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Putting Your Eggs in Someone Else's Basket: Inserting Uniformity into the Uniform Parentage Act's Treatment of Assisted Reproduction

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Putting Your Eggs in Someone Else's Basket: Inserting Uniformity into the Uniform Parentage Act's Treatment of Assisted Reproduction

Kira Horstmeyer*

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I. Introduction

In August 2005, the California Supreme Court issued a landmark decision in the area of family law.¹ In *K.M. v. E.G.*,² the court ruled that "both members of a lesbian couple who plan for and raise a child born to either of them should be considered the child's mothers even after their relationship ends."³ The court's ruling generated a healthy amount of media attention across the country.⁴

1. See Adam Liptak, *California Ruling Expands Same-Sex Parental Rights*, N.Y. TIMES, Aug. 23, 2005, at A10 (noting the "largely uncharted legal territory" that the California Supreme Court entered in making its rulings).

2. See *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005) (finding that two women could be mothers of the same child). On the same day, the court also issued rulings in two similar cases, *Kristine H. v. Lisa R.*, 117 P.3d 690 (Cal. 2005), and *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005), both of which stated that two women could be the mothers of the same child. Although all three cases struck new ground, for purposes of this Note, *K.M. v. E.G.* is the most important case.

3. Liptak, *supra* note 1, at A10.

4. See *id.* (commenting on the new ground the California Supreme Court broke, and acknowledging the fear expressed by lawyers for groups defending traditional values that these rulings erode traditional family values and the traditional definition of a family); Jim Christie, *California Sets Precedent on Lesbian Parents*, BOSTON GLOBE, Aug. 23, 2005, at A3 (describing the three cases and noting that the decisions came down during a period of "bitter debate in California about whether gays should be allowed to marry"); Henry Weinstein & Lee Romney, *Court Grants Full Parenting Rights to Gays, Lesbians*, L.A. TIMES, Aug. 23, 2005, at A1 (discussing the differences among the three cases and noting the differing opinions from various camps, including gay rights activists and those who oppose same-sex marriages); Harold Mintz, *Courts: Lesbians Gain Rights as Parents*, MIAMI HERALD, Aug. 23, 2005, at A7 (commenting on the timing of the decisions and on one of the court's previous rulings on same-sex issues).

Although *K.M. v. E.G.* produced the most attention, contrasting it with *Steven S. v. Deborah D.*,⁵ a less well known California case, highlights the major conflict in this Note—that is, that statutes regarding gamete donation discriminate against donors based solely on their gender. Both the California cases involved gamete donors—those who have donated sperm or eggs to assist someone else in assisted reproduction—who had relationships with the gestating mothers of the children resulting from their respective donations.⁶ The two cases yielded disparate results, largely because Steven was statutorily prohibited from claiming parental rights based on his gender;⁷ however, K.M.'s status as a donor is not addressed by statute, resulting in the creation of a new rule that favors K.M. based on her gender.⁸

Even though both cases discussed in this Note occurred in California, the problem of disparate treatment for gamete donors based on their gender is one of national importance that is likely to occur in the future. A recent case in the Washington Supreme Court,⁹ the California cases¹⁰ decided on the same day as *K.M. v. E.G.*, and several other cases from around the nation, decided between 1999 and 2005,¹¹ highlight the increasing trend of these types of suits. Cases

5. See *Steven S. v. Deborah D.*, 127 Cal. App. 4th 319 (2005) (rejecting a known sperm donor's claims to paternity).

6. See *infra* Part III.A.1–2 (detailing the facts of both cases).

7. See *infra* Part III.A.1 (discussing the facts and ruling of *Steven S. v. Deborah D.*).

8. See *infra* Part III.A.2.B (discussing the facts of *K.M. v. E.G.* and analyzing the court's reasoning behind their rulings).

9. See *Carvin v. Britain (In re L.B.)*, 122 P.3d 161, 163 (Wash. 2005) (holding that a nongestating lesbian partner did not have standing to pursue visitation rights because the statute under which she pursued her claims was declared unconstitutional). Although the ruling in this case was the opposite of *K.M. v. E.G.*, the very appearance of this issue in another state supreme court illustrates the likelihood that similar claims will appear more frequently.

10. See *Elisa B. v. Superior Court*, 117 P.3d 660, 670 (Cal. 2005) (holding that because the nongestating partner openly held the children out as her own, because she raised the children expecting to be their mother, and because there were no competing claims to her parental rights, she was the mother of the children and had to fulfill her parental obligations to them); *Kristine H. v. Lisa R.*, 117 P.3d 690, 695–96 (Cal. 2005) (holding that a pre-birth judgment declaring the nongestating partner as a mother of the child was valid, and that the nongestating partner was also a mother of the children).

11. See, e.g., *Jones v. Jones*, 884 A.2d 915, 919 (Pa. 2005) (finding that the best interests of the child indicated that the nonbiological mother in a lesbian relationship was entitled to custody of the children); *C.E.W. v. D.E.W.*, 845 A.2d 1146, 1152 (Me. 2004) (holding that the nonbiological lesbian partner was entitled to parental rights based on a determination of best interest of the child); *Chambers v. Chambers*, 2002 Del. Fam. Ct. LEXIS 39, *37–38 (2002) (finding that the nonbiological mother in a lesbian relationship was considered a parent under Delaware law and was responsible for child support after the couple split); *V.C. v. M.J.B.*, 748 A.2d 539, 555 (N.J. 2000) (holding that a nonbiological lesbian mother who had formed a psychological bond with the children of her partner was entitled to visitation but not joint legal

dealing with artificial insemination are hardly new phenomena in American case-law,¹² but assisted reproduction involving same-sex couples is a new and relatively unsettled area of law.¹³

Despite the fact that courts have often been called on to resolve these novel cases, courts are a less suitable forum for advancing the law on this new, yet growing, trend in family law because of the likelihood of inconsistent rulings from state to state.¹⁴ Instead, legislatures should seek a uniform and nationally adopted rule¹⁵ that serves to protect families, as well as the best

custody); *Guardianship of Z.C.W.*, 71 Cal. App. 4th 524, 528 (1999) (finding that a lesbian partner cannot claim visitation rights in a child born by artificial insemination, when the gestational mother objects to the visitation).

12. See, e.g., *Lamaritata v. Lucas*, 823 So. 2d 316, 319 (Fla. Dist. Ct. App. 2002) (finding that a sperm donor was statutorily pre-empted from asserting parental rights to the child); *Johnson v. Calvert*, 5 Cal. 4th 84, 93 (1993) (involving a surrogacy contract, in which the court ruled that although genetic consanguinity is valued, in cases of surrogacy, the person intending to be the mother is considered the mother of the resulting child); *K.S. v. G.S.*, 440 A. 2d 64, 68–69 (N.J. Super. Ct. Ch. Div. 1981) (ruling that a husband was liable for child support of a child born through artificial insemination).

13. Although artificial insemination and assisted reproduction are not the same procedure, for the purposes of the Note, these technologies will be considered as interchangeable in terms of what legal outcomes they produce. Furthermore, the recent dates of court cases dealing with same-sex couples in custody disputes indicates that this area of law is fairly undecided. See *supra* notes 9–11 (discussing the recent cases involving same-sex couples and custody disputes).

14. See *Troxel v. Granville*, 530 U.S. 57, 93 (2000) (Scalia, J., dissenting) (discussing how state legislatures might be a better place to ensure "parental rights" because state legislatures can correct any problems that might occur more easily than courts could); *Cotton v. Wise*, 977 S.W.2d 263, 265 (Mo. 1998) (commenting on the problem with allowing courts to create an equitable-parent doctrine because it largely has to improvise the standards to follow, whereas legislatures already have "well-chartered passageways" dealing with these matters); *E.N.O. v. L.M.M.*, 711 N.E.2d 886, 898 (Mass. 1999) (Fried, J., dissenting) (commenting on how legislatures are a better place to systematically handle same-sex couples who wish to raise children because a court's "imprecise, indirect, and piecemeal entry into this field can only cause confusion"); see also Phong Duong, *A Survey of Gay Rights Culminating in Lawrence v. Texas*, 39 GONZAGA L. REV. 539, 556 (2003) (noting inconsistencies in the way state courts have treated decisions regarding homosexual rights, especially in the area of family law); Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 483 (1990) (arguing that courts had been applying improper standards to new models of family, which resulted in inconsistent rulings across states and within states). But see Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 659 (2001) (arguing that courts are the proper forums to create laws when the legislature declines to do so, especially in areas traditionally resolved by common law).

15. See *infra* notes 161–66, and accompanying text (discussing the debate concerning whether matters of family law should be the exclusive province of states, or whether the federal government should inject consistency across the nation).

interest of the child, by allowing those who have bonded with children to continue to raise, support, and love them.

As the law currently stands, the interests of same-sex couples are not addressed in statutes dealing with artificial insemination and assisted reproduction.¹⁶ The Uniform Parentage Act (UPA) and the statutes of most states¹⁷ approach the idea of assisted reproduction based on gender, in that they assume that only a male donor would have an interest in claiming parental rights in a child.¹⁸ The language of the revised UPA § 703 assumes that only a man would provide sperm with the intention of becoming a parent of that child, but fails to mention a woman who might donate an egg with the same intention.¹⁹

Instead of ensuring gender equality, many current statutes focus on the rights of unmarried women to procreate using artificial insemination, which is arguably an acceptable, and even desirable, societal objective.²⁰ Assuming that society does find that allowing a single woman to take advantage of assisted

16. See UNIFORM PARENTAGE ACT §§ 702–03 (2002) ("A donor is not the parent of a child conceived by means of assisted reproduction," and "[a] man who provides sperm for, or consents to, assisted reproduction by a woman as provided in Section 704 with the intent to be the parent of her child, is a parent of the resulting child."). This statute addresses the rights of people involved in heterosexual relationships by only addressing a sperm donor's donation to a woman. See *infra* Part IV (discussing the various statutes regarding artificial insemination around the country).

17. See *infra* Part IV (listing the statutes from around the country).

18. See UNIFORM PARENTAGE ACT § 703 (2002) (stating that only men who express an intention to be the father of the child resulting from their sperm donation can be the father of that child).

19. *Id.*

20. The social acceptability of artificial insemination is evidenced by the updated Uniform Parentage Act, which removed the term "married woman" from its section on artificial reproductive technology. UNIFORM PARENTAGE ACT § 702 cmt. at 63 (2002). The fact that so many states have either adapted similar language to this amended UPA, or changed the language of their own statutes before the UPA was amended further supports the inference that allowing unmarried women to take advantage of assisted reproduction is a goal that has gained fairly widespread acceptance in our society. See *infra* Part II (discussing those states which have adopted the UPA, those who have deviated from the act somewhat, and those that have ignored the act completely). But see Kristin E. Koehler, *Artificial Insemination: In the Child's Best Interest?*, 5 ALB. L.J. SCI. & TECH. 321, 334–37 (1996) (questioning the validity of artificial insemination and the psychological effects that artificial insemination has on the children produced from this procedure).

Some legal scholars suggest that assisted reproductive procedures might not be desirable for anyone regardless of their marital status or sexual orientation. See John A. Robertson, *Procreative Liberty and Harm to Offspring in Assisted Reproduction*, 30 AM. J.L. & MED. 7, 39–40 (2004) (discussing the disadvantages, both physical and emotional, of children born from assisted reproduction procedures, and balancing those disadvantages against an individual's right to procreative liberty).

reproductive procedures is a valid goal, surely that goal does not preclude another valid goal—that of allowing same-sex couples also to enjoy the benefits of assisted reproductive technologies.²¹ In furtherance of that goal, therefore, state legislatures should not focus on the gender of the donor but rather purely on the intentions of the donor, male or female, and those of the woman who is the recipient of the donation and the birth mother of the child.

This Note examines the problem of treating the genders differently in gamete donation cases, while also effecting a new rule courts should follow in determining parentage in egg and sperm donation cases. Part II offers a brief summary of the history of assisted reproduction and the legal commentary surrounding it. Part III gives further details of the two cases mentioned in the introduction,²² compares and contrasts these cases, and examines why the court reached different outcomes in each. In Part IV, this Note will discuss the various state rules regarding egg or sperm donation, noting those states that have gender-neutral statutes regarding donation, as well as those states that have gender-specific statutes. This Part also examines some of the policy reasons behind a particular state's adaptation of their rule. Finally, this Part predicts what the outcomes of the California cases would have been had they occurred in different areas of the country, highlighting the problem of inconsistent outcomes. Part V offers a suggestion for a new rule to be included in the Uniform Parentage Act: In the case of a known donor of either semen or ovum, the birth mother of the resulting child should have to state before the assisted reproduction that she does not intend the donor to have parental rights in the resulting child, if she does not want the donor to have parental rights. This rule would allow the intention of the parties involved in the donation to govern, resulting in the best situation for the child because the people who love and want to care for the child will be the ones raising the child. Finally, Part VI discusses the advantages and disadvantages of the proposed rule, concluding that the advantages outweigh the disadvantages.

21. Although same-sex couples have taken advantage of assisted reproductive technology over the years, the legal recognition of those efforts has developed slowly, and only recently. See A.J. Mistretta, *LGBT Couples Often Choose Assisted Reproduction over Adopting Children*, DALLAS VOICE, Aug. 11, 2006 (noting that while anecdotal evidence points to an increased use of assisted reproductive technology by lesbian, gay, bisexual, and transgendered couples, no research or solid evidence has directly supported this point).

22. *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005); *Steven S. v. Deborah D.*, 127 Cal. App. 4th 319 (2005).

II. A Brief Examination of Assisted Reproduction Across the Country

Although the occurrence of *K.M v. E.G.* and *Steven S. v. Deborah D.* is local in manifestation, the problem derived from these two cases, that of treating male and female donors differently in the statute, is certainly national in character and importance. The latest report from the Centers for Disease Control (CDC) notes that the number of assisted reproductive technology (ART) cycles in the United States has almost doubled between 1996 and 2003 from 64,681 cycles to about 122,872 cycles.²³ The number of infants born from assisted reproduction also doubled between 1996 and 2003 from 20,840 births to about 48,750 births.²⁴ Furthermore, the report also indicates that fertility clinics are located in almost every state in the nation.²⁵ Moreover, this report does not even include instances of artificial insemination, which is prevalent in American society as well.²⁶

Although the law has already made many adjustments because of ART procedures, new adjustments need to occur to improve the legal system's treatment of assisted reproduction and sperm or egg donation. For example, most states include references to artificial insemination in their codes, further reflecting the prominence of these procedures.²⁷ Given the cases discussed in

23. U.S. Dep't for Health & Human Servs., Ctrs. for Disease Control, 2003 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 55 (2005). An ART procedure refers to any fertility procedure in which egg and sperm are handled (and often combined) outside the uterus. *Id.* at 3. Artificial insemination is not considered an ART procedure, since only sperm is handled outside the uterus. *Id.* An ART cycle is an approximately two-week process that involves all the steps which a doctor and his patient must take in order to have a successful fertilization, including beginning a drug regimen to help promote egg production, fertilization of the egg, and implantation of the fertilized egg in the uterus. *Id.* at 3-4. The CDC includes information about all ART cycles that were started but discontinued at some point. *Id.* at 4. Obviously, not all the data from the CDC's report involves those who use egg or sperm donors, although the report does differentiate between successful procedures based on egg donation versus those using the gestating woman's own eggs. *Id.* at 50-54. However, the fact that the use of ART has dramatically increased necessarily indicates that the use of sperm and egg donation would comparably increase.

24. *Id.* at 55.

25. *Id.* at 13. Alaska, Maine, Montana, and Wyoming are the only four states that did not have clinics in 2003. *Id.*

26. In 2000, the Food and Drug Administration noted the presence of about 110 sperm banks in the United States. Dept. of Health and Human Services, Food & Drug Admin., AGENCY INFORMATION COLLECTION ACTIVITIES; PROPOSED COLLECTION; COMMENT REQUEST; ESTABLISHMENT REGISTRATION AND LISTING REQUIREMENTS FOR HUMAN CELLS, TISSUES, AND CELLULAR AND TISSUE-BASED PRODUCTS, Docket No. 00N-1642, Dec. 5, 2000.

27. For a review of the various laws in each state regarding artificial insemination and gamete donation, see *infra* Part IV. Extensive legal commentary covers most aspects of ART procedures. For a review of the most prevalent issues in ART, see Helen M. Alvarez, *The Case*

Part III, however, and the possibility that those fact patterns might occur again, the rule proposed in this Note will address this specific situation—gamete donors being treated differently based on their genders—which has largely been unattended by the laws of the states.

III. *An Examination of the Cases*

A. *The California Cases*

The two cases discussed below highlight one problematic situation that occurs under the 1973 UPA. In fact, the disparity between the two cases helps to illustrate the inequality that can result from the 1973 UPA, especially in the incongruent treatment of gender resulting from the above-mentioned statute²⁸ and the nearly identical California statute.²⁹

for Regulating Collaborative Reproduction: A Children's Rights Perspectives, 40 HARV. J. ON LEGIS. 1, 61–63 (2003) (proposing legislation that will offer increased protection for children's rights in assisted reproduction); Kenneth Baum, *Golden Eggs: Toward the Rational Regulation of Oocyte Donation*, 2001 BYU L. REV. 107, 112 (2001) (focusing on whether oocyte donors should be allowed to receive compensation for their donations); Catherine DeLair, *Ethical, Moral, Economic and Legal Barriers to Assisted Reproductive Technologies Employed by Gay Men and Lesbian Women*, 4 DEPAUL J. HEALTH CARE L. 147, 148 (2000) (concentrating on artificial reproduction and surrogacy agreements, examining the various barriers to access to these technologies, and offering ways to challenge these barriers); James Escuder, *Prisoner Parents: An Argument for Extending the Right to Procreate to Incarcerated Men and Women*, 2002 U. CHI. LEGAL F. 271, 287–301 (2002) (arguing that a state cannot infringe on a prisoner's right to procreate using assisted reproduction procedures); Bartha S. Knoppers & Sonia LeBris, *Recent Advances in Medically Assisted Conception: Legal, Ethical, and Social Issues*, 17 AM. J.L. & MED. 329, 333–34 (1991) (analyzing the use of ART procedures and their effects on five main principles: "1) the respect for human dignity; 2) the security of human genetic material; 3) the quality of services; 4) the inviolability of the human person; and 5) the inalienability of the human body"); Amy M. Larkey, *Redefining Motherhood: Determining Legal Maternity in Gestational Surrogacy Agreements*, 51 DRAKE L. REV. 601, 622–27 (2003) (discussing four different theories of legal maternity and offering suggestions for how to determine legal maternity in Iowa); Susan C. Stevenson-Popp, *"I Have Loved You in My Dreams": Posthumous Reproduction and the Need for Change in the Uniform Parentage Act*, 52 CATH. U. L. REV. 727, 747–58 (2003) (discussing the various statutes and case law surrounding the practice of posthumous insemination and proposing legal changes to deal with possible situations that could occur in the future).

28. UNIFORM PARENTAGE ACT § 5 (1973).

29. CAL. FAM. CODE § 7613(b) (2005); see *infra* Part IV.A.1 (explaining the gendered differences resulting from the original UPA).

I. Steven S. v. Deborah D.

The first case, *Steven S. v. Deborah D.*, involved a male/female custody dispute occurring after an incident of artificial insemination. Steven, who was not married to Deborah, provided Deborah's physician with semen for use in an artificial insemination for Deborah's benefit.³⁰ The first insemination was ultimately unsuccessful, thus the two individuals engaged in sexual intercourse, which again did not result in pregnancy.³¹ After ending the sexual relationship, Deborah once again sought Steven's assistance in artificial insemination, which was successful.³²

In March 2003, Steven filed for paternity rights of Trevor, the child resulting from the artificial insemination.³³ The trial court ruled that public policy indicated that the court should not apply California Family Code Section 7613(b) even though the donor had a relationship with the mother.³⁴ Section 7613(b) states that "the donor of semen provided to a licensed physician and surgeon 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."³⁵ Therefore, the trial court ruled that Deborah should be estopped from relying on that section, and that Steven should be the natural father of Trevor.³⁶ The appellate court reversed the court below, and found that § 7613(b) should apply.³⁷ The court found that the legislative intent of § 7613(b) was to prevent a semen donor from claiming parental rights in the child even if the donor had a relationship with the mother.³⁸ Had the legislature wanted to make an exception in the case of semen donors known to the mother, the court reasoned, it would have been capable of doing so.³⁹ Based on its interpretation

30. *Steven S. v. Deborah D.*, 127 Cal. App. 4th 319, 322 (2005).

31. *See id.* (describing facts from the trial court, including the sexual relationship between the two parties).

32. *See id.* (noting the trial court's finding that the child was conceived through artificial insemination and not through the sexual relationship).

33. *See id.* (noting Steven's initial filing in this action).

34. *See id.* (observing the trial court's decision that despite their determination finding the child resulted from artificial insemination, § 7613 should not apply).

35. *See Steven S. v. Deborah D.*, 127 Cal. App. 4th 319, 322 (2005) (citing CAL. FAM. CODE § 7613(b) (2005)).

36. *See id.* (finding that the trial court recognized that Steven S. was the natural father of the child).

37. *See id.* at 323 (holding that § 7613(b) should apply to known sperm donors).

38. *See id.* at 325 (analyzing surrounding statutes and case law to make a determination of legislative intent).

39. *See id.* (noting that the finding in a prior case, *Jhordan C. v. Mary K.*, 179 Cal. App. 3d 386, 397-98 (1986), the legislature gave unmarried women the right to bear children without

of the legislature's wishes, the appellate court overturned the district court's rulings and found that Steven had no parental rights to Trevor.⁴⁰

2. K.M. v. E.G.

Although *K.M. v. E.G.* has a similar fact pattern to *Steven S. v. Deborah D.*, the facts are far more complicated and played an integral role in the decision of the California Supreme Court.⁴¹ Kate and Emma were involved in an intimate relationship; soon after the two became romantically involved, Emma informed Kate that she would like to have a child, an option that she had considered before she met Kate.⁴² The couple began living together and registered as domestic partners less than a year after they became romantically involved, and while Emma was actively pursuing various options to have a baby.⁴³ For more than a year, Emma tried to conceive through artificial insemination. Kate accompanied her to most appointments and thought that the couple had an understanding that both partners would raise any resulting children together, as equal co-parents.⁴⁴ Emma insisted, however, that no matter how supportive Kate was in her efforts, Emma wanted to be a single parent.⁴⁵

After several more unsuccessful attempts, the doctor suggested in vitro fertilization, using Emma's ova for implantation; these attempts were also unsuccessful.⁴⁶ The doctor then suggested that Kate donate ova for Emma's use, which resulted in a successful pregnancy.⁴⁷ Both parties claimed, however, that their understanding of the situation had not changed: Kate thought the couple would raise the child together, and Emma insisted that she

interference from sperm donors).

40. See *Steven S. v. Deborah D.*, 127 Cal. App., 4th 319, 327–28 (2005) (reversing the judgment of the lower court).

41. For ease of reading, from this point forward, K.M. will be referred to as Kate, while E.G. will be referred to as Emma.

42. *K.M. v. E.G.*, 117 P.3d 673, 675 (Cal. 2005) (relying on testimony from Emma and Kate, the trial court made this determination).

43. See *id.* at 675–76 (including adopting a baby as well as artificial insemination as options they considered).

44. See *id.* (reflecting a discrepancy based on variant testimony at the trial level).

45. See *id.* at 676 (relying on the parties' testimony).

46. See *id.* (failing because Emma was unable to produce sufficient ova for the procedure).

47. See *K.M.*, 117 P.3d at 676 (reproducing the facts determined at the trial level).

was going to be a single mother.⁴⁸ Furthermore, Kate had signed a standard egg donation agreement, which included a waiver of parental rights.⁴⁹ She thought, however, that the waiver did not apply to her because the contract contained a clause that addressed maintaining anonymity, and she obviously knew the recipient of the egg.⁵⁰ Additionally, Kate only had a few minutes to look over and sign the contract and was unable to ask questions in that short period of time.⁵¹

When twin girls were born, the couple told no one that Kate was the ovum donor, and the birth certificate only listed Emma's name.⁵² Despite Kate's lack of official position, however, Emma referred to Kate's father as a grandfather, the children's school had both women named as parents, and the children's nanny said that both women were mothers.⁵³ The couple separated in 2001, and Kate filed a claim for custody, which the superior court dismissed on summary judgment and the appellate court affirmed.⁵⁴

The Court of Appeals concluded that Kate was not the mother of the twins notwithstanding her biological relationship with them.⁵⁵ The court made this decision comparing Kate's situation with that of a sperm donor, who would be statutorily prohibited from receiving custody in this case under California Family Code § 7613(b).⁵⁶ The California Supreme Court ultimately disagreed, however, and determined that Kate should be considered the mother of these children.⁵⁷ The court found, among other things, that the legislature intended to distinguish egg donors from sperm donors in §7613(b).⁵⁸ The court did not

48. *See id.* (restating the facts determined at the trial level).

49. *See id.* (signing a form entitled "Consent Form for Ovum Donor (Known)," which was a standard form distributed at the University of California at San Francisco Medical Center).

50. *See id.* (thinking that because one part of the contract did not apply to her, the clause on parental rights would also not apply to her based on her understanding of the agreement between herself and Emma).

51. *See id.* (disputing evidence from Emma, who said she had received these forms over a month before the ova transfer took place and had discussed them with Kate).

52. *See K.M. v. E.G.*, 117 P.3d 673, 676 (Cal. 2005) (finding that the couple told no one about the ova donation, including their families, friends, and doctors).

53. *See id.* at 677 (using facts determined at the trial level).

54. *See id.* at 677–78 (basing both decisions on the finding that Kate signed away her parental rights).

55. *See id.* at 677 (finding that the parties' actions after the birth did not alter the determination of parental rights).

56. *Id.* (citing the trial court's reasoning in support of their own decision); CAL. FAM. CODE § 7613(b) (2005).

57. *See K.M. v. E.G.*, 117 P.3d 673, 682 (2005) (reversing the decision of the court below).

58. *See id.* (disagreeing with the trial and appellate courts determinations).

need to consider if Kate had also accepted the children into her home and openly held them out as her own, a standard that mimics the requirements for establishing a father-child-relationship in circumstances of illegitimacy.⁵⁹

B. The Reasoning Behind the California Supreme Court's Decision

The California Supreme Court did mention the appellate court's *Steven S. v. Deborah D.* decision in *K.M. v. E.G.*, but it distinguished the two cases.⁶⁰ The supreme court stated that because the lower court did not address whether § 7613(b) would apply if the child lived in the same home as a semen donor, that question was still open for decision.⁶¹ The court implicitly answered this open question in the case of semen donors but restricted its explicit ruling to the facts in this case.⁶² The court suggested that the intention of the parties should not prevail in judicial considerations of parentage because intent would become a post-insemination judicial determination.⁶³

Therefore, the bulk of the California Supreme Court's decision seems to rest on the fact that both women decided to raise the children in their joint home.⁶⁴ This factor, however, has no presence in prior California case law or statutory language.⁶⁵ The court thus crafted a new rule and usurped the role of

59. *Id.*; CAL. FAM. CODE § 7611(d) ("He receives the child into his home and openly holds out the child as his natural child.").

60. *K.M.*, 117 P.3d at 680 n.5 (finding that because Steven S. did not live in the same house as Deborah D., that fact pattern was distinguishable from the instant case).

61. *See id.* (distinguishing the Court of Appeal ruling from the present case).

62. *See id.* at 681–82 (holding that § 7613(b) should not apply to a woman who "supplied ova to impregnate her lesbian partner in order to produce children who would be raised in their joint home"). However, the court's ruling does seem to suggest that had a known sperm donor intended to raise a child in a joint home with an unmarried woman, by logical extension of their holding, the sperm donor would probably be found to be the father of the child. *See infra* note 67 (discussing the court's interpretation of the legislative history of § 7613(b) and their suggestion in dicta that § 7613(b) should not apply to a male sperm donor who intended to raise a child in a joint home with the mother).

63. *K.M.*, 117 P.3d at 681–82. The court also points out that the determination of parentage under the Uniform Parentage Act does not usually consider the intent of the parties involved. *Id.* at 682. The court gives the example of a man who has intercourse with a woman that falsely claims to be infertile; the man would still be the father of the child resulting from that encounter. *Id.*

64. *See id.* at 680 ("[I]t is undisputed that they intended that the resulting child would be raised in their joint home."). The children lived with both women for a little more than five years, from the time of their birth in December 1995 until the couple separated in September 2001. *Id.* at 676–77.

65. The only case law the majority could cite to support its "joint home theory" was a ruling from the Colorado Supreme Court in the case *In Interest of R.C.*, 775 P.2d 27 (Colo.

the legislature, but the rule that the court created is too fact specific and leaves open the question of a male sperm donor who raises a child in a joint home with the mother.

In opposition to the majority, the dissent argued that an intent test, first established in the California case *Johnson v. Calvert*,⁶⁶ should remain the standard to apply in ovum donor situations.⁶⁷ However, the intent test is not an adequate way of resolving disputed parentage for two reasons.⁶⁸ First, the *Johnson* intent test only offers a resolution in cases dealing with ovum donors and fails to address what would occur in the case of a known sperm donor.⁶⁹ Second, the test relies on a court's after-the-fact determination of the intent of the parties as to whom will assume parental rights.⁷⁰ The rule proposed in this

1989). The Colorado court held that the UPA was not intended to apply "to affect the rights of known donors who gave their semen to unmarried women for use in artificial insemination with the agreement that the donor would be the father of any child so conceived." *Id.* at 35.

The California Supreme Court also relied on the legislative history generated when California's Senate adopted the language of the UPA. *K.M.*, 117 P.3d at 680. Although no direct legislative history supported the majority's point, the justices suggested that support was implied by the fact that the Senate had deleted the word "married" from the UPA, in order to allow unmarried women access to artificial insemination. *Id.* However, the court's conclusion that § 7613(b) should not apply to male sperm donors is far from certain. One could just as easily argue that the absence of such an exception in the statute is an indication that the legislature did not want to create an exception to § 7613(b).

Furthermore, the dissent noted that the majority crafted a new rule that deviates from the standard intent test that the court had applied for years. *Id.* at 687 (Werdegar, J., dissenting). The intent test was established by California courts in *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993), in order to help resolve parentage in the case of an ovum donor, a situation which the UPA fails to address. *K.M.*, 117 P.3d at 685-86. The dissent criticized the majority's abandonment of the intent test, stating that the majority's holding created a special exception for ovum donors based on their sexual orientation. *Id.* at 687 (Werdegar, J., dissenting). Instead, the dissent would have preferred to maintain the intent test, finding it adequate to resolve any situation that might occur. *Id.* at 689 (Werdegar, J., dissenting).

Finally, the other statute that the court referenced does not mention a "joint home" requirement. See CAL. FAM. CODE § 7611(d) (2005) (stating that a man has to receive a child into "his home," not a home he lives in jointly with the mother of the child, in order to establish paternity).

66. *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993); see also *supra* note 65 (explaining the *Johnson* intent test, which was the standard for determining parentage in ovum donor situations before the majority's ruling in *K.M. v. E.G.*).

67. *K.M. v. E.G.*, 117 P.3d 673, 689 (Cal. 2005) (Werdegar, J., dissenting).

68. *But see supra* note 65 (noting the dissent's preference for the intent test and its advantages over the majority's newly crafted rule).

69. *K.M.*, 117 P.3d at 685-86 (Werdegar, J., dissenting) (noting that the *Johnson* intent test applies only to cases where ovum donation causes a dispute over which woman is the mother).

70. See *id.* at 681-83 (criticizing the intent test for this later court determination); see also *supra* note 65 (describing the intent test and the majority's criticism of it).

Note, however, would address both of these issues by requiring the mothers to state their intent regarding who has parentage before the insemination takes place.⁷¹ The rule also maintains a gender-neutral stance in reference to donors and does not favor sperm donors over ovum donors, and vice versa.

IV. An Examination of the Statutes

A. The Five Categories of State Statutes Regarding Gamete Donation

This section will compare and contrast the different state statutes regarding gamete donation. Essentially, this analysis divides the states into five categories: (1) the states that exactly or very closely copy the original UPA;⁷² (2) states that use different language than the original UPA, but keep its intent and effect;⁷³ (3) states that imitate the revised UPA's (2002) gender-neutral intent regarding donors and its establishment of paternity for sperm donors in assisted reproduction cases;⁷⁴ (4) states that only indirectly mention the status of donors of semen;⁷⁵ and (5) states that do not have statutes regarding sperm or egg donation.⁷⁶

1. States That Copy the Original UPA

The first category includes those states that resemble the original UPA, which states: "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."⁷⁷ California falls into category one, and its statutory law regarding

71. See *infra* Part V.D (noting the disadvantages of the proposed statute).

72. See *infra* Part IV.A.1 (listing those states and their statutes).

73. See *infra* Part IV.A.2 (listing those states and their statutes).

74. See *infra* Part IV.A.3 (listing those states and their statutes).

75. See *infra* Part IV.A.4 (listing those states and their statutes).

76. See *infra* Part IV.A.5 (listing those states and their statutes). Within each category of states, the minor differences between statutes have no significant effect on the meaning or likely outcomes in the determinations of parentage for each category.

77. UNIFORM PARENTAGE ACT § 5(b) (1973). This original model is the one that California used in adapting its statute, with the small change that omitted the word "married" before "woman," CAL. FAM. CODE § 7613(b) (2005), in order for unmarried women to more easily maintain their independent parental rights. The updated model act modernizes itself by maintaining a gender neutral stance in regards to donation but takes a stance regarding paternity of those men who donate sperm to be used in artificial insemination procedures and who intend

gamete donation only slightly deviates from the original UPA by stating that: "The donor of semen provided to a licensed physician and surgeon 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."⁷⁸ Both statutes fail to address the problem of egg donation, likely because they were enacted at a time when the technology for most egg donation assisted reproductive procedures was not then feasible.⁷⁹

Several other states have adopted a statute that either exactly copies or very closely resembles the original UPA's language regarding artificial insemination, placing those states in category one. For example, Alabama, Minnesota, Missouri, Montana, and Nebraska exactly copy the original UPA.⁸⁰ A few states deviate slightly from the original. Kansas, like California, removes the word "married" from the original UPA, as well as including a provision that would allow the parties to contract against the statute,⁸¹ while Wisconsin's statute adds the phrase "bears no liability for the support of the child and has no parental rights with regard to the child" to the end of the statute.⁸² For the purposes of this Note, the original UPA will represent all states that fall into category one.

Had the cases discussed in Part III occurred in another category one state, the results would have turned out quite differently than they did in actuality. If a different category one state, strictly following the original UPA-like statute, had ruled on these cases, neither Steven S. nor Kate likely would have received parental rights in the child.⁸³ California's result in *K.M. v. E.G.* strayed from

to be fathers of the child. UNIFORM PARENTAGE ACT §§ 702–03 (2002).

78. CAL. FAM. CODE § 7613(b) (2005).

79. The first successful in vitro fertilization happened in 1978, about five years after the first UPA was finalized. See Walter Sullivan, *Woman Gives Birth to Baby Conceived Outside the Body*, N.Y. TIMES, July 26, 1978, at A1 (reporting on the first test-tube baby born in England); see also, 6 THE NEW ENCYCLOPEDIA BRITANNICA 276 (15th ed. 1995) (offering a brief explanation of the technical process of in vitro fertilization, as well as some of the history of the procedure).

80. ALA. CODE § 26-17-21(b) (2006); MINN. STAT. § 257.56 (2006); MO. REV. STAT. § 210.824(2) (2006); MONT. CODE ANN. § 40-6-106(2) (2005); NEV. REV. STAT. § 126.061(2) (2006).

81. KAN. STAT. ANN. § 38-1114(f) (2005).

82. WIS. STAT. § 891.40(2) (2006). In addition, the following statutes also removed the word "married" from before the word "woman": CAL. FAM. CODE § 7613(b) (2007); 750 ILL. COMP. STAT. 40/3(b) (2006); N.J. STAT. ANN. § 9:17-44(b) (2007) (including a provision which allows the parties to contract against this statute, as well).

83. The plain language of the statute would probably preclude both parties from claiming any parental rights in a child that resulted from their donation. See *supra* note 79 and accompanying text (noting the language of the original UPA). Each state, because it lacks statutes that contain provisions specifically mentioning egg donation, would either have to

the UPA's statutory scheme and is an exception to the predicted results in category one states; its supreme court's ruling changed the predicted statutory results from those expected in category one states.⁸⁴

2. States with the Same Intent and Effect as the Original UPA

The category two states use different language from that of the original UPA, but retain the intent and effect as the original UPA in all material aspects. For instance, Connecticut's statute states: "A donor of sperm used in A.I.D. (Artificial Insemination with a Donor), or any person claiming by or through him, shall not have any right or interest in any child born as a result of A.I.D."⁸⁵ This statute would preclude any donor of sperm from claiming interests in the child, as well as precluding any successor in interest from pursuing any similar claims.⁸⁶ Despite this dissimilar language, however, the determination of parentage in these states will yield the same results as the determination under the original UPA.⁸⁷

Likewise, the language of Idaho's code deviates from the original UPA, stating that: "The donor shall have no right, obligation or interest with respect to a child born as a result of the artificial insemination."⁸⁸ Despite the use of different language in the statute, Idaho would also yield the same results as a

analogize egg donors to sperm donors, or to create a new standard, as the California Supreme Court did. Therefore, because analogizing to sperm donors in the case of egg donation is easier and serves judicial efficiency, this Note assumes that most states would likely analogize and not take steps similar to California. This assumption is mirrored by the later change in the revised UPA, which removes the term sperm donor and replaces it with the word donor instead. *See infra* Part IV.B (discussing the revised UPA).

84. *See supra* Part III.B (discussing the reasons why the court decided to adopt a new rule in *K.M. v. E.G.*).

85. CONN. GEN. STAT. § 45a-775 (2007).

86. *Id.*

87. *See infra* note 89 and accompanying text (discussing the results of the two California cases had they occurred in a category two state); *see also supra* note 83, and accompanying text (giving the results of the two cases in category one states).

88. IDAHO CODE ANN. § 39-5405 (2006). Idaho's code also includes a provision that forbids the child born from artificial insemination from claiming any right or interest in the donor. *Id.* The statute also includes an exception for the husband of the birth mother, which grants him parentage. *Id.*; *see also* N.H. REV. STAT. ANN. § 168-B:11 (2006) (protecting a donor from liability for support of any child born as a result of his donation); N.M. STAT. ANN. § 40-11-6(b) (2006) (stating that a donor of sperm—other than the recipient's husband—can only be liable for support of the child resulting from that donation if he consents in writing to his liability); OHIO REV. CODE ANN. § 3111.95(B) (2006) (same); OR. REV. STAT. § 109.239 (2005) (same).

state that followed the UPA.⁸⁹ Therefore, the original UPA can also represent category two states because the differences between category one and category two have no substantive effect in the determination of parentage.

3. States That Simulate the Revised UPA

Category three states mimic the 2002 UPA's gender-neutral intent and effect regarding donors and its gender-specific establishment of paternity in assisted reproduction instances, even if they do not all copy its actual language. The revised UPA's statutes state: "A donor is not a parent of a child conceived by means of assisted reproduction" and "[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."⁹⁰ Similarly, Colorado's statute contains parallel language: "(2) A donor is not a parent of a child conceived by means of assisted reproduction, except as provided in subsection (3) of this section" and "(3) If a husband provides sperm for, or consents to, assisted reproduction by his wife as provided in subsection (1) of this section, he is the father of the resulting child."⁹¹ Another example is Florida's statute, which contains a similar idea and purpose to the revised UPA but uses different language to effect its goals. That statute states: "The donor of any egg, sperm, or preembryo, other than the commissioning couple or a father who has executed a preplanned adoption agreement . . . shall relinquish all maternal or paternal rights and obligations with respect to the donation or the resulting children."⁹²

89. Under Idaho's statute, neither Kate nor Steven S. would be a parent to a child resulting from their gamete donation. *See supra* note 85 and accompanying text (predicting the results had California followed its statute, and maintained consistency with category one states).

90. UNIFORM PARENTAGE ACT § 702-03 (2002). The revised UPA eliminates the word "sperm" from § 702 in order to make the status of donors gender-neutral. *Id.* However, the UPA also recognizes one exception to the status of donors in § 703, which allows some sperm donors to claim parental rights, in limited circumstances. *Id.*

91. COLO. REV. STAT. § 19-4-106 (2) & (3) (2006). Note, however, that the only sperm donor statutorily excepted from subsection (2) is the husband of the birth mother. *Id.* *But see supra* note 90 and accompanying text (noting the exception for sperm donors who can claim parental rights).

92. FLA. STAT. § 742.14 (2006); *see also* DEL. CODE ANN. tit. 13, §§ 8-702-03 (2007) (stating that a donor is not the parent of a child conceived through assisted reproduction); N.D. CENT. CODE §§ 14-20-60 & 14-20-61 (2005) (stating that unless a donor declares in writing that her or she intends to be the parent of the child, the donor is not the parent of a child conceived through assisted reproduction); OKLA. STAT. tit. 10 § 555 (2006) (declaring that an oocyte donor will have no interest in the child); TEX. FAM. CODE §§ 160.702-03 (2006) (preventing a donor from seeking rights in a child, unless that donor is the husband of the woman bearing the child);

Had the facts of *Steven S. v. Deborah D.* and *K.M. v. E.G.* occurred in a category three state, Steven S. possibly would have been found to be the father of the child. Under the revised UPA and in category three states, Steven S. might have an opportunity to claim parental rights in the child if a court determines that Steven intended to be the father of Trevor.⁹³ Kate, however, would not receive the same opportunity based almost entirely on her gender.⁹⁴ Kate would not receive interests in the child because she is not male, and the revised UPA only allows male donors who begin artificial insemination with the intention of being a father to be a parent to the child.⁹⁵ Therefore, since the determination of parentage under these statutes would yield the same results for each state, the revised UPA will represent the states that fall into this category.

4. States That Indirectly Mention the Status of Donors

In the fourth category, a few states only indirectly mention the status of a donor of semen for use in artificial insemination, qualifying for category four. For instance, Alaska's statute states: "A child, born to a married woman by means of artificial insemination performed by a licensed physician and consented to in writing by both spouses, is considered for all purposes the natural and legitimate child of both spouses."⁹⁶ This statute does not contemplate artificial insemination occurring outside the context of a married

UTAH CODE ANN. §§ 78-45g-702 & 78-45g-703 (2006) (same); VA CODE ANN. §§ 20-158(A)(3) (2006) (same); WASH. REV. CODE §§ 26.26.705 & 26.26.710 (2007) (same); WYO. STAT. ANN. §§ 14-2-902 & 14-2-903 (2006) (noting that only a man who enters into sperm donation with the intent of being a father, will have rights as a father). Not all of the states listed completely embrace §703 of the UPA; instead they limit the establishment of paternity in assisted reproduction cases to a husband who consents to the reproduction. *See, e.g.* TEX. FAM. CODE § 160.703 (2005) (allowing husbands who donate sperm to retain parental rights in their children).

93. *Steven S. v. Deborah D.*, 127 Cal. App. 4th 319, 322 (2005). If the trial court determined that Steven intended to be the father from the beginning, then it might have ruled him to be the father of the child. The intention of fatherhood could be inferred from several facts in the case. For example, Deborah called Steven to congratulate him on his fatherhood when she had a child. *Id.* at 324. Furthermore, Trevor's middle name is Steven's last name, implying that Steven intended to be involved in his biological son's life. *Id.*

94. *See supra* Part IV.A.3 (suggesting that a woman would not receive parental rights were she merely a donor of eggs despite the language of the UPA, which does not distinguish between the genders in matters of gamete donation, but which does favor men who intend to become fathers before the insemination takes place).

95. *See* UNIFORM PARENTAGE ACT § 703 (2002) (allowing only male gamete donors to claim parental rights in a child resulting from their donation).

96. ALASKA STAT. § 25.20.045 (2006).

couple; it also by implication prevents any donor from claiming parental rights by granting the married couple exclusive parental rights in the child.⁹⁷

Another state in this category is Louisiana, whose statute states: "The husband of the mother may not disavow a child born to his wife as a result of an assisted conception to which he consented."⁹⁸ This statute, like most of the other statutes from states in category four, also does not conceive of a donor seeking parental rights in a child, largely because these statutes do not contemplate any child born from assisted reproduction to have fewer than two parents.⁹⁹

In category four states, neither Kate nor Steven S. would likely have any entitlement to a child conceived through the artificial insemination. Category four states do not envision artificial insemination occurring outside the marital relationship.¹⁰⁰ Thus, any use of assisted reproductive procedures by an unmarried woman would be statutorily unaddressed by these states.¹⁰¹ The legislatures' failure to consider unmarried women's use of ART procedures would leave courts to determine who else, if anyone, would receive parental rights in the child. Although it would be impossible to predict exactly how each court in these states would react to the fact patterns of these two cases, these statutes are comparatively outdated, suggesting that these states might not be amenable to unusual or novel fact patterns.¹⁰² Even the original UPA provided some statutory advice on how to deal with donors,¹⁰³ while category

97. *Id.*

98. LA. CIV. CODE ANN. art. 188 (2006).

99. *Id.*; see also ARIZ. REV. STAT. § 25-501(B) (2006) (stating that a child born of assisted reproduction is entitled to support from the mother's spouse if he is either the biological father or agreed to the insemination in writing); MASS. GEN. LAWS ch. 46 § 4B (2007) ("Any child born to a married woman as a result of artificial insemination with the consent of her husband, shall be considered the legitimate child of the mother and such husband."); N.C. GEN. STAT. § 49A-1 (2006) ("Any child or children born as the result of heterologous artificial insemination shall be considered at law in all respects the same as a naturally conceived legitimate child of the husband and wife requesting and consenting in writing to the use of such technique."); TENN. CODE ANN. § 68-3-306 (2006) ("A child born to a married woman as a result of artificial insemination, with consent of the married woman's husband, is deemed to be the legitimate child of the husband and wife."). Each of these statutes only envisions artificial insemination occurring within the context of a married couple's efforts to have a child, and thus neglects to mention a donor's specific rights, but the necessary implication of each statute is that the known, unmarried donor of semen has no rights in regards to the child.

100. See *supra* notes 98–101 and accompanying text (suggesting that artificial insemination outside the marital unit is a situation completely outside the comprehension of the legislatures of these states).

101. See *supra* note 101 (examining the statutes of several category four states).

102. See *supra* Part III.A.1–2 (reciting the facts of the two California cases).

103. UNIFORM PARENTAGE ACT § 5(b) (1973).

four states only implicitly address donor's rights. Also, those states that copied the original UPA often altered their statutes to include unmarried women who might wish to engage in assisted reproduction.¹⁰⁴ Therefore, given the fact that category four states have not demonstrated a statutory concern for even slightly nontraditional fact patterns, these states would not have been likely to allow the participants in the California case to assert parental rights.

5. States Lacking a Statute Addressing Gamete Donation

Finally, about one third of the states entirely fail to address gamete donation in their statutes.¹⁰⁵ In these states, the results of the two California cases would be nearly impossible to predict. Hypothetically, State *A*, which has no statute, might grant neither party parental rights, while State *B* might allow both parties to claim parental rights. State *C* could give just Steven rights, while State *D* might give just Kate parental rights.¹⁰⁶ These situations could theoretically result in highly disparate treatment among the states, and the desire for a national consistency in the determination of these cases,¹⁰⁷ means that it is necessary to create a rule that does not arbitrarily discriminate against anyone's rights solely on the basis of gender.¹⁰⁸ Instead, the rule should look to the parties' intentions to determine who should have parental rights in any child resulting from artificial insemination.¹⁰⁹

104. See *supra* Part IV.A.1 (discussing several state statutes that addressed unmarried women's rights to engage in ART procedures).

105. Georgia, Hawaii, Indiana, Iowa, Kentucky, Maine, Maryland, Michigan, Mississippi, New York, Nebraska, Pennsylvania, Rhode Island, South Carolina, South Dakota, Vermont, and West Virginia have no statutory rule specifically on parental status of sperm or egg donors.

106. Arkansas actually has a highly unusual statute, which will not play a role in this Note's analysis. Arkansas's statute is quite irregular in several aspects: It does not actually lay out any statutory presumption of paternity when an unmarried woman uses an anonymous or known sperm donor for artificial insemination. ARK. CODE ANN. § 9-10-201 (2006). However, should an unmarried woman utilize the services of a surrogate mother and use the semen of a known unmarried donor, the child is presumed to be the natural child of the father only. *Id.*

107. See *supra* notes 14–15 (discussing whether national consistency in this area of family law is desirable); see also UNIFORM PARENTAGE ACT Prefatory Note at 579–82 (1973) (stating that one of the objectives of the UPA was to regularize all states' treatment of illegitimate children and ensuring that all the statutes followed constitutional mandates). *But see infra* note 164 (offering scholarship that suggests that the federal government, which would encourage national consistency in the area of family law, should not interfere with the states' traditional right to enforce family law).

108. See *supra* note 80 and accompanying text (noting how the revised UPA grants parental rights on the basis of gender).

109. See *infra* Part V (outlining the specifics of the rule and analyzing its benefits and disadvantages).

B. Policy Reasons Behind the States' Statutes

Each set of states has a different policy reason for why it chose to utilize one statute over the other.¹¹⁰ The policy reasons behind category one and two states can largely be inferred by reference to the 1973 UPA.¹¹¹ The prefatory commentary to the Act expresses a desire to create "substantive legal equality for all children regardless of the marital status of their parents."¹¹² One specifically problematic situation that arose for the National Conference of Commissioners on Uniform State Laws was in regards to artificial insemination.¹¹³ Because artificial insemination technology using sperm donation had not developed for productive human use until about the mid-twentieth century,¹¹⁴ no need for legislative regulation of this new technology likely arose until the technology became more prevalent around this time. In drafting rules for parentage in artificial insemination, the Conference recognized that they could not address every situation that might possibly arise, so they intended their statute to include some flexibility for the future, while leaving some basic standard for courts to follow.¹¹⁵

For category three states, most of the policy behind the statute can be located in the policy reasons for the 2002 UPA.¹¹⁶ The UPA was revised in 2002 for several reasons, including inconsistent case law in construing the original UPA, the fact that the original UPA was virtually silent on the issue of divorce and parentage, and the rise in new technology since the creation of the original UPA.¹¹⁷ Therefore, one of the primary reasons for

110. For the purposes of this Note, policies in each state within a category are assumed to be substantially similar.

111. UNIFORM PARENTAGE ACT (1973).

112. UNIFORM PARENTAGE ACT Commissioner's Prefatory Note at 581 (1973).

113. UNIFORM PARENTAGE ACT § 5 (1973).

114. See 1 THE NEW ENCYCLOPEDIA BRITANNICA 605 (15th ed. 1995) (outlining a brief history of artificial insemination and noting that although the Russians perfected the techniques in animals in the 1930s, the technology was not utilized in humans until later); see also *supra* note 81 (noting how in vitro technology utilizing egg donation first occurred in 1978).

115. UNIFORM PARENTAGE ACT § 5 cmt. at 593 (1973).

116. UNIFORM PARENTAGE ACT (2002).

117. See UNIFORM PARENTAGE ACT Prefatory Note at 1 (2002) (listing these reasons as partial justification for why revised UPA was needed). The introduction also traces the history of the UPA, from the original 1973 version, through the Uniform Putative and Unknown Fathers Act of 1988 (UPUFA), the Uniform Status of Children of Assisted Conception Act (1988) (USCACA), and the Uniform Parentage Act of 2000, to the final amended Act of 2002. *Id.* at 1–2. The UPUFA and the USCACA are incorporated in the 2002 UPA, and therefore, the UPA necessarily contains elements from those acts, as well as supersedes both of those acts. *Id.*

adopting statutes that resemble the 2002 UPA is to address the unique problems created by children born of assisted reproductive technology.¹¹⁸ Another of the major policy goals articulated in the updated UPA is to protect unmarried women's rights to have and to raise a child independently.¹¹⁹ A third policy goal stated is to help ensure paternity and establish a legal father for the child when at all possible.¹²⁰ These articulated goals strike a balance between the respect for traditional values,¹²¹ and adaptation to new technology and circumstances.¹²²

For category four states, the policy reasons seem to endorse traditional values more than anything else. Nearly all the statutes seek to protect parental relationships within the marriage.¹²³ Furthermore, category four statutes do not even contemplate allowing a single woman to take advantage of assisted reproduction or artificial insemination.¹²⁴ Because of these states' discomfort with artificial insemination occurring outside of marriage, it is highly probable that the policies of these states endorse preventing donors from claiming any parental rights, regardless of gender.

at 2.

118. See UNIFORM PARENTAGE ACT Prefatory Note at 2 (2002) (highlighting the increased use of technology to assist in reproduction, and the consequent increase in children born with the help of that technology).

119. See UNIFORM PARENTAGE ACT § 702 cmt. at 63 (2002) (noting this significant difference from the original UPA). The comment also acknowledges that in some instances, the right of an unmarried woman takes precedent over ensuring the child has a legal father. *Id.* at 64. The increased frequency of unmarried women using ART is cited as a major motivating factor in preferring the unmarried women's rights. *Id.* at 63–64.

120. See *id.* § 703 cmt. at 64 (2002) ("This provision reflects a concern for the best interests of nonmarital as well as marital children born of assisted reproduction . . ."). *But see supra* note 20 (discussing the desirability of allowing single women to take advantage of assisted reproduction procedures).

121. For example, the desire to provide two parents for children when possible is often considered a traditional value. See UNIFORM PARENTAGE ACT § 201 (2002) (defining parent-child relationships for mother and child, as well as father and child).

122. See *supra* notes 9–11 and accompanying text (discussing recent cases involving same-sex couples and child custody disputes); see also note 23 and accompanying text (offering a brief discussion of ART procedures); *supra* Part II (noting the increased use of ART technology).

123. LA. CIV. CODE ANN. art. 188 (2006) (envisioning only married couples engaging in assisted reproduction); MASS. GEN. LAWS ch. 46 § 4B (2006) (same); N.C. GEN. STAT. § 49A-1 (2007) (same); TENN. CODE ANN. § 68-3-306 (2006) (same).

124. See *supra* Part IV.A.4 (discussing category four states' statutes).

*V. A Proposal for a New Rule**A. The Proposed Rule*

In order to create a more reliable and fair rule for courts to follow, this Note abandons all gender distinctions between donors and relies instead solely on the intention of the parties involved in the artificial insemination. The rule that the legislatures should adopt is as follows:

1. In the case of a known donor of either eggs or semen, if the birth mother does not wish the donor to be a parent to the child resulting from that donation, then she must state, before the assisted reproduction, that she does not intend the donor to be a parent to the child or children resulting from that donation.
2. The birth mother's statement of intent to prevent the known donor's parental rights in the child must be on record, signed by the birth mother, and notarized before the assisted reproductive procedure takes place.
3. Absent a signed waiver of parental rights by the known donor or the statement of intent required by (2), the known donor is presumed to retain parental rights.
4. In all cases of "anonymous donors," the donor will have no parental rights or responsibilities in the child.
5. **Exemptions:** When the birth mother is married or a party to a civil union,¹²⁵ the birth mother's husband or civil union partner is the presumed parent of a child resulting from assisted reproduction.
6. **Definition:** For purposes of this statute, "known donor" is defined as a gamete donor who has a "significant relationship with the birth mother," but is not related to the birth mother by blood, adoption, or affinity. People related by affinity are those that fall into the following categories: step-relations, in-laws, and those legally related to the birth mother outside the marital or civil union relationship that are not related by blood or adoption.

125. All references to a party to a civil union apply only to Connecticut, New Jersey, and Vermont, which are the only states with civil unions. See CONN. GEN. STAT. §§ 46b-38aa-38pp (2006) (establishing and defining civil unions); N.J. STAT. ANN §§ 37: 1-28-36 (2007) (same); 15 VT. STAT. ANN. § 1201(2) (2006) (same).

"Anonymous donor" is defined as a gamete donor with no "significant relationship with the birth mother."

7. **Definition:** For purposes of this statute, someone who has a "significant relationship with the birth mother" is defined as someone who has established ties to the birth mother before the assisted reproductive procedure occurs, in some capacity, i.e., financially, sexually, emotionally, or psychologically, such that the donor's ties to the mother are the basis for the mother's choice to use the donor's gametes.

This statute is advantageous and desirable for several reasons, and this part of the Note will explore both the advantages and disadvantages of this rule.

B. Explanation of the Rule

This proposed statute is divided into seven subsections in an attempt to address almost any factual situation that might arise in the process of gamete donation. The goals of the statute are to encourage careful forethought and written acknowledgement of the intention of the parties before they engage in assisted reproductive procedures, to protect the interests of the children resulting from ART procedures,¹²⁶ and to avoid disparate treatment of gamete donors based upon their gender.¹²⁷ Requiring a written statement of intent creates a clear and unequivocal statement of the parties' intentions and reduces confusion as to later determinations of parentage.¹²⁸ The rule also tries to incorporate those aspects of current statutes that adequately address problems or serve valid purposes in the area of gamete donation: for example, statutes that prevent anonymous gamete donors from claiming any parental rights in the children resulting from their donations.¹²⁹

The first subsection focuses on the obligations of the birth mother of the child, namely that she must unequivocally state in writing her intentions to not grant parenthood to known donors.¹³⁰ This requirement creates a statutory

126. This statutory goal tracks similar goals of the revised UPA. *See supra* note 122 (discussing the UPA's goal of trying to establish two parents for every child, if possible).

127. *See supra* notes 80 & 110 and accompanying text (noting how previous statutes and the UPA have discriminated against donors based upon the donor's gender).

128. *See infra* notes 134–35 and accompanying text (comparing the proposed statute to an earlier test for determining parentage based on intent).

129. *See* UNIFORM PARENTAGE ACT § 702 (2002) (preventing all sperm donors from claiming parental rights, which would also include the category of anonymous sperm donors). *But see infra* note 136 (noting an exception to § 702).

130. *See supra* Part V.A (outlining the proposed statute).

presumption that, in the absence of writing, a known gamete donor would also have parental rights in the child.¹³¹ This presumption helps to ensure that a child starts with a base of two parents, and it requires some action on the part of the birth mother to defeat that presumption.

The second subsection in the proposed statute is an attempt to have an accurate recording of the mother's intent, in order to limit possible disputes that might arise at a later time.¹³² The recording would protect against after-the-fact court determinations of the intention of the parties that might run contrary to the birth mother's expressed pre-insemination statement of intention.¹³³

The third subsection protects the rights of the known gamete donors, both to claim their parental rights, or to remain free from parental duties if they so prefer.¹³⁴ Furthermore, the third subsection also contains the same statutory presumption as clause one, namely that should the writing required by the statute never occur, the donor has parental rights in the child resulting from the donation.¹³⁵

The fourth subsection maintains one desirable aspect of the revised UPA—preventing anonymous sperm donors from claiming parental rights in the child.¹³⁶ Preventing anonymous sperm donors from claiming parental rights also tracks another of the UPA's goals, allowing unmarried women to take advantage of artificial insemination and assisted reproduction procedures.¹³⁷

131. *Id.*

132. *Id.*

133. *See supra* note 65 and accompanying text (discussing the majority's criticism of the intent test established in *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993)). Part of the majority's decision rested on the fact that they did not want to retain the *Johnson* intent test because it required an after-the-fact determination of the parties' pre-birth intentions. *See K.M. v. E.G.*, 117 P.3d 673, 682 (Cal. 2005) (criticizing the *Johnson* intent test).

134. *See supra* Part V.A (stating the language of subsection three). One caveat to a donor claiming parental rights is that the birth mother's written statement of opposite intention will defeat a donor's parental rights. *See id.* (noting how a statement drafted according to subsection (2) will defeat the presumption created in subsection (3)).

135. *Id.*; *see also supra* notes 133–34 and accompanying text (describing the statutory presumption present in clause one).

136. *See supra* Part V.A (stating the language of clause four); UNIFORM PARENTAGE ACT § 702 (2002) ("A donor is not the parent of a child conceived by means of assisted reproduction."). By precluding all donors from claiming parental rights, the revised UPA necessarily precludes anonymous sperm donors from claiming parental rights as well. The revised UPA does make exceptions for certain sperm donors who may claim parental rights in a child if they express their intent to do so. *See supra* note 92 and accompanying text (examining the revised UPA's §§ 702 & 703).

137. *See supra* note 122 (explaining how the revised UPA altered its statute in order to allow unmarried women to also receive the benefits of the reproductive technological advances; also examining scholarly opinion on assisted reproductive procedures); *see also* UNIFORM PARENTAGE ACT § 702 cmt. at 63 (2002) (discussing the removal of the term "married woman"

The fifth subsection tries to protect the rights of married couples (or parties to a civil union) to their children, regardless of the fact that they engaged in assisted reproductive procedures. This subsection acknowledges that sometimes these couples might have to look outside their relationship in order to find a gamete donor; given this fact, therefore, these couples should not be punished for using a "known donor" as opposed to an anonymous donor.¹³⁸ Additionally, this subsection notes that in the cases of lesbian civil partners, the couple has no choice but to look outside the union in order to find a sperm donor, and their choices should not be unfairly limited to anonymous donors.

The sixth subsection offers definitions of "known donor" and "anonymous donor."¹³⁹ This subsection tries to limit those who fall under the statutory definition of "known donors," even if the excepted categories might technically know the birth mother.¹⁴⁰ For instance, a birth mother's sister would not have presumptive parental rights in the child,¹⁴¹ nor would a birth mother's sister-in-law,¹⁴² if either of these parties served as a gamete donor.

Finally, the seventh subsection attempts to limit the definition of "known donor" even further by requiring a certain amount of contact between the birth mother and donor.¹⁴³ Mandating a certain level of contact between the parties to assisted reproduction prevents those donors who have minimal contact with the birth mother from claiming parental rights in her child. For instance, this subsection would keep an anonymous gamete donor from introducing himself or herself to a birth mother one time, then using that minor contact as a basis for claiming parental rights.

from the new statute).

138. This subsection tries to protect the birth mother's partner's rights, much in the same way that category four states sought to protect the rights of married couples who used sperm donation. *See supra* note 125 and accompanying text (noting the policy reasons for category four state statutes).

139. *See supra* Part V.A (containing the language of the proposed statute's fifth subsection).

140. For instance, prohibiting those related by blood to the birth mother from claiming parental rights is a desirable outcome that this proposed statute endorses.

141. *See supra* Part V.A (limiting the definition of known donors to those not related by blood or affinity).

142. *See id.* (limiting the definition of known donors).

143. *See supra* Part V.A (offering the language of clause (7)).

C. Advantages of the Proposed Statute

Although the statute proposed in this Note does not perfectly reconcile every single situation that might arise in the case of assisted reproductive procedures,¹⁴⁴ it does have many advantages over the present, varied, statutes throughout the nation. The first advantage is that the proposed statute will reduce disputes and discord over who has parental rights in the child. Because the statute mandates written expression of intention before artificial insemination,¹⁴⁵ a clear record of what the parties intended when they began the insemination process will exist. This record will greatly reduce confusion should the parties' relationship become acrimonious and a conflict over parental rights or responsibilities arise.¹⁴⁶ The pre-insemination determination of parental rights will greatly assist judicial efficiency and save courts time in making decisions on parental rights.

Furthermore, should a party to assisted reproduction neglect to draft a written expression of intent as required by the proposed statute,¹⁴⁷ the presumption is in favor of granting parental rights and responsibilities to the "known donor."¹⁴⁸ This presumption also assists in creating judicial efficiency because a court's only factual determination in a disputed case would be determining if the parties had a written expression of intention. If the parties have a written expression, then the court would look to that stated intention of the parties; if the parties do not have a written expression, then the statutory presumption would rule.¹⁴⁹

Another advantage of the proposed statute is that it is more easily adaptable to new situations. The original UPA and the revised UPA based

144. Two possible conflicts are foreseeable from the use of this statute: One, that a "known donor" would wish to have parental rights in a child, but the birth mother would not wish the donor to have those rights. Two, a birth mother wishes a "known donor" to be a parent of the child, but the donor does not wish to claim these parental rights. See *infra* notes 172–73 and accompanying text (offering a more extensive discussion of these two conflicts).

145. See *supra* Part V.A (expressing the language of the proposed statute in clause one and three, which require the intention of the parties to be written, notarized and recorded); see also *supra* notes 132–33, 136–37 and accompanying text (explaining the statutory language of those sections).

146. Any judicial proceeding could simply refer to the written record to determine whether a party has standing, whether a party should have custody rights, visitation privileges, child support obligations, fiscal responsibility, or any of the other rights and duties that accompany parenting.

147. See *supra* Part V.A (reciting the proposed statute).

148. See *supra* notes 133 & 137 and accompanying text (highlighting this presumption).

149. See *supra* Part V.B (explaining each clause of the rule and noting the presence of these requirements and presumptions).

their statutes on sperm donation; essentially, the statute either envisioned only sperm donation as a possibility,¹⁵⁰ or the statute only allowed semen donors to claim parental rights in a child resulting from the donation.¹⁵¹ The proposed statute instead contains inherent flexibility that provides for unforeseeable possibilities in the future by basing the determination of parental rights on the intentions of the parties involved in the artificial insemination process.¹⁵² Given the increase in the use of assisted reproductive procedures,¹⁵³ as well as the increase in homosexual couples seeking to have and raise children,¹⁵⁴ this statute will provide the elasticity needed as these less traditional situations occur.

Another advantage of the proposed statute is that it will encourage people to consider their options and decisions seriously before beginning the artificial insemination process. If people have a statutory obligation to decide who gets parental rights and express that decision in writing before assisted reproductive procedures take place, then it is likely that this demand will cause every party to examine carefully their reasons for engaging in assisted reproduction.¹⁵⁵

150. See UNIFORM PARENTAGE ACT § 5(b) (1973) ("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."). See also *supra* note 81 and accompanying text (commenting on the fact that the rule was drafted before assisted reproductive procedures involving egg donation were scientifically possible).

151. See UNIFORM PARENTAGE ACT § 703 (2002) ("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."). The statute, by its plain language, very clearly precludes a female gamete donor from claiming the same parental rights that a male gamete donor could claim.

152. See *supra* Part V.A (outlining the language of the proposed statute's clause one and three, both of which express the importance the parties' intentions before engaging in artificial insemination).

153. See *supra* Part II (offering a brief examination of the current status of assisted reproductive procedures, and noting the marked increase in the use of those procedures over the past ten years).

154. See *supra* notes 9–11 and accompanying text (listing cases that rule on same-sex couples' child custody matters).

155. *K.M. v. E.G.* offers a good illustration of this point. Kate and Emma offered conflicting stories over what expectations they had in regards to parental rights. See *supra* Part III.A.2 (outlining the facts in the case and noting the points at which Kate and Emma's testimony do not coincide). Although the trial court determined that Emma's testimony more accurately reflected the understanding of the parties as to parental rights, *K.M. v. E.G.*, 117 P.3d 673, 677 (Cal. 2005), Kate's testimony was not implausible and could just have easily been preferred by the trial court. In fact, the insertion of portions of Kate's testimony, including the points at which Kate's testimony deviated from Emma's testimony, indicates that the California Supreme Court saw some measure of validity in Kate's testimony. See *supra* Part III.A.2 (explaining Kate's testimony and emphasizing where her testimony conflicted with Emma's). A written recording of the parties' intentions before they initiated assisted reproduction would

Moreover, because the default rule in the absence of any writing is in favor of granting parental rights to the donor, those who wish to defeat this presumption will be more likely to record their intentions.¹⁵⁶ Additionally, each state has interests in family stability and the welfare of the child,¹⁵⁷ and the statute would assist the state's interest by requiring people to make deliberate, careful decisions in family planning rather than engaging in rash decisions that might cause dispute and instability.

A final advantage of the proposed statute is that the statute would help produce consistent rulings in regards to determining parentage of children born through assisted reproductive procedures. As noted throughout Part IV, states have different statutes that result in a variety of outcomes when the statutes are applied to the same set of facts.¹⁵⁸ This statute creates consistency among the states, by ensuring predictable results.¹⁵⁹ Predictable and consistent results in

have eliminated the need for a court to prefer one party's testimony over the other whenever the two testimonies were in conflict.

156. Again, *K.M. v. E.G.* offers a good illustration of this point. Emma claims that she did not want Kate to have any parental rights in the children, and, instead, Emma wanted to be a single mother. *K.M. v. E.G.*, 117 P.3d 673, 676 (Cal. 2005). Had a statute required Emma to write down her intent to prevent Kate from claiming parental rights, she would have been more likely to clearly state that intent beforehand, in order to ensure that she alone was the mother of the resulting children.

157. See *Alaska Civ. Liberties Union v. Alaska*, 122 P.3d 781, 792 (Alaska 2005) (acknowledging that family stability is an important and valid public goal); *Evans v. Wilson*, 382 Md. 614, 642 (2004) (declaring that the state has strong interest in protecting the best interests of the child and preserving family unity); *In re Adoption of K.S.P.*, 804 N.E.2d 1253, 1257 (Ind. 2004) (stating that the state has an interest in protecting children by helping them be raised by stable families); *Blixt v. Blixt*, 437 Mass. 649, 657 (2002) (finding that the state has an interest in preventing harm to children); *Callendar v. Skiles*, 591 N.W.2d 182, 191 (Iowa 1999) (making note of the state's valid interests of protecting children and preserving marital stability); *Dawn D. v. Superior Court*, 17 Cal. 4th 932, 950 (1998) (noting that the state has valid interests in both protecting the welfare of a child and promoting familial stability).

158. See *supra* Part IV.A.1-5 (examining the possible outcomes of *K.M. v. E.G.* and *Steven S. v. Deborah D.* had they occurred in states not in the same category as California).

159. This statute would also help avoid problems with states not honoring the custody decisions in other states by helping to ensure that custody results in each state would be the same. Although the "full faith and credit" clause of the Constitution requires each state to respect the judgments and rulings of other states, exceptions to this clause exist, and have been employed by states at various times to avoid validating judgments that one state finds repugnant or invalid. Most recently, the exceptions to the "full faith and credit clause" have been used by some states to avoid acknowledging same-sex marriages from another state. See, e.g., Barbara Cox, *Same-Sex Marriage and Choice-Of-Law: If We Marry in Hawaii, Are We Still Married When We Return Home?*, 1994 WIS. L. REV. 1033, 1062-99 (exploring the possibilities of states declaring same-sex marriages that were entered into in another state invalid, based on public policy objections); Deborah Henson, *Will Same-Sex Marriages Be Recognized in Sister-States?: Full Faith and Credit and Due Process Limitations on States' Choice of Law Regarding the Status and Incidents of Homosexual Marriages Following Hawaii's Baehr v. Lewin*, 32 U.

every state would keep people from forum shopping, disrupting families and relocating children in order to obtain a ruling that might preclude the other party from claiming parental rights.¹⁶⁰

Although this Note argues that consistency across the country in this area of family law is a desirable objective, many would argue that despite certain forays by the federal government into the area of family law,¹⁶¹ family law is

LOUISVILLE J. FAM. L. 551, 561–63 (1994) (noting how the public policy exception has been invoked in the past to avoid acknowledging polygamous, incestuous, and interracial marriages); Thomas M. Keane, *Aloha, Marriage? Constitutional and Choice-of-Law Arguments for Same-Sex Marriage*, 47 STAN. L. REV. 499, 522 (1995) (arguing that if the public policy exception to the full faith and credit clause was used to deprive homosexual couples of their right to marry, then that use would be invalid). *But see* Jeffrey L. Rensberger, *Same-Sex Marriages and the Defense of Marriage Act: A Deviant View of An Experiment in Full Faith and Credit*, 32 CREIGHTON L. REV. 409, 417–19 (1998) (arguing that the Defense of Marriage Act does not violate the full faith and credit clause).

A full discussion of the "full faith and credit" clause is outside the scope of this Note. For a thorough explanation of the "full faith and credit" clause, see generally Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses (Part One)*, 14 CREIGHTON L. REV. 499 (1981).

160. This strategy of relocation and forum shopping is often seen in the context of lesbian families with children. See Kyle C. Velte, *Towards Constitutional Recognition of the Lesbian-Parented Family*, 26 N.Y.U. REV. L. & SOC. CHANGE 245, 246–50 (2000) (noting one case in which the legal mother in a lesbian relationship left with the child, leaving the other partner with no legal recourse). This Article also mentions the increasing frequency with which this type of custody case is occurring, mentioning that these cases often result in the loss of the child permanently, which forces the non-legal parent to grieve for their child as if that child were dead. *Id.* at 247–49; see also *K.M. v. E.G.*, 117 P.3d 673, 677 (Cal. 2005) (reciting in the facts that Emma moved to Massachusetts to live with her mother after Kate filed an action for custody); Polikoff, *supra* note 14, at 533–42 (noting four cases in which lesbian, biological mothers used the court systems to their advantage and restricted their former partners contact with the children); Kimberly P. Carr, Comment, *Alison D. v. Virginia M.: Neglecting the Best Interests of the Child in a NonTraditional Family*, 58 BROOK. L. REV. 1021, 1025–26 (1992) (noting one case in which the legal mother of the child moved to Ireland, and subsequently, terminated all of the non-legal mother's contact despite an oral visitation agreement between the parties).

161. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 75 (2000) (holding that a Washington law granting grandparents visitation rights violated custodial parents due process rights to raise their children as they see fit); *Quillion v. Walcott*, 434 U.S. 246, 255–56 (1978) (finding that a Georgia law, which only required the mother's consent for adoption of a child that was born outside a marital relationship and not formally recognized by the biological father, did not violate the due process rights of the biological father); *Stanley v. Illinois*, 405 U.S. 645, 657–59 (1972) (holding that an Illinois law which made children of an unmarried, deceased woman wards of the state immediately upon her death deprived the biological father of his parental rights in the child). All of these Supreme Court cases, however, only address issues involving the family when someone's fundamental rights are infringed upon by the state. *But see Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 17–18 (2004) (declining to rule on an issue of constitutional standing because that issue was inextricably linked with complicated matters of

traditionally left to the states, and national uniformity in family law would grant the federal government too much power over private concerns.¹⁶² States might also be a more suitable forum for resolving family disputes because states are free to extend more protection than the federal government does¹⁶³ but also because states often serve as grounds for trying experiments, often followed later by the federal government.¹⁶⁴ Despite these arguments for maintaining state dominance in the area of family law and preventing the federal government from mandating consistency across the nation, the fact remains that insofar as the Uniform Parentage Act was a worthwhile endeavor, so too is the proposed rule in this Note, which attempts to add uniformity to the UPA.

D. Disadvantages of the Proposed Statute

The statute proposed in this Note does have some possible disadvantages. The first disadvantage is that it places a burden on those seeking to use assisted reproductive procedures by requiring them to declare their intentions before initiating the ART procedures.¹⁶⁵ This burden is slight, however, when one

family law).

162. See Ann C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1791–92 (1995) (arguing that family law should be state-ruled because national authority over family law matters would lead to government tyranny over the moral identities of state citizens); Joan Schaffner, *The Federal Marriage Amendment: To Protect the Sanctity of Marriage or Destroy Constitutional Democracy?*, 54 AM. U.L. REV. 1487, 1526–36 (2005) (arguing, among other things, that a federal marriage amendment would unconstitutionally expand the federal government's power into the area of family law, which is traditionally an area of law reserved to the state); Scott Ruskay-Kidd, Note, *The Defense of Marriage Act and the Overextension of Congressional Authority*, 97 COLUM. L. REV. 1435, 1467–82 (1997) (arguing that Congress should not define marriage in federal statute because that interferes with state power over domestic relations). *But see* Michael Ashley Stein, *The Domestic Relations Exception to Federal Jurisdiction: Rethinking an Unsettled Federal Courts Doctrine*, 36 B.C.L. REV. 669, 720–22 (1995) (suggesting that maybe federal courts should be involved in more family law decisions because of the national character of many family law questions and because federal courts can better protect federal rights).

163. *Arizona v. Evans*, 514 U.S. 1, 8 (1995) ("[S]tate courts are absolutely free to interpret state constitutional provisions to accord greater protection to individual rights than do similar provisions of the United States Constitution.").

164. For example, California was the first state to outlaw its anti-miscegenation marriage statute. See *Perez v. Sharp*, 198 P.2d 17, 29 (Cal. 1948) (finding anti-miscegenation statutes prohibiting interracial marriage to be unconstitutional). The California decision occurred almost twenty years before the Supreme Court made the same ruling. See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding that Virginia's prohibition on interracial marriage was unconstitutional).

165. See *supra* Part V.A (requiring an expression of parental responsibility in clauses one and three).

considers the benefits that this provision allows, including limiting later judicial disputes and resolving confusion between the parties engaged in the assisted reproduction.¹⁶⁶ Assisted reproduction requires significant thought, planning, and paperwork; this statute requires a little more paperwork, and one more step in the process.¹⁶⁷ This extra step helps to protect the children that might result from the ART procedures by requiring the parents of the children to consider their actions carefully before undergoing any procedures.¹⁶⁸ Furthermore, perhaps requiring those who undergo assisted reproduction to consider carefully their actions before engaging in the process should be a socially desirable objective.¹⁶⁹

The statute also has a disadvantage in the fact that it fails to address the parties' desires adequately in two situations mentioned above: a mother who wants the "known donor" to be a parent, when the known donor does not want that responsibility, or a known donor who wants parental rights in the child, which the birth mother does not wish to grant.¹⁷⁰ The new statute is designed to prevent the birth mother from forcing the known donor to claim parental rights, as well as to prevent the known donor from forcing the birth mother to accept his or her parental rights.¹⁷¹ Although the new statute does not specifically resolve this situation, the fact that the conflict occurs before the insemination procedure takes place offers a common sense solution—these two parties should not engage in assisted reproduction together. If the two participants cannot agree as to their intentions before the procedure takes place, then it seems logical for them not to enter into this activity together.

166. See *supra* Part V.C (discussing the benefits of the proposed statute).

167. This extra requirement of writing is only present for an unmarried woman who wishes to prevent a "known donor" from claiming parental rights in the child, or in "known donors" who do not wish to be a parent to the child. In all other cases, a written statement of intent is unnecessary because the "known donor" is presumed to have rights in the child, whether that "known donor" is the birth mother's husband, a friend of the birth mother, or the birth mother's partner in a civil union. See *supra* Part V.A (noting the language of the statute and defining the "known donor").

168. See *supra* note 157 and accompanying text (examining the dispute in the *K.M. v. E.G.* case and arguing that the proposed statute might have avoided much of the conflict between the two parties).

169. Requiring careful consideration before using assisted reproduction is likely a valid social objective because it will likely result in better care of children. Only those who have carefully considered their actions will use assisted reproduction, resulting in children who are truly wanted, cared for, and whose parents agree on the management of their care.

170. See *supra* note 146 (introducing these hypothetical factual situations).

171. See *supra* Part V.A (noting the language of the proposed statute, especially in clauses one through three).

This same problem is not as easily resolved when the parties agree before the assisted reproduction as to their intentions, but find that they might want to change those initial intentions after the child is born. Specifically, one could argue that someone who gave up parental rights in a child later might wish, after spending time with the child, to seek parental rights. To this end, the initial intentions of the parties to prevent the donor's claim of parental rights is not immutable and can be overridden by a later written expression of both parties' desire to allow the donor to have parental rights. Requiring both parties' approval to override their expression of intent tracks the requirement of the proposed statute that both parties clearly state their initial intentions.¹⁷²

Despite the possibility that the initial expression of intention can be overturned, a reversal of intention from only one of the parties would not overcome the initial expression of intention. This requirement would prevent the donor from later claiming parental rights over the birth mother's objections; it would also prevent the birth mother from forcing parental responsibilities on a known donor who does not want those responsibilities.¹⁷³ Only two situations could possibly detrimentally affect the individuals involved by precluding unilateral rescission of the initial written intentions: if the birth mother really wanted the gamete donor to claim parental rights in the child, or if a donor wanted to have parental responsibilities and the birth mother did not want the donor to have those rights.

Although these situations might detrimentally affect the individuals involved in them, preventing people from unilaterally rescinding earlier written expressions of intention will serve a greater societal purpose—that of forcing people to consider the effects and ramifications of using assisted reproductive procedures before they begin the process. Forcing people to think about the possibility that the parties' mindsets will not always be the same will encourage them to take their time and not rush to action.¹⁷⁴

Another possible disadvantage to the proposed statute is that absent any writing, the statutory presumption is in favor of granting parental rights to the known donor.¹⁷⁵ One could argue that this might lead to one highly unusual

172. See *supra* Part V.A (stating the language of the statute, which requires both parties to record their intentions).

173. Not allowing parties to force parental rights on one another after the child is born tracks the same objective that the statute promotes before the assisted reproduction takes place. See *supra* note 171 and accompanying text (noting this particular statutory objective).

174. See *supra* notes 170–71 and accompanying text (arguing that requiring parties to carefully consider their intentions before entering into assisted reproduction is a socially desirable objective).

175. See *supra* Part V.B (explaining the statute in plain language and noting this particular statutory presumption).

custody situation.¹⁷⁶ In the case of an unmarried woman, it is conceivable that a birth mother might require the services of two "known donors": one male, one female. Although this problem could be easily resolved if the parties all recorded their written intentions, should the parties not execute these documents, three people would have a claim to parental rights in the child. This circumstance would require a judicial determination of either what the intentions of the parties were beforehand, or whose claim would benefit the child more. For instance, were this unmarried woman involved in a lesbian relationship with the female "known donor," then a judicial determination that the female donor's claims trump the male donor's would probably make more sense. Therefore, in this one instance, judicial interference would be necessary to resolve the parties' conflict because the statute fails to adequately resolve this situation.

VI. Conclusion

Although the proposed statute listed above does have a few disadvantages,¹⁷⁷ this statute addresses far more situations without judicial interference than the statutes that have preceded it. The rule tracks with several of the UPA's stated goals and objectives.¹⁷⁸ The rule also helps to ensure that the parties' stated intentions of parental rights dictate the actual determination of those parental rights.

The facts of the cases discussed above¹⁷⁹ could have occurred in any other state. Had they occurred in a different state it is entirely possible that neither Kate nor Steven S. would have received parental rights, even though they both were involved in their children's lives. Not allowing either party to claim parental rights to the child seems to run contrary to the best interests of the child, as well as of society. That is why this proposed statute seeks to cure the problems that these cases produced and tries to offer a solution that will ensure that the intentions of the parties rule.

176. Because the statute does not allow a "known donor's" presumption to exist when the birth mother is either married or a party to a civil union, neither a married couple nor a couple in a civil union would have to worry about a third party asserting parental rights. *See supra* Part V.A (noting the language in clause five).

177. *See supra* Part V.D (examining the disadvantages of the proposed statute).

178. *See supra* notes 109, 119–23 and accompanying text (explaining some of the goals of the UPA).

179. *See supra* Part III.A.1–2 (discussing the facts of the two cases highlighted in this Note).

No statute is perfect. No statute can address every single issue that might ever arise. No statute can please everyone. As previously demonstrated, though, this statute is flexible, adaptable, and suited to most individuals' desires and wishes. The benefits of the rule outweigh any possible disadvantages, would serve state interests and individual interests, create judicial efficiency, and help to protect children born of assisted reproduction.

