

## In with New Families, Out with Bad Law. Determining the Rights of Known Sperm Donors Through Intent-Based Written Agreements

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### I. INTRODUCTION

U.S. society is changing. Just turn on the television and see. Each week, millions of devoted fans tune in to shows like “Modern Family” and “The New Normal,” which portray the lives of “non-traditional families,” including same-sex couples with adopted children, surrogate mothers, and single parents.<sup>1</sup> The market for television shows that feature “non-traditional families” demonstrates that U.S. society and values concerning the “traditional family” are changing and accepted.<sup>2</sup>

Presently, U.S. society is no longer confined by the “Leave it to Beaver”<sup>3</sup> conception of the traditional family unit. Statistical data gathered in the 2010 U.S. Census demonstrates that over the last ten years, husband-wife households made up less than 50% of all U.S. households for the first time in U.S. history, while unmarried opposite sex households increased by 40%, and same-sex households increased by 80%.<sup>4</sup> In accordance with popular culture’s evolution of the family unit, U.S. law has also evolved to reflect the rise of “non-traditional

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1. See Rick Kissel, *‘Modern Family’ Tops, ‘American Idol’ Hits Series Low on Wednesday*, VARIETY (May 2, 2013, 9:21 AM), [variety.com/2013/tv/news/modern-family-tops-american-idol-hits-series-low-on-wednesday-1200440486/](http://variety.com/2013/tv/news/modern-family-tops-american-idol-hits-series-low-on-wednesday-1200440486/) (indicating that 9.5 million viewers watched “Modern Family” on a particular night). “Modern Family” centers on the Pritchett family, which consists of Jay, the father, Mitchell, the son, and Claire, the daughter. Jay is in his second marriage to a much younger woman, Gloria, who has a pre-teen son of her own. Jay and Gloria also have a child of their own. Mitchell is gay and has a partner named Cameron. They have an adopted baby girl. Claire is married to Phil, and they have three children. “The New Normal” centers on a gay couple, Bryan and David, who are seeking to welcome a baby into their lives. They find Goldie, a single mother of a nine-year-old, who agrees to be their gestational surrogate. Bryan, David, and Goldie develop a close friendship. Goldie’s mother is very much involved in her daughter and granddaughter’s lives.

2. See Jessica R. Feinberg, *Friends as Co-Parents*, 43 U.S.F. L. REV. 799, 803 (2009) (“Census officials note that ‘the increasing prevalence of non-traditional family structures reflects powerful societal trends that cannot be easily reversed.’”).

3. “Leave it to Beaver” was a 1950s sitcom that featured a suburban, “all-American family” comprised of a professional father, a stay-at-home mother, and their two sons. See *Leave it to Beaver*, IMDB, <http://www.imdb.com/title/tt0050032/> (last visited Oct 6, 2013).

4. See U.S. CENSUS BUREAU, HOUSEHOLDS AND FAMILIES: 2010 5–6 (Apr. 2012), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf>. In addition, between 2000 and 2010, the number of female households with no spouse present and with own children increased by 10.6% and the number of male households with no spouse present and with own children increased by 27.3%.

families.” For instance, eleven states and Washington D.C. recognize same-sex couples’ right to marry.<sup>5</sup> However, the law has not evolved as rapidly in other areas of family law that directly affect the construction of “non-traditional families.” One such area is artificial insemination and the rights of sperm donors.

Motherhood among lesbian women and single, unmarried heterosexual women is increasing in the U.S.<sup>6</sup> This is in part due to scientific advancements in assisted reproductive technology (ART) and its growing use.<sup>7</sup> Many women wishing to conceive do so through artificial insemination using a sperm donor.<sup>8</sup> While many women choose to be inseminated with semen from an anonymous donor, others use semen from a known donor.<sup>9</sup> A woman’s preference for a known donor may stem from her increased opportunity to observe the behavior and characteristics of a man she knows, access his medical history, and reduce the costs associated with the procedure.<sup>10</sup>

The law is well settled that anonymous donors relinquish their parental rights. As such, they cannot be sued for child support and cannot sue for parental rights.<sup>11</sup> However, the law regarding parentage and the rights of known donors is somewhat nebulous and often outdated. This note discusses the issues arising from these laws and the need for reform.

The conflict of determining parentage and the rights of known sperm donors occurs primarily in two scenarios.<sup>12</sup> In the first scenario, the recipient-

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5. See FREEDOM TO MARRY, [Freedomtomarry.org/states](http://Freedomtomarry.org/states) (last visited Oct 6, 2013) (listing Connecticut, Delaware, Iowa, Maine, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, Vermont, and Washington as states permitting same-sex marriage). Note that over the four month period I wrote this note, the number of states permitting same-sex marriage jumped from 9 to 11 states, with RI and DE added to the list this May, demonstrating how rapidly our acceptance of “non-traditional” families is moving forward.

6. Justyn Lezin, *(Mis)Conceptions: Unjust Limitations on Legally Unmarried Women’s Access to Reproductive Technology and Their Use of Known Donors*, 14 HASTINGS’ WOMEN’S L.J. 185, 188 (2003).

7. *Id.*

8. *Id.*

9. Lezin, *supra* note 6, at 188; see also *In re K.M.H.*, 169 P.3d 1025, 1029 (Kan. 2007) (where an unmarried female was artificially inseminated using semen from her friend); *Ferguson v. McKiernan*, 940 A.2d 1236, 1238 (Pa. 2007) (where an unmarried female was artificially inseminated using semen from a former romantic partner).

10. See Browne Lewis, *Two Fathers, One Dad: Allocating the Parental Obligations Between the Men Involved in the Artificial Insemination Process*, 13 LEWIS & CLARK L. REV. 949, 978-79 (2009) (noting that a woman may “be more comfortable using the sperm of a man she knows because she has been able to observe his behavior and ascertain his character . . . it [is] easier for the child to obtain his or her medical history . . . [and] the use of a known sperm donor eliminates the cost of the sperm and makes the use of a physician optional.”); see also Elizabeth E. McDonald, *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, 340 (2009) (noting that modern users of ART often receive sperm from known donors such as “male friends or acquaintances . . . selected for a variety of reasons, including healthy medical histories or prestigious graduate degrees.”).

11. See, e.g., *Woodward v. Comm’r of Soc. Sec.*, 760 N.E.2d 257, 270 n.23 (Mass. 2002) (stating that anonymous sperm donors sign contracts relinquishing their parental rights which is a practice that the majority of states follow) (citation omitted).

12. I have arrived at the existence of these two scenarios based on my own research and reading of cases. I found these two scenarios to be the most prevalent causes of litigation regarding this matter.

mother approaches a known donor and the parties agree that the known donor will relinquish all parental rights and responsibilities if a child is conceived. The recipient-mother agrees that she will not seek to hold the known donor responsible for financial or emotional support regarding the child. In this scenario, the legal system becomes involved when the recipient-mother reneges on this agreement and files a claim against the known donor for child support.

In the second scenario, a recipient-mother approaches a known donor and the parties agree that the known donor will have continued involvement in the child's life. This can range from full parental rights to visitation rights. However, after the child's birth, the recipient-mother terminates the relationship between the known donor and the child and contests the existence or enforceability of any agreement. It is important to note that in both the first and second scenario, the facts are often unclear as to whether there was an agreement between the parties or what the terms of any alleged agreement may be.

This note examines the issues involved in determining parental and donor rights when mothers-to-be enter into agreements with known sperm donors. First, in section II, I discuss the evolution of the Uniform Parentage Act of 1973 from its conception in 1973 to its most recent articulation in 2002. In section III, I briefly explain the intent-based approach to determining donor's rights. In section VI, I critique two types of state statutes that are applicable to parentage determinations in known-donor cases: licensed physician statutes and written agreement opt-out statutes. In section V, I discuss the two scenarios mentioned above in which litigation ensues, and a donor's rights and obligations are called into question. In section VI, I discuss the Supreme Court's decision in *Troxel v. Granville* and the challenge it may present to known-donors seeking visitation. In the note's conclusion, I propose that the best approach to determining parental rights for known-donors is an intent-based model memorialized in a formal written contract enforceable in a court of law.

## II. THE UNIFORM PARENTAGE ACT OF 1973 AND 2002

The National Conference of Commissioners on Uniform State Laws drafted the Uniform Parentage Act (UPA) in 1973.<sup>13</sup> Currently, the 1973 UPA remains in effect in thirteen states, although some of these states have amended the act since its initial adoption.<sup>14</sup> The 1973 UPA contains the following provision regarding the parental status of a donor: "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>15</sup> This provision was designed to protect the married couples' parental rights to a child conceived through artificial insemination.<sup>16</sup>

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13. See UNIF. LAW COMMISSION, <http://uniformlaws.org/Act.aspx?title=Parentage%20Act> (last visited Oct 6, 2013). One of the principle reasons that the UPA was drafted was to provide the same rights to children born to unmarried parents as those provided to marital children.

14. John J. Sampson, *Uniform Family Laws and Model Acts*, 42 FAM. L.Q. 673, 681 (2008) (noting that California, Colorado, Hawaii, Illinois, Kansas, Minnesota, Missouri, Montana, Nevada, New Jersey, Ohio, and Rhode Island still retain versions of the 1973 UPA).

15. UNIF. PARENTAGE ACT § 5(b) (1973).

16. See Justice Carol A. Beier & Larkin E. Walsh, *Is What We Want What We Need, and Can We Get*

However, the 1973 UPA provisions do not apply to unmarried women who undergo artificial insemination. This, as well as advancements in ART and legal developments over approximately 30 years,<sup>17</sup> led to the drafting of the 2002 UPA.<sup>18</sup>

The 2002 UPA takes a broader approach to parentage issues and governs ART for both married and unmarried women.<sup>19</sup> The 2002 UPA also uses a gender-neutral approach to ART by using the unqualified term “donor,” without specifying a sperm or egg donor.<sup>20</sup> Another significant change in the 2002 UPA is its modification of the parental status of a donor provision quoted above. The 2002 UPA simply states: “A donor is not a parent of a child conceived by means of assisted reproduction.”<sup>21</sup> An important divergence from the 1973 UPA is that the 2002 Act does not require that a sperm donor provide his semen to a physician in order to relinquish his parental rights and obligations.<sup>22</sup> This distinction will be discussed in greater detail in section VI. Currently, eight states have enacted the 2002 UPA.<sup>23</sup> Among those eight states, Alabama is the only one to transition from the 1973 UPA to the 2002 UPA.<sup>24</sup>

The differences between the 1973 UPA and 2002 UPA are important because, as mentioned, many states still utilize the outdated 1973 UPA.<sup>25</sup> This is problematic since, unless amended, the 1973 UPA’s ART provisions apply only

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*it in Writing? The Third-Wave of Feminism Hits the Beach of Modern Parentage Presumptions*, 39 U. BALT. L.F. 26, 29 (2008) (noting that the design of the 1973 UPA was intended, in part, to “protect the expectations of married couples.”)

17. See *Sampson*, *supra* note 14, at 680-681.

18. See UNIF. PARENTAGE ACT Prefatory Note (2002) (noting a “thoroughgoing revision of the Act” is warranted by the recent scientific advances and the states’ “widely differing treatment” on subjects both covered and uncovered by the Act.)

19. *Id.* at § 702 cmt.

20. *Id.* at § 702.

21. *Id.*

22. *Id.* at § 702 cmt. (“This section shields all donors, whether of sperm or eggs, . . . from parenthood in all situations in which either a married woman or a single woman conceives a child through ART with the intent to be the child’s parent, either by herself or with a man.”).

23. *Sampson*, *supra* note 14, at 681 (noting that Alabama, Delaware, North Dakota, Oklahoma, Texas, Utah, Washington, and Wyoming have adopted the 2002 UPA).

24. *Id.*

25. See Kristine S. Knaplund, *Children of Assisted Reproduction*, 45 U. MICH. J.L. REFORM 899, 908-09 (2012) (noting that courts struggle to apply outdated laws in ART disputes and going on to discuss the UPA). The following states retain the 1973 UPA’s licensed physician requirement and still limit the ART statute to a married woman: Colorado, Illinois, Minnesota, Missouri, Montana, and Nevada. See COLO. REV. STAT. ANN. § 19-4-106 (West 2009); 750 ILL. COMP. STAT. ANN. 40/3 (West 2013); MINN. STAT. ANN. § 257.56 (West 2013); MO. ANN. STAT. § 210.824 (West 2012); MONT. CODE ANN. 40-6-106 (West 2013); NEV. REV. STAT. 126.061 (West 2011). Hawaii and Rhode Island do not appear to have a statute regulating ART. See HAW. REV. STAT. § 584-1 (West 2013) & R.I. GEN. LAWS § 15-8-1 (West 2013). California and Kansas retain the licensed physician requirement but the law applies to both married and single women, and contains written agreement opt-out provisions. See CAL. FAM. CODE § 7613 (West 2013) & KAN. STAT. ANN. § 23-2208 (West 2012). California’s statute in particular provides for an “assisted reproduction agreement” allowing a donor to retain parental rights based on intent. See CAL. FAM. CODE § 7606 (West 2013). New Jersey and Ohio retain the licensed physician requirement but it applies to married and single women. See N.J. STAT. ANN. § 9:17-44 (West 2013) and OHIO REV. CODE ANN. §§ 3111.90, 3111.95 (West 2013).

to married women and require physician involvement.<sup>26</sup> Thus, under the 1973 UPA, when a donor provides a woman with sperm directly, rather than through a licensed physician, or when an unmarried woman uses a sperm donor to conceive, the UPA is inapplicable and a donor has not relinquished parental rights to the child.<sup>27</sup> This situation can be the catalyst for litigation regarding the parentage of a child conceived through artificial insemination. The issues presented by the 1973 and 2002 UPA demonstrate why an intent-based model for determining parentage and donor's rights should be the critical lens through which current ART and donor paternity statutes should be viewed.

### III. AN INTENT-BASED APPROACH TO DETERMINING THE RIGHTS OF KNOWN DONORS

The intent-based approach to rights of known donors is almost identical to the intent-based approach to parentage. Professor John Lawrence Hill defines intended parents as "the person or couple who initially intended to raise the child."<sup>28</sup> In other words, the intended parents are the parties who "affirmatively intended the birth of the child," "took the steps necessary to effect" ART, and "[b]ut for their acted-on intention, the child would not exist."<sup>29</sup> The intent-based approach to parentage determines the identity of the intended parents and legally enforces those intentions by declaring those parties legal parents.

The intent-based model to determine parentage can also be used to determine the rights of known donors, which may or may not include legal parentage. In artificial insemination cases, a known donor may relinquish parental rights, retain full parental rights, or establish visitation rights without parental rights. Regardless of the agreement, a court should examine the parties' intentions and determine the agreed upon relationship between the donor and the child. The court should then assign rights to the donor accordingly.

As I will discuss more fully, a formal written contract memorializes the intent of both parties while also capturing the best interests of the child. This is because the formal, written contract makes clear which individuals are dedicated to the upbringing and care of the child, and therefore it can be assumed they have the child's best interests at heart.<sup>30</sup> Thus, an intent-based approach to determining rights of known donors is best because it honors the wishes of the parties and the construction of their "non-traditional family," while also protecting the best interests of the child.

26. See UNIF. PARENTAGE ACT § 5 (1973).

27. See Knaplund, *supra* note 25, at 908-09 (detailing how the 1973 UPA determined paternity only in situations where a man provided sperm to a licensed physician "for use by a married woman who was not the donor's wife.").

28. John Lawrence Hill, *What Does it Mean to be a "Parent"? The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353, 356 n.12 (1991); see also *Johnson v. Calvert*, 19 Cal. Rptr. 2d 494, 500 (Cal. 1993) (en banc) (citing to Professor Hill's work and finding that in a surrogacy case, the woman who intended to bring about the birth of the child and intended to raise the child as her own was the natural mother).

29. *Calvert*, 19 Cal. Rptr. 2d at 500.

30. See McDonald, *supra* note 10, at 348 (explaining that written contracts designed to capture intent to parent establish care giving and parenting intention as essential determinates of parentage).

## IV. TYPES OF STATUTES

This section will focus on two different statutory schemes regulating ART and donors' parental status. Licensed physician requirement statutes and written agreement opt-out statutes demonstrate which statutory scheme best honors the intent of the parties involved when known donor paternity and rights become the subject of litigation.

## A. Licensed Physician Requirement

In 2009, William Marotta of Topeka, Kansas answered Angela Bauer and Jennifer Schreiner's Craigslist ad seeking a sperm donor.<sup>31</sup> Marotta provided the lesbian couple with his sperm and signed a contract waiving all parental rights and financial responsibility to the couple's child.<sup>32</sup> Marotta, who was not compensated for his donation, left thinking he had performed a good deed.<sup>33</sup> Schreiner and Bauer successfully performed an at-home insemination and Schreiner gave birth to a baby girl.<sup>34</sup> However, since then, Marotta has found good reason to quote the well-known saying, "No good deed goes unpunished."<sup>35</sup>

In 2012, after Bauer and Schreiner ended their relationship, Schreiner sought public benefits for the child.<sup>36</sup> In Kansas, when a single mother seeks welfare for a child, it is common for the Kansas Department for Children and Families to locate the child's biological father and order him to pay support.<sup>37</sup> In Marotta's words, Schreiner was "coerced" and "pressured" by the State to identify him as the biological father.<sup>38</sup> The State immediately filed a petition for child support against Marotta, identifying him as the legal father of Schreiner and Bauer's daughter.<sup>39</sup> Marotta has never provided financial support for the child, has only seen her twice, and is not in any way involved in her life.<sup>40</sup>

Even though Marotta signed a contract relinquishing his parental rights to Bauer and Schreiner's daughter, Kansas law recognizes him as the child's legal

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31. See *KS Sperm Donor Could be Forced to Pay Child Support* (Fox News television broadcast), available at <http://marottacase.com/index.php/component/k2/item/18-kan-sperm-donor-could-be-forced-to-pay-child-support> (interviewing Marotta regarding his legal battles with Schreiner) [hereinafter *Fox News television broadcast*]; see also *Sperm Donor Liable for Child Support* (CNN television broadcast), available at <http://marottacase.com/index.php/component/k2/item/19-cnn-newsroom-interview-sperm-donor-liable-for-child-support> (profiling Marotta's donation and subsequent legal battles) [hereinafter *CNN television broadcast*]. LS Rule 1.2 and 18.2.2.

32. *Fox News television broadcast, supra* note 31.

33. *See id.*

34. *See id.*

35. *See id.*

36. *Id.*

37. John Hanna, *William Marotta, Kansas Sperm Donor to Lesbian Couple, Fighting Child Support Payments*, THE HUFFINGTON POST (Jan. 2, 2013), [http://www.huffingtonpost.com/2013/01/02/william-marotta\\_n\\_2395412.html](http://www.huffingtonpost.com/2013/01/02/william-marotta_n_2395412.html).

38. *Fox News television broadcast, supra* note 31.

39. *See id.*

40. *Fox News television broadcast, supra* note 31. Accordingly, when Marotta was asked in a CNN interview if he would seek rights towards the child if ordered to pay child support, he replied, "No, because I'm not her parent. That's Jennifer and Angie." See *CNN television broadcast, supra* note 31.

father. This is because the applicable Kansas statute, which relieves sperm donors of their parental rights and responsibilities, requires a physician be involved in the insemination process.<sup>41</sup> The Kansas statute 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 he were not the birth father of a child thereby conceived, unless agreed to in writing by the donor and the woman.<sup>42</sup>

The Kansas statute is nearly identical to the outdated 1973 UPA, which also requires physician involvement in the insemination process in order for a donor's parental rights to be waived.<sup>43</sup> Other states, such as those that have enacted the 2002 UPA, have removed the licensed physician requirement.<sup>44</sup> Licensed physician requirements can lead to determinations of known donor rights contrary to the parties' intent when a recipient-mother uses a known donor in artificial insemination and fails to involve a physician in the procedure.

There are several reasons why women choose to self-inseminate rather than involve a physician. Physician-performed inseminations can be prohibitively expensive and are not generally covered by health insurance.<sup>45</sup> While the actual insemination itself is not that costly, there can be associated medical bills for necessities such as ultrasounds, blood work, and fertility drugs, which quickly add up. Also, often times, more than one attempt at insemination may be needed.<sup>46</sup> For many women, this process is unaffordable, especially when at-home insemination is a comparatively simple and inexpensive procedure.<sup>47</sup>

In addition, the licensed physician requirement may make donors reluctant to donate to women who choose to self-inseminate.<sup>48</sup> In a state with a licensed physician requirement, donors are not protected from parental responsibilities when insemination occurs at home. Therefore, there is a greater chance known

41. See KAN. STAT. ANN. § 23-2208(f) (West 2012).

42. *Id.* (emphasis added).

43. See UNIF. PARENTAGE ACT § 5(b) (1973); see *supra* Section II.

44. See UNIF. PARENTAGE ACT § 702 (2002); see *supra* Section II.

45. See *How Much Does Artificial Insemination Cost*, COSTHELPER, [health.costhelper.com/artificial-insemination.html](http://health.costhelper.com/artificial-insemination.html) (last visited Oct. 6, 2013) (noting it is common for insurers to exclude coverage of artificial insemination).

46. See Lucy R. Dollens, *Artificial Insemination: Right of Privacy and the Difficulty in Maintaining Donor Anonymity*, 35 IND. L. REV. 213, 214 (2001) (explaining that doctor performed insemination costs between \$235 and \$400 before blood work and medicine performed); see also *How Much Does Artificial Insemination Cost*, COSTHELPER, [health.costhelper.com/artificial-insemination.html](http://health.costhelper.com/artificial-insemination.html) (last visited Oct. 6, 2013) (noting that artificial insemination can range from \$300-\$500 per attempt and that the success rate is 10 to 20 percent, meaning that up to 10 attempts could be required before conception). Note that the medical costs of artificial insemination will vary from woman to woman based on her medical needs and the facility she chooses. Of course, whether or not a procedure is deemed "expensive" is also relative to the personal financial situation of each woman. Thus, artificial insemination may not be "expensive" for every woman but it certainly could be for some.

47. See Lezin, *supra* note 6, at 191 & n. 21 (noting that standard vaginal insemination is "often easily performed outside medical settings" and many women use the so-called "turkey-baster" method); see also E.E. v. O.M.G.R., 420 N.J. Super. 283, 285 (N.J. Super. Ct. Ch. Div. 2011) ("Plaintiff is a single woman . . . [who] did not wish to assume the expense of purchasing sperm through a sperm bank or use a licensed physician in order to effect the insemination.").

48. Lewis, *supra* note 10, at 984.

donors can be sued for paternity and child support.<sup>49</sup> Thus, because of the law, many women who cannot meet the licensed physician requirement are hindered or foreclosed from having children.<sup>50</sup>

The licensed physician requirement is not only an unnecessary burden to women; in many cases, strict adherence fails to properly honor the rights of known donors and recipient-mothers. When the licensed physician requirement is not met, courts may find that the donor did not relinquish parental rights and can be ordered to pay child support. Such a result disregards the parties' intent and is disrespectful to the family structure that the parties seek to create.

Two cases, *Jhordan C. v. Mary K.* and *E.E. v. O.M.G.R.*, demonstrate the unfavorable outcomes that the licensed physician requirement can have on known donors and recipient-mothers. Although *Jhordan C.* is a 1986 decision and California law has since been modified, its facts and analysis are still relevant today, as courts today continue to rely on it for guidance.<sup>51</sup>

*Jhordan C.* dealt with a California artificial insemination statute that contained a licensed physician requirement. The statute stated: "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 he were not the natural father of a child thereby conceived."<sup>52</sup> The facts were as follows: Mary and her partner Victoria decided to have a child through artificial insemination and to raise the child together.<sup>53</sup> The couple met Jhordan through mutual friends and chose him as their sperm donor.<sup>54</sup> The parties' versions of their pre-insemination oral agreement were conflicting.<sup>55</sup> According to Mary, she told Jhordan she did not want a donor who would have continued involvement with the child after his birth.<sup>56</sup> However, once the child was born she permitted Jhordan to see the child to "satisfy his curiosity."<sup>57</sup> According to Jhordan, he and Mary agreed he would have continued involvement with the child and he would care for the child two or three times per week.<sup>58</sup> The parties' pre-insemination oral agreement was not formalized into a written agreement, nor did either party seek legal advice.<sup>59</sup> Nevertheless, Jhordan provided his sperm to Mary and she performed an at-home self-insemination and became pregnant.<sup>60</sup>

At trial, although the parties disputed the terms of their oral agreement, they agreed on the following facts:<sup>61</sup> During Mary's pregnancy, Jhordan visited her at work, took photographs of her, told her he obtained a playpen, crib, and

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49. See CNN television broadcast, *supra* note 31 (when Marotta is asked if he would do this again had he known what would happen, he responds, "Probably not.").

50. Lewis, *supra* note 10, at 984.

51. See *E.E. v. O.M.G.R.*, 420 N.J. Super. at 289.

52. *Jhordan C. v. Mary K.*, 179 Cal. App. 3d 386, 392 (Cal. Ct. App. 1986).

53. *Id.* at 389.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 390.

61. *Id.*



high chair for her child, told her he started a trust fund for the child, and stated that he wanted to be the child's legal guardian in case Mary died.<sup>62</sup> Mary told Jhordan to keep the baby items at his home, and denied his request for guardianship, but approved of the trust fund.<sup>63</sup> Jhordan was not involved in Mary's pre-natal care; rather, Victoria accompanied Mary to her medical appointments.<sup>64</sup> However, when the child was born, Jhordan was listed on the child's birth certificate.<sup>65</sup> Jhordan visited the child the day after he was born and took pictures of him.<sup>66</sup> Five days later, he called Mary to see if he could visit the child again.<sup>67</sup> While Mary initially resisted, she allowed Jhordan to visit.<sup>68</sup> At that time, Jhordan claimed a right to see the child and Mary agreed to monthly visits.<sup>69</sup> Jhordan visited the child on about five more occasions before Mary terminated the visits.<sup>70</sup> Soon after, Jhordan filed suit against Mary to establish paternity and visitation rights.<sup>71</sup> The trial court declared Jhordan the child's legal father and granted him visitation.<sup>72</sup> Mary and Victoria appealed the trial court's decision.

On appeal, the court focused its analysis on the licensed physician requirement of the California statute, since Mary's self-insemination was non-compliant with the statute. The court described the statute's provisions as "derived almost verbatim from the [1973] UPA."<sup>73</sup> The court then gave two justifications for the licensed physician requirement.<sup>74</sup> First, physician involvement allows a doctor to obtain the complete medical history of the donor and screen for disease.<sup>75</sup> Second, the physician is a "professional third-party" who, for evidentiary purposes, can "create a formal, documented structure for the donor-recipient relationship" in case a dispute arises between the donor and recipient.<sup>76</sup> The court went on to admit that "nothing inherent in artificial insemination requires the involvement of a physician" as it is a simple procedure easily performed at home.<sup>77</sup> In addition, the court recognized that the licensed physician requirement may "offend a woman's sense of privacy and reproductive autonomy, might result in burdensome costs to some women, and might interfere with a woman's desire to conduct the procedure in a comfortable environment such as her own home or to choose the donor herself."<sup>78</sup> Yet still,

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62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 391.

73. *Id.* at 392.

74. *Id.* at 393.

75. *Id.*

76. *Id.*

77. *Id.* at 393-94.

78. *Id.* at 394.

the appellate court found that because the parties did not comply with the licensed physician requirement, Jhordan had not relinquished his parental rights, and thus, Jhordan was the legal father of Mary's child.<sup>79</sup>

First, *Jhordan* demonstrates why oral agreements regarding known donor insemination are problematic. Jhordan and Mary gave conflicting testimony about the terms of their oral agreement.<sup>80</sup> From the start, the court had few concrete facts to help determine what the parties had agreed to and what Jhordan's rights should be. The court's interpretation of the facts would have been aided by a formal, written agreement between the parties.

Second, the decision in *Jhordan C.* does not honor the parties' intent. Although the factual dispute makes it more difficult to determine the parties' intentions, the parties agreed that Mary became pregnant with the intention of parenting her child with Victoria.<sup>81</sup> The facts indicate that Mary and Victoria were co-parenting the child, who spent at least two days a week at Victoria's home and spoke with her by phone on the days they were apart.<sup>82</sup> Mary and Victoria discussed their child daily and made joint decisions about his care and upbringing.<sup>83</sup> The women and their child took vacations together, and the child regarded Victoria's parents as his grandparents.<sup>84</sup> Thus, even though the facts suggest that Mary and Victoria might have agreed to an ongoing relationship between Jhordan and their child, as evidenced by Mary's acceptance of the trust fund and acquiescence to monthly visitation, it does not seem likely that the parties agreed to Jhordan retaining full legal status as a parent.<sup>85</sup> Even Jhordan never claims that he was to be the child's legal parent, but rather that he would have an ongoing relationship with the child.<sup>86</sup>

Thus, assuming that the parties' intentions were for Mary and Victoria to be parents, and for Jhordan to have an ongoing relationship with the child, the appellate court's reliance on the licensed physician requirement and grant of legal parentage to Jhordan does not honor the parties' intentions. By considering the licensed physician requirement as the lynchpin in determining parentage, the court disregards the parties' intentions as well as the best interests of the child.

Since *Jhordan*, California has amended its parentage act to create a statutory scheme that now borrows from both the 1973 UPA and the 2002 UPA.<sup>87</sup> While California still requires physician involvement in artificial insemination for the relinquishment of donor's parental rights to be effective, the law now provides that a donor can retain parental rights if this decision is "agreed to in a writing signed by the donor and the woman prior to the conception of the child."<sup>88</sup> In addition, California law now defines an "assisted reproduction agreement" as "a

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79. *Id.* at 398.

80. *Id.* at 389.

81. *Id.*

82. *Id.* at 391.

83. *Id.*

84. *Id.*

85. *See id.* at 389-91.

86. *See id.* at 389.

87. *See* CAL. FAM. CODE § 7613 (2012).

88. *Id.* at § 7613(b) (2012).

written contract that includes a person who intends to be a legal parent of a child or children born through assisted reproduction and that defines the terms of the relationship between the parties to the contract.”<sup>89</sup> Also, California law provides that a party to the assisted reproduction agreement may bring an action to establish the parent-child relationship “consistent with the intent expressed in that assisted reproduction agreement.”<sup>90</sup> Thus, California’s addition of a written provision requirement in determining donor paternity utilizes an intent-based approach by regarding the written agreement as a memorial of the parties’ intentions and mechanism to enforce these intentions. While this does not circumvent the licensed physician requirement, it does defer to the parties’ intent where there is a written agreement.<sup>91</sup>

Although California laws regarding ART have evolved since *Jhordan*, recent court decisions still look to *Jhordan* for guidance. For instance, in *E.E. v. O.M.G.R.*, a 2011 New Jersey Superior Court dealt with a case where E.E., a single woman, performed an at-home insemination with her friend, O.M.G.R.’s sperm donation.<sup>92</sup> E.E. opted for at-home insemination because she did not wish to accrue the expenses of acquiring sperm from a sperm bank or a physician.<sup>93</sup> After E.E. became pregnant, she and O.M.G.R. entered into a notarized, written contract where E.E. would be the “sole parent and provider for the child” while relinquishing O.M.G.R. of “financial or emotional support” as well as parental rights.<sup>94</sup> In addition, after the child’s birth, E.E. and O.M.G.R. signed a consent order in which O.M.G.R. relinquished parental rights and responsibilities and E.E. assumed all financial and emotional responsibility for the child.<sup>95</sup> However, the court denied the motion for termination of O.M.G.R.’s parental rights because the parties did not comply with the licensed physician requirement, and O.M.G.R. did not relinquish parental rights.<sup>96</sup> As such, O.M.G.R. was the child’s legal parent.<sup>97</sup>

Concluding that New Jersey’s ART statutes did not apply, the court analyzed this case outside the context of artificial insemination, and instead as a matter of child custody, as if the parties had conceived a child through sexual intercourse.<sup>98</sup> This is part of the danger in the strict application of licensed physician statutes, where courts resort to application of law that is not meant to apply to artificial insemination cases.

The court began with the premise that “a child has the right to the security

89. *Id.* at § 7606.

90. *Id.* at § 7630(f).

91. Furthermore, California law has made great strides in applying the intent-based model in other areas of ART, like surrogacy. See *Johnson v. Calvert*, 19 Cal. Rptr. 2d 494, 500 (Cal. 1993) (*en banc*) (using intent to determine parentage in a surrogacy case). (KR Rule 10).

92. *E.E. v. O.M.G.R.*, 420 N.J. Super. 283, 285-86 (N.J. Super. Ct. Ch. Div. 2011).

93. *Id.* at 285.

94. *Id.* at 286.

95. *Id.*

96. *Id.* at 293-94.

97. *Id.*

98. See *id.* at 293 (noting that although donor has parental rights, he has chosen not to exercise them).

of two parents at the time of birth.”<sup>99</sup> Working from this premise, the court cited to a case in which a divorcing couple’s separation agreement contained provisions terminating the husband’s parental rights to the marital child.<sup>100</sup> The *E.E.* court stated that parties cannot contract to terminate parental rights, and that “a child’s relationship with his or her parents is so significant that all doubts are to be resolved against the destruction of that relationship.”<sup>101</sup> However, the application of this principle to the situation between *E.E.* and *O.M.G.R.* is inappropriate. There is a stark distinction between a husband who attempts to shirk his parental obligations towards a child he intended to parent, and a sperm donor relinquishing parental rights to a child he never intended to parent.

Furthermore, the court made clear that biology is determinative of parentage except in the case of artificial insemination where parties strictly comply with the licensed physician requirement.<sup>102</sup> The court stated:

Although this court can see by the parties’ original agreement that the intent was to have defendant’s role limited to supplying biological material and for defendant to be absolved from further liability, the parties failed to abide by the statute in failing to use a physician . . . . Accordingly, this court is bound to follow the language of the statute and may not ignore a portion of the statute because of the parties’ intent.<sup>103</sup>

Here, the court declared *O.M.G.R.* a legal parent, despite expressly acknowledging that the parties’ intentions were contrary to the court’s decision. The court ultimately granted sole custody to *E.E.* and did not order *O.M.G.R.* to pay child support because *E.E.* was not seeking any.<sup>104</sup> However, the court did not terminate *O.M.G.R.*’s parental rights and implied that this result was suitable so long as *O.M.G.R.* refrained from exercising his parental rights.<sup>105</sup> This suggests that if, at a later date, *O.M.G.R.* chose to exercise his parental rights, the outcome might be different.<sup>106</sup> Thus, the court left *E.E.*’s parental rights vulnerable to subsequent challenge from *O.M.G.R.*

The court’s decision in *E.E.* is problematic for several reasons. To begin with, the court seems pegged between two policy decisions, and as such, reaches a conclusion that is not entirely sound. The court strictly adheres to the licensed physician requirement and finds that *O.M.G.R.* is the legal parent, yet the court

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99. *Id.* at 286 (citing *C.M. v. C.C.*, 152 N.J. Super. 160, 167 (N.J. Super. Ct. Juv. & Dom. Rel. Ct. 1977)). Note that *C.M. v. C.C.* is a 1977 case in which a woman conceived of a child by self-insemination of sperm from a known donor, a man she had had a prior dating relationship with. In that case, the court stated, “if an unmarried woman conceives a child through artificial insemination from semen from a known man, that man cannot be considered to be less a father because he is not married to the woman.” *C.M. v. C.C.*, 152 N.J. Super. at 167.

100. *Id.* at 287 (citing *R.H. v. M.K.*, 254 N.J. Super. 480 (Ch. Div. 1991)).

101. *Id.* at 287-88.

102. *See id.* at 288-89.

103. *Id.* at 292-93.

104. *Id.* at 293.

105. *See id.* (“[*O.M.G.R.*] . . . has made the choice not to exercise his parental rights and, should that continue by agreement between the parties, the court sees no reason to impose a different result.”).

106. *See id.* (“The court expresses no opinion as to the appropriateness of the termination of defendant’s parental rights at a later date.”).

does not hold him accountable for child support.<sup>107</sup> This decision seeks to uphold the policy that every child should have two parents and that a parent cannot contract away support. However, the court's decision does not actually enforce this policy because even though O.M.G.R. is a legal parent, he has no obligations. Here, the court's decision would have been more favorable had it either enforced the parties' written agreement and honored their intentions, or, in adherence to the licensed physician requirement, found O.M.G.R. the legal parent, and enforced its policy concerns by ordering O.M.G.R. to pay child support.

In addition, although the practical effects of the court's ruling enforced the parties' intentions, the holding creates ambiguity. For instance, what would happen if years went by and O.M.G.R. decided to exercise his parental rights or if E.E. decided she did want child support from O.M.G.R.? What would happen if O.M.G.R. did not exercise his parental rights and E.E. sought a termination of his parental rights or wanted a partner to adopt her child? This open-ended result demonstrates why an intent-based approach memorialized in a written document is desirable. Binding both parties to the intent manifested in a pre-insemination written agreement creates certainty and closure. It protects a donor seeking to relinquish parental rights from the chance that he will one day be forced to pay child support, while reassuring the recipient-mother that a donor cannot assert parental rights against her child. By the same token, an intent-based model legitimizes and protects any relationship between a donor and the child that was agreed to by both the mother and donor. The disconcerting takeaway from *E.E.* is that the parties did enter into a seemingly valid pre-insemination agreement, yet the court failed to enforce it.

In sum, statutes with licensed physician requirements create problematic results for sperm donors and recipient-mothers. While the policy rationales behind licensed physician requirements are important, pre-insemination written agreements can serve the same function as physician involvement. As the court stated in *Jhordan C.*, physician involvement allows a doctor to obtain the medical history of the donor, while simultaneously serving an evidentiary purpose, and creating a formal structure to the donor-recipient relationship in case a dispute arises.<sup>108</sup>

There are several reasons why a physician is not required to satisfy either of these concerns. First, one of the reasons women choose known sperm donors is because they have easy access to their medical history.<sup>109</sup> If a woman does not know the medical history of her known donor, she can easily ask him. Moreover, even if a woman obtains sperm from a sperm bank and conducts a self-insemination, she does not need a physician to obtain the medical history of the donor. This is because sperm banks screen their donors and do not accept or distribute sperm that may contain infectious diseases.<sup>110</sup> Thus, physician

107. See *id.* at 292-93.

108. *Jhordan C. v. Mary K.*, 179 Cal. App. 3d 386, 393 (1986).

109. See Lezin, *supra* note 6, at 208 n.132.

110. See *Donor Screening*, FAIRFAX CRYOBANK, <http://www.fairfaxcryobank.com/donorscreen.shtml> (last visited Oct. 6, 2013) (explaining that this sperm bank (1) requires each applicant to have a physical exam and have their genetic and medical history evaluated by a clinical

involvement in the insemination process does not serve a unique purpose and its function can be easily accomplished through simple inquiry or routine screening at a sperm bank.

Second, a physician is not required for evidentiary purposes or to create a “formal, documented structure”<sup>111</sup> when a written contract can serve this exact function. A pre-insemination agreement entered into by the donor and mother with terms specifying the donor’s rights and obligations preserves the parties’ intentions in a binding contract that is enforceable in a court of law. This contract provides the same degree of formality as physician involvement and acts as a tool judges can consult when disputes arise between the donor and mother.<sup>112</sup> Hence, the purpose behind licensed physician requirements can still be achieved through other means. The next section discusses donor paternity statutes that provide for written agreements.

## B. Written Agreement Opt-Out Statutes

Several states have written agreement, opt-out statutes which are more favorable to determining the rights of known donors and recipient-mothers based on their intent. These statutes allow donors and recipient-mothers to retain parental rights by opting-out of the default donor paternity bar in a written agreement. While these statutes focus on donor retention of full parental rights, I argue that written contracts should also be used in situations where donors relinquish all parental rights or contract for visitation.

Despite its unfavorable licensed physician requirement, California’s donor paternity statute is one example of a written agreement, opt-out statute:

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 he were not the natural father of a child thereby conceived, *unless otherwise agreed to in a writing signed by the donor and the woman prior to the conception of the child.*<sup>113</sup>

Other states like New Jersey, Kansas, and New Hampshire have also adopted similar statutes that provide a mechanism for known sperm donors to enter into private agreements with recipient-mothers preserving their parental rights.<sup>114</sup>

Written agreement, opt-out statutes are favorable in determining parentage

geneticist and (2) tests donor for infectious diseases and then retests six months after the sperm is donated and quarantined for HIV, hepatitis, syphilis, gonorrhea, and Chlamydia.); *see also What Does Sperm Donation Involve?*, <http://www.stanford.edu/class/siw198q/websites/reprotech/New%20Ways%20of%20Making%20Babies/spermint.htm> (last visited Oct. 6, 2013) (detailing the process for screening of sperm donors, noting that only 5% of all applicants who apply to donate sperm meet the criteria and that applicants go through a “rigorous” screening process before they may donate, including a blood screening, genetic screening, specimen screening, and physical analysis.).

111. *See Jhordan C.*, 179 Cal. App. 3d 386 at 393.

112. *See infra* Section VII for a more specific discussion of what parties should include in a pre-insemination contract.

113. CAL. FAM. CODE § 7613(b) (emphasis added).

114. *See* N.J. STAT. ANN. § 9:17-44 (West 2013); KAN. STAT. ANN. § 23-2208 (West 2012); N.H. REV. STAT. 168-B: 3 (West 2013).

because they protect and honor the parties' intentions. The parties' intentions include their carefully thought out future plans, including the best interests of the child,<sup>115</sup> and their desire for a clear written agreement which allows them to predict how the contract will be enforced in case of a dispute.<sup>116</sup> In Professor Marjorie Maguire Shultz's view, "legal rules governing modern procreative arrangements and parental status should recognize the importance and the legitimacy of individual efforts to project intentions and decisions into the future."<sup>117</sup> Professor Shultz explains that the actions between the parties in ART are deliberative, explicit, and bargained-for by the nature of ART.<sup>118</sup> Choosing ART requires "planning . . . time, effort, emotion and money expended; and the involvement of non-intimates [such as] professionals and reproductive participants."<sup>119</sup> Shultz explains that the parties in an ART agreement are "non-intimates" who place great need on formal dispute resolution since they have serious expectations and rely on the arrangement with the other party.<sup>120</sup> In this way, ART is different from procreation achieved through sexual intercourse, which does not usually involve the same degree of preparation as ART and presumes intent between the two sexual partners.<sup>121</sup> Thus, where the parties' intentions are manifested in such a deliberative, explicit, and bargained-for way and "where they are the catalyst for reliance and expectations," such intentions should be honored.<sup>122</sup> Courts should defer to and uphold such an agreement memorialized in writing because it is clear that the parties contemplated an arrangement that reflects their needs and wishes.

In addition, private contracts create predictability, clarity, enforceability, and formality.<sup>123</sup> Predictability is particularly important because it brings finality

115. See Marjorie Maguire Shultz, *Reproductive Technology and Intent-Based Parenthood: An Opportunity for Gender Neutrality*, 1990 WIS. L. REV. 297, 326 n.80 (1990) ("[A] child's best interests will, in many an ordinary case, be best served by effectuating the deliberate intentions of his parents."); see also Hill, *supra* note 28, at 356 n.12 (explaining that a requirement to be an intended parent is to gain the "constructive consent of the child.").

116. See Shultz, *supra* note 115, at 324 (noting that "[w]here artificial or assisted reproductive techniques are used, the need to reduce uncertainty, to project decisions into the future, and to protect reciprocal expectations and reliance is especially significant").

117. See *id.* at 302.

118. *Id.* at 324.

119. *Id.*

120. *Id.*

121. See *id.* (noting that coital partners are given parental status in part because of their presumed intention, whereas in ART this may be more difficult to discern). It should be noted that although ART requires advanced planning, conception through sexual intercourse can also involve advanced planning, timing, and involvement of physicians in cases where couples have difficulty conceiving naturally. However, ART and sexual intercourse are still distinguishable when it comes to intent, since conception through ART may or may not involve genetic material from an individual without parental intent, whereas in sexual intercourse, it is presumed that both parties intend to parent the child by virtue of their act.

122. *Id.* at 302-03.

123. See *In re K.M.H.*, 169 P.3d 1025, 1039 (Kan. 2007) ("[R]equirement that any such agreement be in writing enhances predictability, clarity, and enforceability."); see also McDonald, *supra* note 10, at 343 (quoting this language in *KMH* to demonstrate why written agreements in the ART context are favorable).

and closure to the parenting agreement.<sup>124</sup> A written agreement puts both the known donor and recipient on notice about future custody or child support battles. Under an opt-out provision, a donor who has not entered into a written agreement is foreclosed from bringing a paternity claim while the recipient-mother is foreclosed from seeking child support.<sup>125</sup> Similarly, if there is a written agreement, the parties know that the terms of their arrangement are memorialized in writing and what those terms are. A written agreement makes those terms easier to enforce if a dispute should arise.

In addition, a written agreement adds an element of formality to the arrangement between the known donor and the recipient-mother.<sup>126</sup> This air of legitimacy may also encourage the parties to carefully consider the terms of their agreement and the gravity of knowing that they are creating a legal document enforceable in court.<sup>127</sup> Also, written agreements serve as tools for pre-emptive conflict resolution.<sup>128</sup> In entering into an agreement, the donor and recipient-mother are compelled to contemplate the best care arrangements and responsibilities of each parent. Thus, private ordering allows parties to anticipate any conflicts or misunderstandings they might have and work them out before the child is conceived or born.

Lastly, written agreement provisions contemplate and, in turn, protect the best interests of the child. These statutes bar known donors from acquiring any parental rights to a child merely by helping the recipient-mother conceive. Instead, they must execute a written agreement. In this way, the statute makes clear that the sole donation of genetic material does not make a donor a legal father.<sup>129</sup> The written agreement provision places the intent to be a parent at the core of gaining legal rights. This serves the best interests of the child because it “diminish[es] importance on genetic or biological connection and looks instead to established caregiving or clearly established parenting intention as essential, or at least co-equal, determinants of parentage.”<sup>130</sup> Using intent to parent and provide for a child as a primary factor in determining parentage is not only intuitive, but creates a greater likelihood that a child will grow up in a nurturing and caring home.

Statutes that contain written agreement, opt-out provisions protect the rights of known sperm donors and recipient-mothers by preserving their intent, ensuring predictability, clarity, and enforceability. However, it should be noted

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124. See *K.M.H.*, 169 P.3d at 1039.

125. See CAL. FAM. CODE § 7613(b).

126. See *In re Paternity of M.F.*, 938 N.E.2d 1256, 1259 (Ind. Ct. App. 2010) (holding that an agreement between a known donor and recipient-mother was enforceable in part because it had the formalities of a legitimate legal contract).

127. See *id.* at 1261 (explaining that the formal contract in this case reflected the parties’ “careful consideration of the implications of such an agreement and a thorough understanding of its meaning and import.”).

128. See *K.M.H.*, 169 P.3d at 1039 (stating that the written agreement provision under discussion is meant to encourage early resolution of parental rights).

129. See *id.* at 1041 (“If . . . [a] genetic relationship must be destiny, then an anonymous donor with no intention to be a father would nevertheless automatically become one.”). LS Rule 10.6.

130. David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125, 136 (2006).



that these written agreement statutes are not broad enough to encompass the variety of arrangements that known donors and recipient-mothers may wish to create. The typical written agreement provision only applies to situations where the known donor seeks to be a legal parent but does not apply to situations where the parties agree that the known donor relinquishes all parental rights, or contracts for limited rights such as visitation. Later in this note, I propose that written agreements should be required by law for all such arrangements, including full parental rights, no parental rights, or visitation rights.

#### V. KNOWN DONORS RELINQUISHING PARENTAL RIGHTS: THE PUBLIC POLICY CONCERNS

As with written agreements to retain parental rights, courts should enforce agreements in which a known donor relinquishes parental rights and responsibilities, so long as they do not violate public policy. Where agreements satisfy public policy, intent should be the guiding factor in determining known donor's rights and obligations.

In *Ferguson v. McKiernan*, a 2007 case, the Pennsylvania Supreme Court analyzed the public policy implications of agreements in which a known donor relinquishes full parental rights.<sup>131</sup> There, a known donor provided sperm to the recipient-mother, a former romantic partner.<sup>132</sup> The recipient-mother preferred the known donor to an anonymous donor because "[s]he knew [his] background. . . [and] makeup, and just said that she preferred to have that anonymous donor known to her."<sup>133</sup> Although the recipient-mother knew the donor, the terms of the oral agreement were constructed to mirror an anonymous sperm donation.<sup>134</sup> The insemination was to take place in a clinical setting, the donor's role would be confidential, the donor would not seek visitation or custody, and the recipient-mother would not demand financial or emotional support.<sup>135</sup> Accordingly, the donor did not assist the recipient-mother with prenatal or post-natal care, nor was he listed on the twins' birth certificate.<sup>136</sup> Five years went by without any deviation from the parties' agreement.<sup>137</sup> During those five years, the donor and mother lost contact.<sup>138</sup> The donor moved to another town, married, and fathered his own child.<sup>139</sup> Then, the recipient-mother unexpectedly filed for child support against the donor.<sup>140</sup>

The trial court found that the parties had a binding oral agreement, but that "a parent cannot bind a child or bargain away that child's right to support" and therefore the agreement was unenforceable against public policy.<sup>141</sup>

131. See *Ferguson v. McKiernan*, 940 A.2d 1236, 1244-45 (Pa. 2007).

132. *Id.* at 1238.

133. *Id.* at 1239 n.4.

134. *Id.* at 1238.

135. *Id.*

136. *Id.* at 1240-41.

137. *Id.*

138. *Id.* at 1240.

139. *Id.* at 1241.

140. See *id.* at 1240.

141. *Id.* at 1241. (The trial court stated, "[T]his Court cannot ignore and callously disregard the

Accordingly, the donor was declared the twins' legal father and ordered to pay \$1,384 per month and \$66,033.66 in arrearages due immediately.<sup>142</sup> Interestingly, the trial court found "ample evidence" of the donor's intention to surrender his rights and responsibilities to the child and, moreover, that the recipient-mother's testimony "contained numerous inconsistencies and contradictions . . . intentional falsehoods, fraud, and deceit."<sup>143</sup> However, the court ignored the mother's deceptive conduct and the parties' agreement in favor of providing the twins with a legal father and additional means of financial support.<sup>144</sup> The Superior Court affirmed the trial court's decision on the same grounds.<sup>145</sup>

On appeal, the Pennsylvania Supreme Court held that the parties' agreement was enforceable and reversed the lower court's child support order.<sup>146</sup> The Supreme Court applied the following definition of public policy:

Only dominant public policy would justify such action [of invalidating a contract]. In the absence of a plain indication of that policy through long governmental practice or statutory enactments, or of violations of obvious ethical or moral standards, the Court should not assume to declare contracts . . . contrary to public policy. The courts must be content to await legislative action.<sup>147</sup>

In its reasoning, the court noted the prevalence of ART and the use of written ART agreements in contemporary society.<sup>148</sup> The court also noted a "growing consensus" that institutional sperm donation does not automatically give rights or obligations to a sperm donor.<sup>149</sup> In addition, the court looked to the absence of a legislative mandate as an indication that there was no strong public policy against donor's relinquishing their parental rights.<sup>150</sup> The court then equated the known donor in this case to an anonymous donor by finding

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interests of the unheard-from third party[,] a party who without their privity to this contract renders it void.").

142. *Id.*

143. *Id.*

144. *See Ferguson*, 940 A.2d at 1241.; *see also supra* Section III(A) and accompanying discussion about the policy concerns in *E.E. v. O.M.G.R.*

145. *See Ferguson*, 940 A.2d at 1241. Note that Pennsylvania has not enacted either the 1973 or 2002 UPA and did not reach its decision in *Ferguson* at the lower court, superior court, or supreme court level by construing either UPA or any Pennsylvania donor paternity statute.

146. *Id.* at 1248.

147. *Id.* at 1245 n. 16.

148. *See id.* at 1245 (noting that "all manner of arrangements involving the donation of sperm or eggs abound in contemporary society" and that "[a]n increasing number of would-be mothers . . . are turning to donor arrangements.")

149. *See id.* at 1246. Note that the court refers to anonymous sperm donations via sperm bank as "clinical, institutional" sperm donations. Hence, it is unclear whether the court requires a clinical setting and physician involvement in order for relinquishment of anonymous sperm donor's parental rights to satisfy public policy. In any case, the court's analysis suggests that when a known donor functions as an anonymous donor in other respects like maintaining anonymity and taking sexual intercourse out of the equation, a known donor's relinquishment of parental rights does not violate public policy.

150. *See id.* at 1248 (noting that "The absence of a legislative mandate . . . illustrate[s] the very opposite of unanimity with regard to the legal relationships arising from sperm donation, whether anonymous or otherwise.").

that the parties negotiated an agreement outside a romantic relationship, agreed to the terms, eliminated sexual intercourse as a factor by performing the ART procedure in a clinical setting, attempted to conceal the known donor's paternity, and adhered to the agreement for five years.<sup>151</sup> The court then noted that anonymous donors routinely enter into contracts with sperm banks relinquishing their parental rights.<sup>152</sup> Therefore, because the agreement in this case did not violate a "dominant public policy" or "obvious ethical or moral standards," it was not void against public policy and the agreement was enforceable.<sup>153</sup> In addition, the Supreme Court's analysis focused on the parties' intentions. It wrote: "The facts of this case . . . reveal the parties' mutual intention to preserve all of the trappings of a conventional sperm donation, including formation of a binding agreement."<sup>154</sup>

Moreover, the decision in *Ferguson* acknowledged the appropriate weight that should be given to the interests of known donors and children conceived by ART. The court noted:

This Court takes very seriously the best interests of the children of this Commonwealth, and we recognize that to rule in favor of Sperm Donor in this case denies a source of support to two children who did not ask to be born into this situation. Absent the parties' agreement, however, the twins would not have been born at all, or would have been born to a different and anonymous sperm donor, who neither party disputes would be safe from a support order.<sup>155</sup>

Here the court appropriately acknowledged the best interests of the children. However, the court recognized that it must also weigh the donor's interests and the parties' intentions. In so doing, the court reached the right result and reversed the child support order.

*Ferguson* makes clear that when known donors act like anonymous donors and have no intention to parent a child, they do not violate public policy in relinquishing their parental rights.<sup>156</sup> While the court in *Ferguson* reached the right outcome, not all agreements in which known donors relinquish parental rights should be enforced. For instance, in *Mintz v. Zoernig*, a recipient-mother and her partner asked a known donor if he would donate sperm and "serve as a male role model" for their child by establishing visitation rights.<sup>157</sup> The couple would be the primary parents and the donor would have no financial

151. *Id.* at 1246-47.

152. *See id.* at 1246.

153. *See id.* at 1248.

154. *Id.* at 1246.

155. *Id.* at 1248.

156. The Pennsylvania Supreme Court also noted another policy rationale against a point-blank distinction between known and anonymous donor's ability to relinquish parental rights and responsibilities. The court stated, "[T]o protect herself and the sperm donor, that 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 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." *Id.* at 1247.

157. *Mintz v. Zoernig*, 198 P.3d 861, 862 (N.M. Ct. App. 2008).

responsibilities to the child.<sup>158</sup> The recipient-mother conducted an at-home insemination and gave birth to a child.<sup>159</sup> The donor and couple put their agreement in writing after the child's birth.<sup>160</sup> Shortly thereafter, the couple ended their relationship.<sup>161</sup> The mother then asked the donor if he would agree to provide sperm for another insemination under the same terms of the first agreement.<sup>162</sup> The donor agreed and another child was born.<sup>163</sup> In light of the agreement, the donor had significant contact with the two children, although the recipient-mother acted as the primary parent.<sup>164</sup> Shortly thereafter, the mother filed a paternity action against the donor seeking child support.<sup>165</sup> The parties entered into a stipulated order approved by the court in which the donor agreed to pay child support.<sup>166</sup> On appeal from a motion for modification of child support, the donor challenged his obligation to pay child support, even though he was current on his payments, and asserted that he was only a mere sperm donor.<sup>167</sup>

At the time *Mintz* was decided, New Mexico had a statute in place that allowed for a donor to be a legal parent if a licensed physician requirement was met *and* the parties signed a written agreement in which the donor consented.<sup>168</sup> Because the recipient-mother self-inseminated without physician assistance, the court found that the donor was not a legal parent pursuant to that statute.<sup>169</sup> However, under a different provision in New Mexico's UPA, the known donor was a presumed father because he held himself out as the children's father, established a relationship with them, had regular visitation with them since birth, filed a motion alleging that the mother interfered with his relationship with the children by imposing conditions on visitation, acknowledged in the stipulated order that he was the natural father, and was registered as both children's father with the vital statistics bureau.<sup>170</sup> Thus, the Court of Appeals found that the donor was "enjoy[ing] the rights of parenthood" and was therefore the children's legal father.<sup>171</sup> The court noted that since the law "reflects a strong public policy in favor of support," the agreement

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158. *Id.*

159. *Id.*

160. *Id.* Note that the specific language and more precise terms of the written agreement were not included in the court's opinion.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 862.

166. *Id.* at 862-63.

167. *Id.* at 863.

168. *Mintz*, 198 P.3d at 863. Note that in 2009, subsequent to the *Mintz* decision, New Mexico amended its Uniform Parentage Act, which now borrows more closely from the 2002 UPA and no longer requires physician involvement in artificial insemination. See N.M. STAT. ANN. §§ 40-11A-101 to -903 (West 2012).

169. See *Mintz*, 198 P.3d at 863 (noting that "[i]n this case, the sperm was not provided to a licensed physician, but rather, Mother inseminated herself. As a result, the artificial insemination section of the UPA is not applicable to our facts.>").

170. *Id.* at 863-64.

171. *Id.* at 864.

relinquishing parental rights was unenforceable and the child support order was upheld.<sup>172</sup>

In *Mintz*, assuming that the known donor really was enjoying the full rights of legal parenthood, the court's decision seems right. *Mintz* is distinguishable from *Ferguson* because the known donor in *Mintz* relinquished his parental rights but still acted as a legal father.<sup>173</sup> Thus, the agreement in *Mintz* violated public policy because the children's father reaped the benefits of legal parenthood while shirking the financial obligations.<sup>174</sup> In a situation like *Mintz*, even if the donor relinquishes his parental rights in a written agreement, the court should find the agreement unenforceable as it would violate public policy.<sup>175</sup>

In addition, *Mintz* demonstrates the difference between a known donor-child relationship maintained through visitation rights and a known donor-child relationship in which the donor is actually parenting. If the donor is actually parenting the child, he should be given parental rights and his parental obligations should be enforced, despite an earlier agreement to the contrary.<sup>176</sup> To this point, *Mintz* raises the issue of changed circumstances in insemination agreements—an issue that will be mentioned in Section VII of this note.

Moreover, certain factors may aid a court in considering whether an agreement relinquishing a donor of parental rights should be enforced. First, the court should not solely apply a best interest of the child standard.<sup>177</sup> This is because this standard will always weigh in favor of compelling the donor to provide support.<sup>178</sup> Surely a child benefits more from two sources of financial support than just one. Thus, if a court can conclusively find that the recipient-mother and the donor agreed that the donor relinquish financial support, the court should enforce the agreement.<sup>179</sup>

Another factor the court should consider is whether the parties were

172. *Id.* (quoting *In re Estate of DeLara*, 38 P.3d 198, 201 (N.M. Ct. App. 2001)). Note also that the court doesn't mention at all that the first child was born with the intent that the recipient-mother's ex-lesbian partner would parent the child. It is beyond the scope of this article but worth wondering whether the court should have gone after the former partner for child support for the first child. It is also interesting to consider this in light of the issues surrounding gay marriage and the implications for children born to gay couples who are not legally recognized as married or having the same obligations of a heterosexual couple. *See id.* at 862 (noting that both of "the women would be primary parents.").

173. *Id.* at 862.

174. Note that the known donor in *Mintz* was current on child support once the lower court ordered it. However, on appeal to the New Mexico Court of Appeals he challenged his obligation to pay child support. *Id.* at 862-63.

175. Note that this assumes that *Mintz* was really acting as a legal parent to the children. If he was a known donor with visitation rights, then he probably should not have been awarded full parental rights and the court should have enforced the visitation agreement, unless it was the parties' intent that the donor have full parental rights.

176. Note that finding that the donor is a legal parent and enforcing his responsibilities pursuant to that relationship are both within the best interests of the child because the child will benefit from his caretaker having legal authority to make decisions on his behalf.

177. M. Scott Serfozo, *Sperm Donor Child Support Obligations: How Courts and Legislatures Should Properly Weigh the Interests of the Donor, Donee, and Child*, 77 U. CIN. L. REV. 715, 734 (2008).

178. *Id.*

179. *See id.*

involved in a romantic relationship at the time the agreement was made.<sup>180</sup> The underlying idea is that a donor romantically involved with the recipient-mother more likely intends to parent the child than a non-intimate donor who may be making a “true” donation with no strings attached.<sup>181</sup> A third factor to consider is the timing in which the recipient-mother files suit for child support.<sup>182</sup> The more time that passes between the date that the agreement was entered into and the date that the recipient-mother brings suit, the greater the likelihood that the parties did not intend for the donor to be a parent to the child.<sup>183</sup>

In evaluating whether agreements by known donors to relinquish parental rights violate public policy, a court should conduct a fact-specific inquiry into both the parties’ intentions and the current relationship between the known donor and the child. If the known donor is not actually parenting while shirking his financial obligations, the agreement likely comports with public policy.

The next section discusses the constitutional barriers that known donors seeking parental or visitation rights may face, even with a binding written agreement.

#### VI. *TROXEL V. GRANVILLE*: CONSTITUTIONAL BARRIERS TO KNOWN DONORS’ RIGHTS

Often, known donors who develop a relationship with the child they help conceive find themselves in a situation where the recipient-mother severs the donor’s relationship with the child. This may be problematic in cases where there is a written agreement awarding the known donor visitation.<sup>184</sup> Despite the written agreement, the Supreme Court’s decision in *Troxel v. Granville* may be a barrier to known donors who seek to enforce such agreements and receive visitation rights.

In *Troxel v. Granville*, the Supreme Court struck down a Washington visitation statute, which permitted “[a]ny person” at “any time” to “petition a superior court for visitation rights . . . and authorize[d] that court to grant such visitation rights whenever ‘visitation may serve the best interest of the child.’”<sup>185</sup> The Supreme Court held Washington’s third-party visitation statute unconstitutional as applied because it did not give deference to the children’s legal parent, their mother, before awarding visitation to their grandparents.<sup>186</sup>

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180. *Id.* at 734–35.

181. *Id.* at 735.

182. *Id.*

183. Serfozo, *supra* note 177, at 735. For instance, in *Ferguson*, five years went by before the mother sought child support from the known donor and the court found her testimony riddled with fraudulent allegations. See *Ferguson v. McKiernan*, 940 A.2d 1236, 1240 (Pa. 2007).

184. Note that in my research I did not find a case on point in which a known donor came into court with a written agreement and the *Troxel* problem arose. Rather, the most common cases construing *Troxel* involve grandparents and ex-lesbian partners seeking visitation. However, this issue would arise for known donors if they sought visitation through a state’s third-party visitation statute or if they sought to have a written agreement enforced and courts determined that *Troxel* is a barrier to enforcing such an agreement.

185. *Troxel v. Granville*, 530 U.S. 57, 60 (2000) (quoting WASH. REV. CODE ANN. §26.10.160(3) (West 2000)).

186. See *id.* at 67 (“Once the visitation petition has been filed in court and the matter is placed before a judge, a parent’s decision that visitation would not be in the child’s best interest is accorded

Therefore, the statute infringed on the mother's fundamental parental rights to direct the care, custody, and control of her child.<sup>187</sup> Thus, in *Troxel*, the Supreme Court reaffirmed a parent's fundamental right, superseding all other people, to direct the upbringing of his or her children.

After *Troxel*, the question emerged as to whether a third-party could successfully petition for visitation with a child against a fit parent. The underlying rationale for awarding third-party visitation is to safeguard the relationship between a child and a non-legal parent who has formed a meaningful and legitimate relationship with the child.<sup>188</sup> Thus, when known donors come into court seeking visitation with a child whom they helped procreate and with whom they have an established relationship, courts should give weight to written visitation agreements between the known donor and the recipient-mother. This approach does not offend the Court's ruling in *Troxel*.

In the case of a known donor who made a pre-existing written agreement with a recipient-mother for visitation rights with her child, the legally binding agreement actually defers to the recipient-mother, assuming the contract is enforceable. Thus, it does not violate *Troxel* for a court to equally weigh the rights of the known donor and the recipient-mother when the mother authorized the donor to share some of her parental rights with her child in a formal and binding legal document. If a mother wishes to retain full protection of her parental rights, she "cannot cede over to [a] third party parental authority of the exercise of which may create a profound bond with the child."<sup>189</sup> Therefore, if a known donor and mother entered into a written visitation agreement, the donor should have a right to be heard.

As a back-up option to having the written agreement enforced, a donor petitioning a court in a state with a third-party visitation statute should seek visitation through such a statute. After *Troxel*, third-party visitation statutes are not *per se* unconstitutional, nor are a fit parent's decisions immune from judicial review.<sup>190</sup> For example, Delaware's third-party visitation statute is a constitutionally permissible mechanism that known donors with an established relationship to a child could use to obtain visitation rights.<sup>191</sup> Delaware's third-party visitation statute provides:

- (a) Prior to granting a third-party visitation order, the Court shall find . . .
- (1) Third party visitation is in the child's best interests; and
  - (2) One of the following as to each parent:

no deference.").

187. *Id.* at 57.

188. *See id.* at 98 (Kennedy, J., dissenting) (focusing on applying the best interests of the child standard in third-party visitation cases and protecting legitimate and established relationships between a child and third party).

189. *V.C. v. M.J.B.*, 748 A.2d 539, 552 (N.J. 2000) (reasoning that when a legal parent authorizes a third-party, non-legal parent to act as a parent for her child, the legal parent no longer maintains a zone of privacy with herself and her child in the context of a *de facto* parentage action).

190. *Fenn v. Sheriff*, 109 Cal. App. 4th 1466 (Cal. Ct. App. 2003) (holding that a third-party grandparent visitation statute was constitutional).

191. DEL. CODE ANN. tit. 13, § 2412 (West 2013).

- (a) The parent consents to the third-party visitation;
- (b) The child is dependent, neglected, or abused in the parent's care;
- (c) The parent is deceased; or
- (d) The parent objects to the visitation; however, the petitioner has demonstrated, by clear and convincing evidence, that the objection is unreasonable; and has demonstrated, by a preponderance of the evidence, that the visitation will not substantially interfere with the parent/child relationship.<sup>192</sup>

Although, in the event the legal parent refuses to agree to third-party visitation, the petitioner must meet the high evidentiary burden of clear and convincing evidence, Delaware's statute is favorable towards known donors. The statute includes the best interests of the child standard, which inherently considers the relationship between the donor and the child, and presumes that the stronger the relationship between the donor and the child, the more likely an award of visitation will be in the best interests of the child.<sup>193</sup>

A third-party visitation statute that balances the rights and interests of a legal parent, the best interests of the child, and the donor would be a successful one.<sup>194</sup> For instance, the Lambda Legal Defense and Education Fund and Gay and Lesbian Advocates and Defenders developed the following standing requirement for third-parties bringing visitation petitions: A petitioner must show:

- (1) [T]he curtailment of a significant relationship with the children of a quality and depth that sets petitioner[] apart from the many people, even blood relatives, with whom children have positive, loving relationships, coupled with (2) a showing of prior parental knowledge and fostering of the relationship that allowed it to grow in importance to a child.<sup>195</sup>

Only after clearing this standing requirement will the court proceed and apply a best interest of the child standard.<sup>196</sup> The first prong accounts for the donor's interest in his established relationship with the child, the second prong protects the legal parent's rights because it requires consent to the donor-child relationship, and the best interests of the child standard protects the welfare of the child. A statutory scheme that balances these three interests is a favorable one.

A written agreement between the known donor and recipient-mother may persuade a court to allow a donor to petition for visitation, and to view that petition on equal footing with the mother's position, despite *Troxel*. In addition, third-party visitation statutes that balance the interests of the known donor, the

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192. *Id.*

193. *Id.*

194. See Sally Goldfarb, *Visitation for Nonparents after Troxel v. Granville: Where Should States Draw the Line?* 32 RUTGERS L.J. 783, 800 (2001) ("[O]nce a parent has decided to allow someone to share the parental role . . . the interests of both the child and the nonparent in maintaining the significant bond between them . . . warrant granting standing to the nonparent to seek a visitation order.").

195. Brief of Lambda Legal Defense & Education Fund & Gay & Lesbian Advocates & Defenders as Amici Curiae in Support of Respondent at 7, *Troxel v. Granville*, 530 U.S. 57 (2000) (No. 99-138).

196. *Id.* at 8.



legal parent, and the child could result in successful visitation claims

#### VII. PROPOSAL: WHAT SHOULD A WRITTEN AGREEMENT LOOK LIKE?

This note has demonstrated that certain state laws and court decisions regulating ART are problematic because they do not apply an intent-based approach to determinations of a donor's rights. I propose that the best mechanism for honoring the intent of the known donors and recipient-mother is a written agreement that sets out the rights and expectations of the parties. An agreement where the parties decide the donor will relinquish full parental rights, retain full parental rights, or have continued involvement with the child in the form of visitation rights, should all be in writing.

First, state laws should require that written agreements be entered into prior to the child's conception; that is, before the insemination takes place. The purpose of this requirement is to ensure that both parties enter into the agreement at a time when they have equal bargaining power.<sup>197</sup> The agreement should look like an arm's length transaction, where the agreement is entered into voluntarily, i.e. without compulsion or duress, and the parties act in their own self-interest.<sup>198</sup> An agreement should be the result of fair dealing, which includes real negotiations between the parties and the ability to choose.<sup>199</sup> Requiring the known donor and recipient-mother to enter into the agreement prior to the insemination is an attempt to ensure equal bargaining and encourage the drafting of a fair and honest agreement. In addition, entering into the agreement prior to insemination encourages early resolution of conflicts and an early determination of each party's rights.<sup>200</sup> Therefore, I propose that known donors and recipient-mothers be required by law to enter into an agreement prior to insemination.

Second, the written agreement must "reflect the parties' careful consideration of the implications of such an agreement and a thorough understanding of its meaning and import."<sup>201</sup> One way this may be demonstrated is through the formality of the agreement. The written agreement construed in *In re Paternity of M.F.* is an example of the formalities and comprehensiveness of a pre-insemination agreement. In *Paternity of M.F.*, the known donor waived all rights to custody or visitation with the child and the mother waived all rights to child support and financial assistance from the donor.<sup>202</sup> The court enforced the agreement in part because it was a

197. See *In re K.M.H.*, 169 P.3d 1025, 1039 (Kan. 2007) (commenting on Kansas' written agreement opt-out provision: "the design of the statute implicitly encourages early resolution of . . . whether a donor will have parental rights . . . 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.").

198. See *Walters v. Knox Cnty. Bd. of Revision*, 546 N.E.2d 932, 933 (Ohio 1989) (listing the elements of an arms' length transaction).

199. See *Stirlen v. Supercuts, Inc.*, 51 Cal. App. 4th 1519, 1519, 1533-34 (Cal. Ct. App. 1997) (stating that contracts may be unconscionable when there is an inequality of bargaining power between the parties).

200. See *K.M.H.*, 169 P.3d at 1039.

201. *In re Paternity of M.F.*, 938 N.E.2d 1256, 1261 (Ind. Ct. App. 2010).

202. *Id.* at 1257.

comprehensive and formal contract.<sup>203</sup> The document was six pages and twenty-four paragraphs; it had been prepared by an attorney, as so stated in the agreement and included provisions regarding the acknowledgement of rights and obligations, waiver, consent to adopt, mediation and arbitration, amending the agreement, a four-corners clause, and a choice of law provision.<sup>204</sup> The parties also included a clause entitled "Legal Construction," which provided that each party understood that legal questions could arise from the issues in the agreement which had not been settled by statute or court decisions, but nonetheless entered into the agreement with "the intent and desire that it be fully enforceable . . . and to document their intent at the time the child was conceived."<sup>205</sup> The court went on to state that it was hesitant to set out formal requirements for the form and content of all ART contracts but reiterated that the agreement should reflect the careful consideration of the parties.<sup>206</sup> The court did note, however, that it "[did] not mean to sanction the view that a writing consisting of a few lines scribbled on the back of a scrap of paper found lying about will suffice in this kind of case."<sup>207</sup> Thus, the formality and comprehensiveness of the written agreement in *Paternity of M.F.* is a good paradigm for a contract between a known donor and recipient-mother.

Third, aside from the written agreement's formality and legal provisions, it should contain certain provisions and terms that are detailed enough to be useful in the event of a dispute. This will vary depending on the party's arrangement. For instance, an agreement in which a known donor intends to relinquish full parental rights, including custody and visitation, and the recipient-mother intends to waive her rights to child support and financial assistance will be sufficiently detailed if it essentially states just that. The contract in *Paternity of M.F.* is a good example of this. The contract read:

Mother hereby waives all rights to child support and financial assistance from Donor, including assistance with medical and hospital expenses incurred as a result of her pregnancy and delivery . . . . It is expressly agreed that Mother will be solely responsible for the financial support of the child. . . . Donor hereby waives all rights to custody of or visitation with such child and releases Mother from any and all claims for visitation and covenants and that he will not demand, request or compel any guardianship, custody or visitation rights with any such child.<sup>208</sup>

This provision is sufficiently detailed and should be encouraged. However, a simpler agreement stating that the donor relinquishes parental rights and the mother waives the right to child support could be sufficiently adequate as well.

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203. *Id.* at 1261-62.

204. *Id.*

205. *Id.* at 1262.

206. *Id.*

207. *Id.* at 1261.

208. *Id.* at 1257 (The agreement goes on to state that the mother will be responsible for all "legal, financial, child-rearing and medical needs of such child without any involvement by or demands of authority from Donor, and Donor expressly agrees that Mother shall have sole physical and legal custody of such child and that Mother's custody of such child is in the child's best interest." *Id.* at 1258.).

By contrast, an agreement where the known donor retains either full parental rights or visitation rights should be much more detailed since such an arrangement allocates caretaking to each party. In these cases, the agreement should adhere more closely to child custody agreements and comport with state law. The difficulty with this approach is that state child custody laws assume that a child already exists, which makes it easier for the parties to make an agreement based on their daily routines. Still, an agreement between a known donor and recipient-mother should specify if the arrangement is for sole or joint custody, and include the residential and decision-making arrangements for the child.<sup>209</sup> The agreement can also list the areas over which one or both parties has decision-making authority, like education, healthcare,<sup>210</sup> and religious upbringing. Similarly, an agreement that gives the known donor visitation rights, while relinquishing parental rights, should specify the frequency of visitation, where the visitation will take place, whether it is supervised by the legal mother or not, and any limitations on the basis of time, travel, and activity.<sup>211</sup>

Furthermore, like all child custody arrangements, the agreement should be subject to modification. The standard for modification should be changed circumstances that affect the welfare of the child.<sup>212</sup> Changed circumstances should be broadly defined and may include lack of stability in the living or childcare situation, the child's poor performance in school, changes in the child's health, and changes in the parents' circumstances.<sup>213</sup> The driving factor behind a modification should be the best interests of the child. The ability to modify the donor and mother's agreement is very important in the ART situation since the agreement will be reached prior to the child's conception and the parties' documented aspirations may either fall short of or supersede the pragmatism of the arrangement once the child is born.<sup>214</sup>

Fourth, as previously mentioned, to be enforceable, a written agreement between the known donor and recipient-mother must not violate public policy.<sup>215</sup> One way to determine if a written agreement is valid against public policy is if it comports with the requirements of uniform acts, such as the UPA.<sup>216</sup> I propose that if a written agreement comports with the requirements of the 2002 UPA, Article 7: Children of Assisted Reproduction, it does not violate public policy. Some key guidelines from Article 7 are as follows: A child conceived through

209. *Id.* at 1257

210. *Id.*

211. Unfortunately in my research, I was unable to find a sufficiently detailed agreement where a donor retains full parental rights or where a donor is given visitation rights. This is actually fitting as it demonstrates the lack of specificity and formality that parties currently exercise in entering into ART contracts.

212. *See* *Wilson v. Wilson*, No. FM-04-298-00, 2006 WL 848128, at \*3 (N.J. Super. Ct. App. Div. April 3, 2006) (per curiam) (parties seeking to modify custody "must demonstrate changed circumstances which affect the welfare of the children." (citations omitted)).

213. *See id.*

214. *See supra* Section V and the accompanying discussion about the *Mintz* case.

215. *See supra* Section V.

216. *See In re Paternity of M.F.*, 938 N.E.2d 1256, 1259 (Ind. Ct. App. 2010) (noting that the UPA is an "excellent tool for ensuring that contracts for these services do not violate our public policy of protecting the welfare of children." (citation omitted)).

sexual intercourse is not a child of assisted reproduction and not subject to Article 7,<sup>217</sup> a licensed physician need not be involved in the procedure for assisted reproduction,<sup>218</sup> the act applies to both married and single women,<sup>219</sup> and the determination of parentage is based on which parties intended to parent the child.<sup>220</sup> This last requirement gives the written agreement legal force by allowing the parties to include their intentions in the contract. Even though the UPA discusses parentage, I propose that the intent requirement also apply to the intent to relinquish parental rights and the intent to permit and partake in visitation rights.

Nothing in the 2002 UPA prevents parties engaging in artificial insemination from forming a legally binding written agreement.<sup>221</sup> Therefore, an agreement between the parties that gives the known donor visitation rights, retains his full parental rights, or relinquishes his full parental rights is valid if it complies with the 2002 UPA. In addition, a written agreement should be found compliant with public policy if it satisfies the earlier discussion of concerns raised in *Ferguson* and *Mintz*.<sup>222</sup> Even if a written agreement complies with the 2002 UPA, if, in reality, it amounts to a legal parent shirking his parental responsibilities, the contract will not be enforced.

Lastly, it may be a concern that the written agreement requirement imposes state intervention into the family realm and requires the parties to enlist a lawyer. While I have considered this in my proposal, I have concluded that, based on the case law mentioned in this note, and other cases that are not mentioned, it is in the parties' best interests to create a formal written agreement enforceable in a court of law. The written agreement serves to protect the unique arrangement that the parties have contemplated. If the parties do not commit their agreement to writing, they leave themselves vulnerable to an unpredictable and possibly unfavorable outcome if a dispute arises down the line.

In sum, I propose that state law require parties engaging in assisted reproductive technology to enter into formal, written contracts expressing their intentions and rights.

## VIII. CONCLUSION

As the number of "non-traditional" families increase, it becomes more and more important for our legislatures to enact laws that enable these new families. Current law governing determinations of known donors' rights falls short of this task and leads to results that do not honor the intentions of parties who utilize assisted reproductive technology. For this reason, requiring known donors and recipient-mothers to enter into written, pre-insemination agreements is vital to ensuring that children of assisted reproductive technology are born into the arms of their intended caretakers. It is these caretakers who have the child's best

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217. UNIF. PARENTAGE ACT § 701(2002).

218. *Id.* at § 702 cmtt.

219. *Id.*

220. *See id.* at § 703 ("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 resulting child.").

221. *See* UNIF. PARENTAGE ACT § 5 (2002).

222. *See supra* Section V and accompanying discussion of public policy concerns.

interests in mind and who are in the best position to love and raise that child. Private contracting allows for each individual to freely construct his or her family in a personal and meaningful way. It is incumbent upon U.S. legislatures and courts to push for changes in the law that will preserve this precious human inclination to procreate with, parent with, and love whomever one chooses.