *supra* note 25, at 236-54; HENRY, *supra* note 24, at 28, 50, 102-05.

²⁹ DENFELD, *supra* note 28, at 5.

³⁰ SEIGEL, *supra* note 24, at 114-16.

³¹ *Id.* at 119.

³² *Id.* at 7, 105.

meant they automatically agreed with some preconceived set of values or goals.³³

This individualism poses an interesting conundrum for law reform. Third-wave feminists shrewdly discern that it has limits for achieving feminist goals of transformation and autonomy for individual, real women;³⁴ because much of the law is structured on presumptions, generalizations about the desires of individuals, and the patterns most helpful to achieving them.

Bridget Crawford posits that the third-wave's reclamation of feminism through engagement with the media is powerful "cultural work" that may be a necessary pre-condition to an evolution in the law,³⁵ and she predicts that "third-wave engagement with culture may be a precursor to the law's adoption of some third-wave feminist ideas."³⁶ In essence, the thesis is that the media are tools to produce cultural infrastructure, without which even the best intentioned and artfully designed legal reforms are ineffective. For example, women may now have the legal right to enter into contracts, but exercise of that right requires extralegal recognition that women, in fact, have power to bargain and to control something worth bargaining for.

IN THE INTEREST OF K.M.H.

Kansas adopted certain portions of 1973 UPA in 1985³⁷ but did not legislate on artificial insemination until 1994.³⁸ At that point, drafters departed from the UPA design in two respects: (1) they made no distinction between married and unmarried women undergoing the procedure, and (2) they specifically provided that a woman and a sperm donor could agree in writing to escape the legal presumption of donor non-paternity. The statute, Kansas Statute Annotated § 38-1114(f), thus reads:

The 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

³³ See Ann Ferguson, *Moral Responsibility and Social Change: A New Theory of Self*, 12 HYPATIA 116, 133 (Summer 1997).

³⁴ Bridget J. Crawford, *Toward a Third-Wave Feminist Legal Theory: Young Women, Pornography and the Praxis of Pleasure*, 14 MICH. J. GENDER & L. 99, 159 (2007) (applauding the *Manifesta*'s authors' demand we "make explicit that the fight for reproductive rights must include birth control," but critiquing their failure to evaluate "the existing state of the law and how the current jurisprudential framework may or may not be adequate for achieving this goal").

³⁵ *Id.* at 162.

³⁶ *Id.* at 162-63.

³⁷ See H.B. 2012, 1985 Leg., ch. 114 (Kan. 1985).

³⁸ See H.B. 2583, 1994 Leg., ch. 292 (Kan. 1994) (now codified at KAN. STAT. ANN. § 38-1114(f) (2000)).

he were not the birth father of a child thereby conceived, unless agreed to in writing by the donor and the woman.³⁹

The second drafting difference would eventually tell the tale in the Kansas Supreme Court's 2007 decision in *K.M.H.*, which involved an unmarried woman, S.H., who desired to become a mother through artificial insemination by a known donor.⁴⁰ She approached a friend, D.H., who agreed to participate.⁴¹ S.H. and D.H. entered into no written agreement on the donation, the insemination, or their expectations with regard to D.H.'s parental rights or lack thereof.⁴²

S.H. gave birth to twins, K.M.H. and K.C.H.⁴³ The day after their delivery, S.H. filed an action to terminate D.H.'s parental rights.⁴⁴ D.H. responded in the case initiated by S.H. and filed a separate action to establish his paternity; he acknowledged financial responsibility and sought joint custody and visitation.⁴⁵ After the actions were consolidated, S.H. moved to dismiss the paternity action, relying on the absence of a written agreement under the statute.⁴⁶ D.H. asserted that he and S.H. had an oral agreement that he would be a father to the twins.⁴⁷

D.H. challenged the constitutionality of the statute on both equal protection and due process grounds, citing the California, Oregon, and Ohio cases interpreting absolute bar statutes.⁴⁸ A majority of the court distinguished those cases because of the Kansas statute's provision permitting participants in artificial insemination to opt out of the donor non-paternity presumption through a written agreement.⁴⁹ Such a statute had not yet been "subjected . . . to a constitutional crucible"⁵⁰ in any state.

On equal protection, the majority opinion echoed the debate of equal-treatment and special-treatment feminist legal scholars of the second-wave,⁵¹ acknowledging that:

³⁹ KAN. STAT. ANN. § 38-1114(f) (2000).

⁴⁰ *In re K.M.H.*, 169 P.3d 1025, 1029 (Kan. 2007).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *In re K.M.H.*, 169 P.3d 1025, 1029 (Kan. 2007).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 1083 (citing ARK. CODE ANN. § 9-10-201 (2002); FLA. STAT. § 742.14 (2005); N.H. REV. STAT. ANN. § 168-B:3(I)(e) (2002); N.J. STAT. ANN. § 9:17-44(b) (2002); N.M. STAT. ANN. § 40-11-6(B) (2006)).

⁵¹ *See, e.g.*, Wendy Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 194-196 (1982).

K.S.A. 38-1114(f) draws a gender-based line between a necessarily female sperm recipient and a necessarily male sperm donor for an artificial insemination. By operation of the statute, the female is a potential parent or actual parent under all circumstances; by operation of the same statute, the male will never be a potential parent or actual parent unless there is a written agreement to that effect with the female.⁵²

This statutory distinction survived the intermediate equal protection scrutiny applied to such gender classifications, the majority held, because sex difference transcended mere societal construction: “[G]iven the biological differences between females and males and the immutable role those differences play in conceiving and bearing a child, regardless of whether conception is achieved through sexual intercourse or artificial insemination,” it was unlikely that S.H. and D.H. were truly similarly situated.⁵³

Even if that analytical hurdle could have been overcome, the majority stated, several legitimate legislative purposes or important governmental objectives were served by Kansas Statute Annotated § 38-1114(f).⁵⁴ The statute facilitated an individual married or unmarried woman’s choice to become a parent without engaging in sexual intercourse, either because of personal choice or because a husband or partner was infertile, impotent, or ill.⁵⁵ It encouraged

able and willing men to donate sperm to such women by protecting them from later unwanted claims for support from the mothers or the children. The statute protects women recipients as well, preventing potential claims of donors to parental rights and responsibilities, in the absence of an agreement. Its requirement that any such agreement be in writing enhances predictability, clarity, and enforceability Effectively, 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.⁵⁶

The majority then addressed D.H.’s due process claim.⁵⁷ D.H. had conceded that the statute’s provision for lifting the statutory presumption of donor non-paternity through written agreement meant it would survive due process scrutiny as applied to an anonymous sperm donor.⁵⁸ However, he asserted it could not be constitutionally applied to him, a known donor, because it deprived a biological father

⁵² *In re K.M.H.*, at 1039.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *In re K.M.H.*, 169 P.3d 1025, 1040 (Kan. 2007).

⁵⁸ *Id.*

of his parental rights without notice and a meaningful opportunity to be heard.⁵⁹

The majority agreed that an absolute-bar statute such as those at issue in the earlier California, Oregon, Colorado, and Ohio cases would lead to due process concerns.⁶⁰ But it upheld the Kansas statute and its application to D.H., ruling that the requirement of a writing to memorialize any agreement between a woman and a sperm donor denied D.H. no procedural right.⁶¹ Rather, his own inaction before donating merely set up a burden of proof that he was unable to meet.⁶²

The court also rejected D.H.'s argument that the statute inevitably made the woman who is inseminated the sole arbiter of whether a donor can become a father to a child his sperm helps conceive.⁶³ While this may be true after a donation has been made, up until that point, a prospective donor would retain complete autonomy; he could refuse to facilitate the procedure unless the woman agreed to paternity on his terms.⁶⁴

The majority also rejected D.H.'s due process claim to the extent it rested upon substantive rather than procedural grounds.⁶⁵ It held:

We simply are not persuaded that the requirement of a writing transforms what is an otherwise constitutional statute into one that violates D.H.'s substantive due process rights. Although we agree . . . that one goal of the Kansas Parentage Act as a whole is to encourage fathers to voluntarily acknowledge paternity and child support obligations, the obvious impact of the plain language of this particular provision in the Act is to prevent the creation of parental status where it is not desired or expected [The statute] ensures no *attachment* of parental rights to sperm donors in the absence of a written agreement to the contrary; it does not cut *off* rights that have already arisen and attached.

We are confident this legislative design realizes the expectation of unknown or anonymous sperm donors To the extent it does not realize the expectation of a known sperm donor, the statute tells him exactly how to opt out, how to become and remain a father.⁶⁶

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *In re K.M.H.*, 169 P.3d 1025, 1040 (Kan. 2007).

⁶⁴ *Id.* at 1041.

⁶⁵ *Id.*

⁶⁶ *Id.* at 1040-41 (emphasis in original). Two Kansas Court of Appeals judges, sitting by designation, dissented in *In re K.M.H.* They would have ruled that the statute violated due process as applied to D.H., because of his allegation that an oral agreement existed. They assumed that D.H. had a fundamental right to be a father arising out of his biological connection to the twins and could not be deprived of it without an active waiver. *Id.* at 1047-50 (Caplinger, J., dissenting, joined by Hill, J.). One of the judges also wrote separately, arguing the majority's interpretation of KAN. STAT. ANN. § 38-1114(f) did violence to half of the twins' heritage. *Id.* at 1051 (Hill, J., dissenting).

K.M.H. AND FEMINISM

The sensibility that animates third-wave feminism is evident in both the Kansas statute applied in *K.M.H.* and the reasoning of the decision. Although certain aspects of both may continue to rely on patterns and presumptions, in our view, they are consistent with the positive power and individualism that are hallmarks of feminism's third-wave.

Both the statute and majority opinion operate from a position of comfort with a contract model for formation and preservation of parental rights. Under this model, the parties are free to elect, in writing, the family structure they desire.

This freedom would not be possible but for the deconstruction of Victorian separate spheres family life accomplished during the second-wave. The gender determinism from that ideology had to be attacked and destroyed. But we note that the statute and *K.M.H.* avoid any second-wave trap of essentialist insistence on what any person, female or male, should want or must have as a replacement.

This freedom also rests upon a characteristically third-wave expectation of gender-neutral bargaining power or, perhaps, more accurately in the artificial insemination context, biological sex-driven sharing of it. The statute as drawn and enforced by the majority aims to facilitate not only what a given individual wants but what she or he needs to maximize family or non-family potential.

The upshot: under a statute such as that operating in Kansas, any woman or donor choosing to participate or not to participate in an artificial insemination procedure is not controlled by gender-based presumptions of parentage or any other person's estimation of the one, true set of "feminist 'values.'"⁶⁷ This means that certain types of law reform may be consistent with and conducive to further development of third-wave feminist ideals. We are reminded of Gloria Steinem's famous vision: "We are talking about a society in which there will be no roles other than those chosen or those earned; we are really talking about humanism."

⁶⁷ See Ferguson, *supra* note 33, at 133.