IT TAKES THREE, BABY: THE LACK OF STANDARD, LEGAL DEFINITIONS OF "BEST INTEREST OF THE CHILD" AND THE RIGHT TO CONTRACT FOR LESBIAN POTENTIAL PARENTS

HARVEY L. FISER, J.D., AND PAULA K. GARRETT, PH.D.*

In order to consider the plausibility of contracts regarding Artificial Insemination, or AI, this article will first review various options and legal ramifications for choices regarding AI and then focus on the effect of inconsistent application of the Uniform Parentage Act, or UPA, among states that have chosen to adopt any legislation. This legal conundrum creates major obstacles for lesbian couples in procreation and in legal protection for children and often denies lesbian Americans the right to equal enforcement of contracts. This article will consider how the current standard of "best interest of the child" is being used in the absence of the UPA standards and, in some respects, to prevent model UPA legislation from being used to grant sole custody to a lesbian birth mother and to prevent the termination of parentage rights of sperm donors. Of particular interest in this article is discrimination against lesbians seeking legal assistance in the enforcement of contracts to formalize parenting rights and responsibilities for children resulting from artificial insemination. This article will then suggest alternatives for this affected group in an attempt to clarify the issues and mitigate some of the impact of the lack of legislation, inconsistent and incomplete laws and, in some cases, outright prejudicial rulings.

I. INTRODUCTION

In the growing field of legislation regarding same-sex couples, one area that is receiving increasing attention involves same-sex parenting. Often same-sex couples are parents because one person in the couple has a child from a previous heterosexual relationship. With the proliferation of Artificial Insemination, or AI, technologies, however, same-sex couples are increasingly having children without heterosexual intercourse. With the uncertainty of the law in most jurisdictions, same-sex couples who want to have children must navigate far more complex legal

* Harvey L. Fiser, J.D., Assistant Professor of Business Law, Millsaps College, Jackson, Mississippi and Paula K. Garrett, Ph.D., Vice President for Academic Affairs and Dean of the College, Warren Wilson College, Asheville, North Carolina.

and practical matters than their heterosexual counterparts. The issue of AI is further complicated because it is actually at an intersection between the often incomplete state legislation and the judicially determined custody standard of "best interest of the child," neither of which provides sufficient legal protection to lesbian potential mothers.

In the states that have addressed AI issues through legislation, few have considered the impact of the law on "unwed" mothers or, in this case, same-sex couples.[1] Many states have failed to address AI issues in any respect, and, in this absence of legislation, have caused particular difficulties for same-sex couples. This article primarily discusses AI contracts in light of these laws and the failure of legislation to protect same-sex couples and their potential children during the process of AI.[2]

In order to consider the plausibility of contracts regarding AI, this article will first review various options and legal ramifications for choices regarding AI and then focus on the effect of inconsistent application of the Uniform Parentage Act among states that have chosen to adopt the legislation. This legal conundrum creates major obstacles for lesbian couples in procreation and in legal protection for children and often denies lesbian Americans the right to equal enforcement of contracts. This article will then consider how the current standard of "best interest

---

[1] *See infra* notes 60-70 and accompanying text (discussing the failure to address non-married heterosexual mothers). The Uniform Parentage Act of 1973 appeared to require by its terms that donors would only be released from the status of "natural father" if he provided the sample "to a licensed physician for use in artificial insemination of a married woman other than the donor's wife . . . ," thus failed to address any possibilities of insemination in an unmarried woman or a lesbian couple. UNIF. PARENTAGE ACT § 5(b) (1973) [hereinafter 1973 UPA]. States adopting 1973 UPA in some form include: Alabama, ALA. CODE §§ 26-17-1 to 26-17-22 (1984); California, CAL. FAM. CODE §§ 7600 to 7730 (West 1976); Colorado, COLO. REV. STAT. §§ 19-4-101 to 19-4-130; Hawaii, HAW. REV. STAT. §§ 584-1 to 584-26 (1976); Illinois, 750 ILL. COMP. STAT. ANN. 45/1 to 45/28 (West 1985); Kansas, KAN. STAT. ANN. §§ 38-1110 to 38-1138 (West 1985); Minnesota, MINN. STAT. §§ 257.51 to 257.75 (1980); Missouri, MO. REV. STAT. §§ 210.817 to 210.852 (1987); Montana, MONT. CODE ANN §§ 40-6-101 to 40-6-135; Nevada, NEV. REV. STAT. §§ 126.011 to 126.371 (1979); New Jersey, N.J. STAT. ANN. §§ 9:17-38 to 9:17-59 (1983); New Mexico, N.M. STAT. ANN. §§ 40-11-1 to 40-11-23; Ohio, OHIO REV. CODE ANN. §§ 3111.01 to 3111.19 (1982); Rhode Island, R.I. GEN. LAWS §§ 15-8-1 to 15-8-27 (1979). States adopting the 2000 version of the UPA in some form include: Delaware, DEL. CODE ANN. 13 §§ 8-101 to 8-904 (2004); North Dakota, N.D. CENT. CODE §§ 14-20-01 to 14-20-66 (2005); Oklahoma, OKLA. STAT. ANN. §§ 7700-101 to 7700-902 (2006); Texas, TEX. FAM. CODE ANN. §§ 160.001 to 160.763 (2001); Utah, UTAH CODE ANN. §§ 78-45g-101 to 78-45g-902 (2005); Washington, WASH. REV. CODE §§ 26.26.011 to 26.26.913 (2002); and Wyoming, WYO. STAT. ANN. §§ 14-2-401 to 14-2-907 (2003). However, the contents of the various legislation are far from uniform. While the 2000 version of the UPA clarifies that unwed or lesbian mothers have the same rights as married heterosexual mothers, few states have adopted this simplified language. *See* UNIF. PARENTAGE ACT §§ 702-703 (2000) [hereinafter "2000 UPA" or "UPA" when referring to both 2000 UPA and 1973 UPA].

[2] This article primarily discusses artificial or alternative insemination (AI) contracts and the laws affecting lesbians and gay men in their attempts to have children. An interesting distinction is that, in those respects, this article is discussing contracts affecting "potential" children and the components needed to make those children. In some cases, states have attempted to define when an "actual" child exists. For example, in Mississippi, a wrongful death action may be brought on behalf of a mother *and* an "unborn quick child." "A 'quick child' is defined as a child that has developed so that it moves within the mother's womb." 66 Fed. Credit Union v. Tucker, 853 So. 2d 104 (Miss. 2003) (quoting BLACK'S LAW DICTIONARY (1968)). The confusion lies in whether that child is still a "potential" child until it is born, or whether that has been changed by state statute.

of the child" is being used in the absence of the UPA standards and, in some respects, to prevent model UPA legislation from being used to grant sole custody to a lesbian birth mother and to prevent the termination of parentage rights of sperm donors. Of particular interest in this article is discrimination against lesbians seeking legal assistance in the enforcement of contracts to formalize parenting rights and responsibilities for children resulting from AI. This article will then suggest alternatives for this affected group in an attempt to clarify the issues and mitigate some of the impact of the lack of legislation, inconsistent and incomplete laws and, in some cases, outright prejudicial rulings.

II. LEGAL CONSEQUENCES OF AI CHOICES

Numerous advances in reproductive technology have taken place in recent years.[3] AI has been around since as early as the late eighteenth century when a Scottish surgeon, Dr. John Hunter, conducted the first known artificial insemination.[4] The procedure is now quite common in the United States.[5]

Women wishing to become pregnant outside of heterosexual relationships have used many methods of procreation. While women may have numerous options in the types of AI they choose, the absence of legislation forces women to contemplate the various methods of insemination from a number of perspectives: convenience, legal, financial and medical. While in most jurisdictions these choices are not legislatively addressed at all, the method of insemination and the choice of sperm can have significant impact on the legal consequences of these choices. Often, women make these choices to mitigate the effects of this lack of legislation.

---

[3] This article primarily mentions "artificial insemination," also referred to as "alternative insemination." However, there are many other types of fertilization that also fall under the discussions of this paper. Often policy discussions or legal distinctions between different forms of insemination are made clear in the text of the paper, but the term AI is used in many cases where no legal distinction would likely be made. Technically, as one writer describes, "[i]n vitro fertilization takes place within the body of a woman. Artificial insemination is a form of in vitro fertilization similar to natural reproduction except that the fertilization is not the direct result of sexual intercourse." Michael Hopkins, *What is Sauce for the Gander is Sauce for the Goose: Enforcing Child Support on Former Same-Sex Partners Who Create A Child Through Artificial Insemination*, 25 ST. LOUIS U. PUB. L. REV. 219, 221 (2006) [hereinafter *What is Sauce for the Gander*] (citing Hutton Brown et al., *Legal Rights and Issues Surrounding Conception, Pregnancy and Birth*, 39 VAND. L. REV. 597, 607-608 (1986)).

During artificial insemination, sperm is deposited by a plastic syringe into the opening of a woman's uterus shortly after she has ovulated. By contrast, in vitro fertilization takes place outside of the body, where one or more ova are removed from the woman by a surgical technique and are placed in a dish where processed sperm are mixed with the ova. If fertilization occurs, the ovum undergoes division, and then within two to three days is placed in a woman's uterine cavity. *What is Sauce for the Gander, supra* (citations omitted).

[4] Sandi Varnado, *Who's Your Daddy: A Legitimate Question Given Louisiana's Lack of Legislation Governing Assisted Reproductive Technology*, 66 LA. L. REV. 609 (2006) [hereinafter *Who's Your Daddy*]. *See also* Note, *Reproductive Technology and the Procreative Rights of the Unmarried*, 98 HARV. L. REV. 669, 669 (1985).

[5] *See, e.g., infra* note 19 (estimating that over one million children have been born through AI procedures.)

A. Methods of Insemination

Typically, a woman will obtain sperm from a sperm bank or a private donor.[6] However, many women choose various AI methods based on several factors. Some make choices on the basis of convenience, some for legal reasons, some for financial reasons and some for medical reasons. On one extreme of the spectrum, for example, a recent story in *The New York Times Magazine* discussed a Minnesota lesbian couple who wished to have children and requested that one of their best gay friends—also in a relationship—provide the needed sperm.[7] The sperm was donated without the assistance of artificial insemination through intercourse. While this method is obviously the least expensive, it is fraught with potential legal complications. Namely, regardless of intentions, courts will likely read the sexual intercourse as evidence of intent to create paternity and thereby hold the "donor" responsible for paternity and likewise entitle him to some type of child custody.[8]

Another option is self-insemination or insemination by a partner or friend using either fresh or frozen sperm.[9] Many women may prefer the comfort of home and appreciate a more familiar surrounding as the insemination process, while not complicated, is quite personal and invasive.[10] However, this option goes against a primary condition of 1973 UPA requiring physician intervention and may create legal issues when parties attempt to terminate any possible parentage rights of the donor. [11]

---

[6] John E. Durkin, *Reproductive Technology and the New Family: Recognizing the Other Mother*, 10 J. CONTEMP. HEALTH L. & POL'Y 327 (1993).

[7] John Bowe, *Gay Donor or Gay Dad?*, N.Y. TIMES MAGAZINE , Nov. 19, 2006, at 66 (according to the donor, "using syringes and cups seemed inorganic and inefficient. Sperm would lose its potency during each transfer. 'I wanted the numbers . . . .'").

[8] Neither 1973 UPA nor 2000 UPA would be applicable to protect the co-parents from a paternity suit by the donor in a "non-assisted" or "natural" insemination. *See* 1973 UPA § 5(b) ("The donor of semen provided to a licensed physician for use in *artificial insemination* . . . ."); 2000 UPA § 701 ("This [article] does not apply to the birth of a child conceived by means of sexual intercourse . . . .") (emphasis added). *See also* MINN. STAT. ANN. § 257.56 (1987). Minnesota's UPA (applicable to Minnesota residents) further assumes that the recipient is heterosexual, stating that "[t]he 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 biological father of a child thereby conceived." This obviously creates additional problems for fighting a paternity action, if one were filed.

[9] *Who's Your Daddy, supra* note 4, at 616. (Donor insemination or AI is a process where sperm is injected into the reproductive tract of a woman to cause pregnancy) (citing Kathryn Venturatos Lorio, *Alternative Means of Reproduction: Virgin Territory for Legislation*, 44 LA. L. REV. 1641, 1643 (1984)).

[10] *See* Jhordan C. v. Mary K., 224 Cal. Rptr. 530, 535 (Cal. Ct. App. 1986) ("A requirement of physician involvement, as Mary argues, might offend a woman's sense of privacy and reproductive autonomy, might result in burdensome costs to some women, and might interfere with a woman's desire to conduct the procedures in a comfortable environment such as her own home or to choose the donor herself.") (citing Kern & Ridolfi, *The Fourteenth Amendment's Protection of a Woman's Right to be a Single Parent Through Artificial Insemination by Donor*, 7 WOMEN'S RTS. L. REP. 251, 256 (1982)) [hereinafter Kern & Ridolfi].

[11] *See* 1973 UPA § 5(a) (requiring AI to be performed "under the supervision of a licensed physician."). *See also Jhordan C.*, 224 Cal. Rptr. at 535 (finding that "[t]he existence of sound justification for physician involvement further supports a determination [that] the Legislature intended to

Other women opt for an alternative method of insemination, ordering sperm by mail through a sperm bank or fresh sperm from a known or anonymous donor but delivered to a doctor, rather than to the patient. The woman is then inseminated in a medical setting by the physician. Despite the fact that this option may not be preferable for financial or emotional reasons, many women choose this more formal method in an attempt to follow even the most stringent requirements of the 1973 UPA, hoping that the intentions of a formal procedure will more likely be upheld in a court if a paternity battle ensues.[12] Some states adopting the UPA grant known donors the right to forfeit parental rights and responsibilities only if the formal procedures are strictly followed.[13] Although this option seems to provide the most legal protection for lesbians seeking maternity, it is often prohibited by hospital or clinic policy.[14] Many hospitals or clinics have strict policies against aiding "unwed" women with fertility.[15]

B. Choice of Source for Semen

Just as women have choices for the method of insemination, they also have choices for the source of semen. Frozen sperm can be provided by commercial sperm banks, or fresh sperm can be acquired through local donors. Frozen sperm from a sperm bank is typically given for compensation to the donor. The donor often has the choice to remain anonymous or be known when the potential child is eighteen. Willing-to-be-known donor insemination allows potential contact with the donor if the child wishes to learn more about his or her genetics.[16] Women may choose the frozen sperm option in an attempt to eliminate the possibility of

require it" and holding that insemination without physician involvement renders the act inapplicable).

[12] *See* Ferguson v. McKiernan, 940 A.2d 1236 (Penn. 2007) (upholding a contract for sperm donation and denying child support request by the mother in jurisdiction absent a version of the UPA. The court noted:

> [i]ndeed, the parties could have done little more than they did to imbue the transaction with the hallmarks of institutional, non-sexual conception by sperm donation and IVF. They negotiated an agreement outside the context of a romantic relationship; they agreed to terms; they sought clinical assistance to effectuate IVF and implantation of the consequent embryos, taking sexual intercourse out of the equation; they attempted to hide Sperm Donor's paternity from medical personnel, friends and family; and for approximately five years following the birth of the twins both parties behaved in every regard consistently with the intentions they expressed at the outset of their arrangement . . . . *Id.* at 1246.

[13] *See infra* notes 41-78 and accompanying text (discussing court opinions regarding the failure to follow strict UPA requirements).

[14] *See Ferguson*, 940 A.2d at 1240 (the court noted that "there appears to be no dispute that Dr. Dobson will assist in IVF only for women in stable marriages.").

[15] *See id.*; Justyn Lezin, *(Mis)Conceptions: Unjust Limitations on Legally Unmarried Women's Access to Reproductive Technology and Their Use of Known Donors*, 14 HASTINGS WOMEN'S L.J. 185, 208 (2003) [hereinafter *(Mis)Conceptions*].

[16] *See* California Cryobank, www.spermbank.com/newdonors/index.cfm?ID=4 ("Donors will be reimbursed $75 per specimen and up to $1,100 a month by donating 3 times a week. We periodically offer incentives such as movie tickets or gift certificates for extra time and effort expended by participating donors.").

paternity mainly through the anonymity provided by sperm banks.[17] However, current psychology would argue that children born from anonymous donors potentially experience a void and longing for information about the unknown donor.[18] Numerous stories of children born from anonymous sperm donations abound, supporting arguments for a more careful attention to the possible effects of this paternal anonymity.[19]

For this reason, sperm banks now offer sperm from donors who are willing to be known when the child turns eighteen.[20] Many women find the sperm bank option preferable because of the potential for elimination of paternity until the child is eighteen.[21] Sperm banks offer the extra layer of legal protection for both the potential mother and the sperm donor in that the child would have difficulty finding the donor, and obtaining jurisdiction over the donor because states provide anonymous donors legal protection.[22]

Fresh sperm is typically provided by a known donor, although efforts may be made to protect the donor's anonymity.[23] Although known fresh donor insemination is the most legally complicated method, pregnancy rates are significantly higher with fresh sperm than with frozen sperm and the cost is often significantly lower.[24] More importantly, the donor is a known commodity, his

---

[17] Most authorities believe that sperm provided by anonymous donors through commercial sperm banks carries little risk of donor paternity cases. *See (Mis)Conceptions, supra* note 15, at 194 , Kyle C. Velte, *Egging on Lesbian Maternity: The Legal Implications of Tri-Gametic In Vitro Fertilization*, 7 AM. U. J. GENDER SOC. POL'Y & L. 431, n. 57 (1999) [hereinafter *Egging on Lesbian Maternity*]. According to the Human Rights Campaign, "in all 50 states, men who provide sperm as an unknown donor assume no legal responsibility for any resulting children born." Human Rights Campaign, Donor Insemination Laws: State by State, www.hrc.org/issues/2490.htm.

[18] *See* David Plotz, *Who's Your Daddy?*, INT'L HERALD TRIBUNE, May 20, 2005, *available at* http://www.iht.com/articles/2005/05/19/opinion/edplotz.php for a discussion of the call to open records. *See also* Amy Harmon, *Are You My Sperm Donor? Few U.S. Clinics Will Say*, INT'L HERALD TRIBUNE, Jan. 20, 2006, *available at* http://www.iht.com/articles/2006/01/20/healthscience/web.0120donor.php (also discussing that donors willing to be known are often paid additional compensation).

[19] This issue has, in fact, garnered so much attention that even Oprah recently hosted children of sperm donors, inviting them to discuss their psychological need for knowledge of the donor. *The Oprah Winfrey Show, The Ultimate Reunion: When Dad is a Sperm Donor* (Feb. 8, 2008) (estimating that more than one million children have been born through AI procedures).

[20] *See* California Cyrobank, Donor Compensation, www.spermbank.com/newdonors/index.cfm?ID=4. Interestingly, a donor is paid more for "willing to be known" donations than for "anonymous" donations. *See also (Mis)Conceptions, supra* note 15, at n.1.

[21] *See* California Cryobank Open Donors, www.cryobankdonors.com/newdonors/index.cfm?ID=19.

[22] *See* About Your Confidentiality: California Cryobanks, www.cryobankdonors.com/newdonors/index.cfm?ID=5 (including the donor and recipient contract language and referencing the California statutes).

[23] A seemingly controversial website was opened in the United Kingdom offering anonymous fresh sperm donations. The site, www.mannotincluded.com, is apparently out of operation at this time. *See* Fresh Sperm for Sale, House of Commons, Science & Tech. Comm., http://www.tellparlaiment.net/scitech/node/view/23.

[24] *See* N.E. Bachtell, J. Conaghan, & P.J.Turel, *The Relative Viability of Human Spermatazoa From the Vas Deferens, Epididymis and Testes Before and After Cryopreservation*, 14 HUMAN REPRODUCTION 3048-3051 (1999) ("Motility of fresh testicular sperm fell by 96% after the cryopreservation, whereas vassal sperm motility decreased 46% after Freeze-Thaw.").

personality and family history can be more thoroughly investigated, and there may be comfort for the potential mother in receiving sperm from a known donor.[25] However, receiving fresh sperm from a local, known donor for insemination in a state without legislation to protect the parties creates the most tenuous legal grounds of all insemination methods for the mother in preventing the donor from asserting rights as the father.[26]

The current status of legislation regarding sperm donations from known donors varies by state and this highlights the need for more uniform laws regarding artificial insemination.[27] The various methods of delivery and choices of procurement of semen illustrate the complexity of legal issues related to AI procedures. Each choice raises new and difficult legal questions.[28]

III. SUMMARY OF LEGAL FRAMEWORK

While artificial insemination is not prohibited by law, many states have no legislation regulating either the donation of sperm or eggs and have no avenues to protect contracts between a potential mother and a sperm donor. In fact, most

---

[25] *See, e.g., Ferguson*, 940 A.2d at 1239 n.4 ("In testimony uncontradicted by Mother, Sperm Donor stated that Mother preferred him to an anonymous sperm donor because '[s]he knew my background. She just knew my makeup, and just said that she preferred to have that anonymous donor known to her.'"). *See also Jhordan C.*, 224 Cal. Rptr. at 535 n.7 ("One article on the subject of artificial insemination notes that many women prefer to choose a known donor because this 'eliminates potential difficulties in gaining access to medical information, permits the prospective mother to make the choice of donor herself, and allows the child access to paternal roots.'") (quoting Kern & Ridolfi , *supra* note 10, at 256); *Egging on Lesbian Maternity, supra* note 17, at 56, n.18; and The Donor Sibling Registry, www.donorsiblingregistry.com.

[26] *See infra* Section III.

[27] *See* In Interest of R.C., 775 P.2d 27, 30-31 (Colo. 1989).

Whether section 5 of the model UPA was intended to extinguish parental rights of semen donors known to the woman is the subject of some debate. *Compare* G.P. Smith, *The Razor's Edge of Human Bonding: Artificial Fathers and Surrogate Mothers,* 5 W. NEW ENG. L. REV. 639, 652 (1983) (the "obvious" purpose of section 5 is "to protect anonymous [semen] donors from all legal responsibility for those children fathered as a consequence of their donation of semen") *and* Note, *Contracts to Bear a Child,* 66 CAL L.REV. 611, 614 (1978) (the purpose of section 5 "is clearly to protect anonymous donors from legal responsibility for any children fathered by the use of their semen") *with* Kern & Ridolfi, *supra* note 10, at 256 (although purpose is to protect anonymous semen donors from support obligations, section 5 "could also be raised by a mother seeking protection from a paternity suit by a donor" even when the donor was known to the mother). *Id.*

[28] One court summed up the spectrum as follows:

> [T]wo potential cases at the extremes of an increasingly complicated continuum present themselves: dissolution of a relationship (or a mere sexual encounter) that produces a child via intercourse, which requires both parents to provide support; and an anonymous sperm donation, absent sex, resulting in the birth of a child. These opposed extremes produce two distinct views that we believe to be self-evident. In the case of traditional sexual reproduction, there simply is no question that the parties to any resultant conception and birth may not contract between themselves to deny the child the support he or she requires . . . . In the institutional sperm donation case, however, there appears to be a growing consensus that clinical, institutional sperm donation neither imposes obligation nor confers privileges upon the sperm donor. Between these poles lies a spectrum of arrangements that exhibit characteristics of each extreme to varying degrees-informal agreements between friends to conceive a child via sexual intercourse; non clinical non-sexual insemination; and so on. *Ferguson*, 940 A.2d at 1246.

states with laws regarding artificial insemination presume that this technology will be reserved for heterosexual, married couples who are infertile.[29] There is a void in legislation for artificial insemination when the woman is "unmarried" or lesbian.[30]

A. Attempt at Clarification and Uniformity: The Uniform Parentage Act

1. 1973 Uniform Parentage Act

The Uniform Parentage Act is the most comprehensive set of laws proposed regarding the delineation of rights in AI cases. The Act was first proposed in 1973 by the National Conference of Commissioners on Uniform State Laws, or the NCCUSL; it proposes that states adopt a uniform approach to AI cases as follows:

> Section 5. [Artificial Insemination.]
> If, under the supervision of a licensed physician and with the consent of her husband,[31] a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband's consent must be in writing and signed by him and his wife. The physician shall certify their signatures and the date of the insemination and file the husband's consent with the [State Department of Health], where it shall be kept confidential and in a sealed file. However, the physician's failure to do so does not affect the father and child relationship. All papers and records pertaining to the insemination, whether part of the permanent record of a court or of a file held by the supervising physician or elsewhere, are subject to inspection only upon an order of the court for good cause shown.
> (b) The donor of semen provided to a licensed physician for use in artificial insemination of a married[32] woman other than the donor's wife is treated in law as if he were not the natural father of a child thereby conceived.[33]

---

[29] *See infra* Section III, part A for discussion of the UPA.

[30] *See infra* notes 31– 33 and accompanying text (discussing that unmarried women and lesbians are left out of the 1973 UPA that is in force in so many states.)

[31] At least one jurisdiction has determined that the term father or husband shall be interpreted as gender neutral. *See* Jenny Wald, *Legitimate Parents, Construing California's Uniform Parentage Act to Protect Children Born into Nontraditional Families*, 6 J. CENTER FOR FAMILIES, CHILD. & CTS. 139, 153 (2005) ("The rule that a husband is the lawful parent based on his consent to the artificial insemination of his wife by an anonymous sperm donor also applies to same-sex and unmarried parents.") (citing Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005); K.M. v. E.G., 117 P.3d 673, 679 (Cal. 2005); Kristine H. v. Lisa R., 117 P.3d 690, 691 (Cal. 2005)).

[32] While this section of the UPA would, by its plain reading, appear to prevent a donor from asserting parental rights to a child of a married woman, this section may not apply in the event the woman is unmarried or in a lesbian relationship in a state that does not allow same sex marriage. Several states address the issues resulting from the assumptions of the 1973 UPA that AI is used only in marriage by omitting the term "married" from this section of the UPA. *See* Hecht v. Superior Court, 20 Cal. Rptr. 2d 275, 865-86 (Cal. App. 1993) ("We agree with the reasoning in *Jhordan C*; had the legislature intended to express a public policy against procreative rights of unmarried women or against artificial insemination of unmarried women, it would not have excluded the word 'married' from section 7005, subdivision (b). Colorado, Washington, Wisconsin and Wyoming have also eliminated the word

Clearly, the 1973 UPA is written for the use of AI in the context of heterosexual marriage. Note that a "wife" inseminated by a man other than her "husband" must have her husband's written consent, after which the husband is considered the father of a resulting child, and the donor's rights are eliminated. This version of the UPA essentially allows the transfer of parental rights from one man (the donor) to another (the husband).

2. 2000 Uniform Parentage Act

In 2000, the NCCUSL unanimously approved a revised and much simplified version of the UPA, including a major revision to the portions of the sections dealing with AI rights. The relevant sections of the revised UPA include:

> SECTION 701. SCOPE OF ARTICLE. This [article] does not apply to the birth of a child conceived by means of sexual intercourse [, or as the result of a gestational agreement as provided in [Article] 8].[34]
> SECTION 702. PARENTAL STATUS OF DONOR. A donor[35] is not a parent of a child conceived by means of assisted reproduction.[36]
> SECTION 703. PATERNITY OF CHILD OF ASSISTED REPRODUCTION. 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.

'married' from subsection (b) in the adoption of the UPA.") (citations omitted).

[33] 1973 UPA § 5. Various versions of the 1973 UPA were adopted in some form or another by nineteen states as of the year 2000. *See* Prefatory Note, 2000 UPA.

[34] *See* Comment to 2000 UPA § 701 (referring to gestational agreements).

[35] 2000 UPA § 103(8) defines a "donor" as follows:

> 'Donor' means an individual who produces eggs or sperm used for assisted reproduction, whether or not for consideration. The term does not include:
> (A) a husband who provides sperm, or a wife who provides eggs, to be used for assisted reproduction by the wife;
> (B) a woman who gives birth to a child by means of assisted reproduction [, except as otherwise provided in [Article] 8]; or
> (C) a parent under Article 7 [or an intended parent under Article 8].

[36] The Comment to § 702 of the 2000 UPA makes clear that this simplified version is intended to clear up some of the ambiguities and difficulties that have arisen over the restrictive procedures as they affected unmarried women, and more importantly, lesbians who, by state law, may not be married.

> The new Act does not continue the requirement that the donor provide the sperm to a licensed physician. Further, this section of the new UPA does not limit a donor's statutory exemption from becoming a legal parent of a child resulting from ART [Assisted Reproductive Technology] to a situation in which the donor provides sperm for assisted reproduction by a married woman. This requirement is not realistic in light of present ART practices and the constitutional protections of the procreative rights of unmarried as well as married women. Consequently, this section shields all donors, whether of sperm or eggs, (§ 102 (8), *supra*), from parenthood in all situations in which either a married woman or a single woman conceives a child through ART with the intent to be the child's parent, either by herself or with a man, as provided in sections 703 and 704.

Comment to 2000 UPA § 702.

> SECTION 704. CONSENT TO ASSISTED REPRODUCTION.
> (a) Consent by a woman, and a man who intends to be a parent of a child born to the woman by assisted reproduction must be in a record signed by the woman and the man. This requirement does not apply to a donor.
> (b) Failure of a man to sign a consent required by subsection (a), before or after birth of the child, does not preclude a finding of paternity if the woman and the man, during the first two years of the child's life, resided together in the same household with the child and openly held out the child as their own.[37]

Although between nineteen and twenty-one states have attempted to pass legislation based on the UPA,[38] most other states have little, if any, guidance on the rights of persons participating in AI. Further, most of the states adopting some version of the UPA have significantly varying provisions, which makes the act far from "uniform."[39] Absent any legislation, courts are left to grapple with child custody disputes over children resulting from AI, making further ambiguous the state of the law for lesbian couples attempting to navigate the legal pitfalls of AI.

With or without legislation, parties contemplating AI may attempt to draft contracts in order to formalize their intentions, clarify parental rights and responsibilities, and provide legal guidelines. Where no state legislation or judicial guidance exists, however, those entering into contracts have little security in how the contracts might be interpreted by the court in the event they are later challenged. Contracts for the donation of sperm may not be enforceable and the recipient of sperm may not be able to ensure that the donor will not seek custody at a later time. Similarly, the donor of sperm would be unable to terminate his parental rights or obligations through these contracts.

The issues discussed above highlight the failure of many states to protect gays and lesbians in the process of creating a family, calling particular attention to the limitations of allowing individual judges to make decisions based on their own view of what is in the "best interest of the child"[40] and the similar limitations of enforcing contracts for artificial insemination.

---

[37] 2000 UPA §§ 70—704.

[38] *What is Sauce for the Gander*, *supra* note 3. With the vast variations in the adopted UPA language in several states, the exact number of states basing their statutes on the UPA may vary depending on the reviewer.

[39] *See, e.g.*, N.J. STAT. ANN. § 9:17-44(b) (West 1983), adding statutory language formalizing the right to contract for paternity. The additional language states: "unless the donor of semen and the woman have entered into a written contract to the contrary . . . ." *Id.* Other states have completely re-written the UPA. *See,* e.g., KAN. STAT. ANN. §§ 38-1110 to 38-1138 (1985) and OHIO REV. CODE ANN. §§ 3111.01 to 3111.19 (1982).

[40] *See infra* note 80.

3. Inconsistent Legislation Clashing with Insemination

While many states have adopted the UPA or variations of the UPA, courts have struggled to apply its often antiquated provisions to modern scenarios.[41] The 1973 UPA adopted by most states with any UPA legislation,[42] has several requirements that must be followed in order to adequately protect the rights of the parties involved in the insemination process. Typically, the legislation requires that the insemination occur under the supervision of a licensed physician.[43] Both husband and wife must consent to the procedure in writing and the signatures must be certified by the physician.[44] The consent must be filed with the State's Department of Health and kept there in a sealed file.[45] Once this procedure is followed, the husband of the mother is to be treated as the natural father of the resulting child.[46] The donor has no rights to the child if the UPA requirements are followed.[47]

Several issues have been litigated under the UPA and courts have had varying opinions about a couple's failure to follow the exact procedures prescribed by the law. For example, in *Jhordan C. v. Mary K.*,[48] the failure of the parties to involve a physician during AI rendered the protections of the California version of the UPA ineffective.[49] The California Court of Appeals stated clearly that, "[s]ubdivision (b) states only one limitation on its application: the semen must be 'provided to a licensed physician.' Otherwise, whether impregnation occurs through artificial insemination or sexual intercourse, there can be a determination of paternity with the rights, duties and obligation such a determination entails."[50]

Similarly, in *C.O. v. W.S.*,[51] the Ohio Court of Common Pleas granted a sperm donor parental rights when the parties failed to adequately follow all statutory guidelines. In this case, the sperm donor was selected and known by the recipient mother and her partner.[52] According to the Ohio court, the applicable statutes provide that:

> the insemination must be performed by a physician or a person who is under the supervision and control of a physician and, the physician must obtain and maintain various information, statements, and records, including a statement that the donor shall not be advised as to the identity of the

---

41 *Who's Your Daddy, supra* note 4, at 636-37, n.5.

42 *See id.* at n.5.

43 1973 UPA § 5(a).

44 *Id.*

45 *Id.*

46 *Id.*

47 1973 UPA § 5(a); *See also, Who's Your Daddy, supra* note 4, at 637.

48 224 Cal. Rptr. 530 (Cal. Ct. App. 1986).

49 *Id.* at 533-34.

50 *Id.* at 534 (quoting CAL. CIVIL CODE § 7005 (b)).

51 639 N.E.2d 523 (Ohio C.P. 1994).

52 *Id.* at 524.

> recipient, and that the recipient shall not be advised as to the identity of the donor.[53]

The court found that the failure of the parties to adhere to the "critical element of anonymity" negated the mother's attempt to use the statute as a shield to prevent parental rights in the donor.[54]

In light of these cases, parties would be advised to follow the strict language of the UPA in the insemination procedures. However, lesbian couples may find these requirements impossible to follow because the 1973 UPA presumes that artificial insemination will be used by heterosexual couples who are infertile.[55] Ambiguity arises when the person requesting insemination is unmarried.[56] For example, the 1973 UPA does not address the rights of the donor to terminate parental rights when the recipient woman is unmarried.

Courts have addressed this problem with mixed results. In *Herman v. Lennon,*[57] a boyfriend donated his sperm for artificial insemination and signed a "Consent for Artificial Insemination" form. The New York court held that this consent was insufficient to create a binding contract as the contract was "void for vagueness" and "unenforceable."[58] Further, the court ruled that the New York version of the UPA was inapplicable because the couple was not married.[59]

In *Interest of R.C.*,[60] the Colorado Supreme Court was faced with an action by a donor to seek parental rights over the child created through AI. The Court found that the Colorado version of the UPA was ambiguous as to unmarried parties

---

[53] *Id.* (citing OHIO REV. CODE ANN. §§ 3111.32, 3111.5).

[54] *Id.* at 525. The court found that the failure of the anonymity provision, which is contained in the physician requirements section of the statute, controlled and prevented the mother from denying parental rights to the donor father. *Id.* This decision was reached even as the court cited OHIO REV. CODE § 3111.35 which, according to the court, holds that "the failure of a physician to comply with the applicable statutory requirements shall not affect the legal status, rights, or obligations of a child conceived as a result of a non-spousal artificial insemination." *Id.*

[55] *See* 1973 UPA § 5. Some states have amended the 1973 UPA, eliminating the requirements that the woman be married. For example, in *Jhordan C.*, 224 Cal. Rptr. 530, 533-34, the court notes that "[t]he original UPA restricts application of the nonpaternity provision of subdivision (b) to a '*married* woman other than the donor's wife.' . . . The word 'married' is excluded from subdivision (b) of § 7005, so that in California, subdivision (b) applies to all women, married or not." (citations omitted). The California court notes that "[t]his omission also occurs in the versions of the UPA adopted in Wyoming and Colorado." *Id.* at 534 n.5 (citations omitted).

[56] *See In Interest of R.C.*, 775 P.2d 27, 30 (Colo. 1989) (citing Note, *Artificial Insemination: Donor Rights in Situations Involving Unmarried Recipients,* 26 J. FAM. L. 793, 796 (1988)). According to the court, "section 5 is 'sketchy overall,' 'silent as to what its application would be for an unmarried woman,' and 'equally ambiguous in its treatment of the donor'"). *See also, Who's Your Daddy, supra* note 4, at 642.

[57] 776 N.Y.S.2d 778 (Sup. Ct. 2004).

[58] *Id.* at 779.

[59] The court reasoned that the New York version of the UPA "applies only to a *married* woman . . . with the consent . . . of . . . her husband." *Id.* at 779, (citing N.Y. DOM. REL. LAW § 73(1) (McKinney 1974)). Of interest to the court was the fact that the child was not a result of the insemination and was not, in fact, a child of the donor.

[60] 775 P.2d 27 (Colo. 1989).

when the donor was known.[61] Instead, the court used common law principles to hold that the intent of the parties was significant in determining the rights and obligations of the donor and recipient mother, and remanded the case for further findings.

In *McIntyre v. Crouch*,[62] an unmarried woman used the semen of an unmarried man to inseminate herself without the assistance of a physician.[63] The donor argued that the parties agreed that he would take an active role in the life of the resulting child, yet the mother contended that no such agreement existed.[64] The court held that the statute is "generally intended" to cut off the rights of the donor *even though she is unmarried*, but remanded a Due Process claim by the donor on the question of whether the recipient "can establish that he and [the mother] agreed that he should have the rights and responsibilities of fatherhood and in reliance thereon he donated his semen."[65] In other words, the state statute cannot place an

---

[61] *Id.* at 31. The Colorado UPA had omitted the term "married" from its version of the UPA:

> Because we conclude that section 19-4-106 does not apply when the known semen donor and the unmarried recipient agreed that the known donor would have parental rights and expressly agreed at the time of insemination that he would be treated as the natural father of any child so conceived, an agreement is relevant to whether J.R.'s parental rights were extinguished through the artificial insemination process. A factual dispute remains as to whether J.R. and E.C. at the time of insemination agreed that J.R. would be the natural father of R.C. This factual dispute must be resolved on remand. If no such agreement was present at the time of insemination, then section 19-4-106(2) operates to extinguish J.R.'s parental rights and duties concerning R.C. If such an agreement was present, then section 19-4-106(2) does not operate to extinguish J.R.'s parental rights and duties concerning R.C., and the juvenile court must determine paternity.

[62] 780 P.2d 239 (Or. App. 1989).

[63] Of note, the Oregon statute appears to alter the requirement that the recipient and donor of sperm be married. The statute clarifies that: "Artificial insemination shall not be performed upon a woman without her prior written request and consent and, *if she is married*, the prior written consent of her husband." OR. REV. STAT. § 677.365 (1977) (emphasis added).

[64] *McIntyre*, 780 P.2d at 243. Interestingly, the Court opined as to the purpose of the Oregon version of the UPA:

> The legitimate purposes of the act are: (1) to allow married couples to have children, even though the husband is infertile, impotent or ill; (2) *to allow an unmarried woman to conceive and bear a child without sexual intercourse;* (3) to resolve potential disputes about parental rights and responsibilities: that is, (a) the mother's husband, if he consents, is father of the child and (b) an unmarried mother is freed of any claims by the donor of parental rights; (4) to encourage men to donate semen by protecting them against any claims by the mother or the child; and (5) to legitimate the child and give it rights against the mother's husband, if he consents to the insemination. *Id.* (emphasis added).

[65] *Id.* at 471-73 (emphasis added). The Oregon statute has no prohibition against insemination of an unmarried woman, but does include the following: "SECTION 3. (1) Artificial insemination shall not be performed upon a woman without her prior written request and consent and, if she is married, the prior written request and consent of her husband." *Id.* at 467 (citations omitted). Of significant importance to this article is the court's discussion of the due process rights of the donor in this case. The court quotes the United States Supreme Court stating:

> when an unwed father demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child, . . . his interest in personal contact with his child acquires substantial protection under the Due Process Clause. . . . But the mere existence of a biological link does not merit equivalent constitutional protection . . . . The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a

absolute bar on the donor's assertion of fatherhood based on contract.

Other variations of the UPA, including the 2000 UPA, show mixed results, none of which fully address issues of unwed or lesbian mothers. For example, in several states, the statute merely puts forth that a sperm donor has no legal rights or duties with respect to a child born through AI.[66] However, even with the simplicity of this language, courts continue to struggle with questions of clarity under the 2000 UPA.

Illustrating the confusion that even the updated version of the UPA can create, the Texas Court of Appeals came to different conclusions in two separate cases regarding the standing of a donor to bring suit for parentage under the UPA. In *In re Sullivan*,[67] the court faced the question of whether a donor had standing to bring a suit to determine parentage under the Texas Family Code. The majority of the court declined to decide whether the Texas equivalent of UPA[68] denied or conferred standing to a donor to bring his case for parentage in Texas court.[69] Instead, it held that the effect of the statute is to be decided on the merits at the trial level.[70] The concurring opinion, however, noted that "[t]he 'plain and common meaning' of section 160.702 does not negate Russell's standing."[71] The concurrence attempted to clarify the meaning of section 702 of 2000 UPA by noting that "[the provision] does *not* state that a donor can *never* be a parent under appropriate circumstances . . . ."[72] It further argued that language of the statute should be distinguished from a reading that could have stated that "[a] donor *cannot* be a parent of a child conceived by means of assisted reproduction.'[73] The concurring opinion clarifies that section 702 of the 2000 UPA does not negate standing by the sperm donor to assert paternal rights.[74]

---

relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interest lie. *Id.* at 470-71 (quoting *Lehr v. Robertson*, 463 U.S. 248, 261 (1983)).

66 Partners Task Force for Gay and Lesbian Couples, Parenting Options for Same-Sex Couples in the U.S., Adoption, Foster Care, Donor Insemination, Surrogating, Custody, (Oct. 15, 2008), http://www.buddybuddy.com/parent.html (last visited Oct. 31, 2008). The following states' statutes put forth that a sperm donor has no legal rights or duties with respect to a child born through AI: AL, CO, CT, ID, IL, MN, MT, NJ, NM, NY, OH, OR, TX, WA, WI. *Id.*

67 157 S.W.3d 911 (Tex. App. 2005).

68 This Texas statute holds that "a donor is not a parent of a child conceived by means of assisted reproduction." *Id.* at 915 (quoting TEX. FAM. CODE ANN. § 160-702 (West 2002)).

69 *Id.* at 919-920.

70 *Id.* at 919.

71 *Id.* at 922.

72 *Id.*

73 In re Sullivan, 157 S.W.3d 911, 922 (Tex. App. 2005).

74 It is of special note that the court expressly refused to decide whether a "written co-parenting agreement" present in this case had any part in the decision to confer standing upon the sperm donor to assert his rights as a parent. *Id.* at 920 n.7, 922 n.2.

In contrast, in *In re H.C.S.*,[75] the Texas Court of Appeals held that the question standing as a "donor" was relevant for determining whether a donor could may proceed with a case for parentage.[76] The court concluded that "J.S., as an unmarried man who provided sperm used for assisted reproduction and who did not sign and file an acknowledgment of paternity, does not have standing to pursue a suit to determine paternity of the child born through assisted reproduction."[77] The court made a policy argument for its decision:

> [U]nder J.S.'s reading of the Family Code, any alleged donor-even one who does not know the mother or one who donates to a sperm bank-could challenge paternity in an original proceeding. Rather than promoting assisted reproduction, such a course of action would subject children born of assisted reproduction and their mothers to the financial and emotional costs of defending suits like this one on the merits.[78]

B. Best Interest of the Child

When a donor seeks to claim rights as a father to a child born from artificial insemination, or when a child or mother seeks support from the donor, courts typically employ common law standards in the absence of clear legislation. Most often, courts apply the standard of what is "in the best interest of the child."[79] The standard, however, may vary by state.

The Uniform Marriage and Divorce Act, or the UMDA, attempts to provide some guidance with determining what is in the best interest of the child in child custody matters. According to the Act, a court shall consider the following:

> the wishes of the child's parent or parents as to his custody;
> the wishes of the child as to his custodian;
> the intersection and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;
> the child's adjustment to his home, school, and community; and
> the mental and physical health of all individuals involved.
> The court shall not consider conduct of a proposed custodian that does not

---

[75] 219 S.W.3d 33 (Tex. App. 2006).

[76] *Id.* at 36.

[77] *Id.* While J.S. is a man and his paternity as to H.C.S. has not been adjudicated, and while he alleges himself to be the father of H.C.S., he is admittedly a male donor and thus statutorily he is not an alleged father and does not have standing to pursue an original suit. Further, the standing provision J.S. relies on clearly states that it is subject to other provisions regarding voluntary acknowledgment of paternity.

[78] *Id.* at 37.

[79] All 50 states have some version of the "best interest of the child" standard. Katherine M. Swift, *Parenting Agreements, The Potential Power of Contract, and the Limits of Family Law*, 34 FLA. ST. U.L. REV. 913, 942 (2007) (citing Theresa E. Ellis, *Loved and Lost: Breathing Life into the Rights of Non-Custodial Parents*, 40 VAL. U.L. REV. 267, 276 n.45 (2005)); Durkin, *supra* note 6, at 327, 330 (citing Andrea Charlow, *Awarding Custody: The Best Interest of the Child and Other Fictions*, 5 YALE L. & POL'Y REV. 267, 268 n. 3 (1987)).

affect his relationship to the child.[80]

However, states are inconsistent in applying these factors to lesbian and gay individuals. For example, Mississippi courts have adopted factors that are somewhat similar to the UMDA factors and known as the "Albright" factors. In *Albright v. Albright*, the court set out the following factors for consideration in making a custody award between natural parents:

(1) The age, health and sex of the child;
(2) Which parent had continuing care of the child prior to separation;
(3) *Which parent has the best parenting skills*;
(4) Which has the willingness and capacity to provide primary child care;
(5) Employment responsibilities of both parents;
(6) Physical and mental health and age of parents;
(7) Emotional ties of the parent and child;
(8) *Moral fitness of the parents*;
(9) Home, school and community record of the child;
(10) Preference of the child at the age of 12;
(11) *Stability of the home environment* and employment of each parent,
(12) *Other relevant factors*.[81]

Mississippi's significant departure from the UMDA factors indicates that the state is willing to consider "moral fitness," "stability of the home environment" and "other relevant factors," all of which give a chancellor significant latitude in making a decision on the "best interest of the child."

For example, when asked to enforce a private contract to delineate and secure the rights of a lesbian couple, their potential child, and a potential sperm donor, one Mississippi Chancery Court judge responded: "They obviously can't have their own child naturally, and the law prevents them from adopting. Every child needs a father. Clearly these laws were put there for a reason. As difficult as it is for them to have a child, perhaps they should just reconsider having children at all."[82]

In *S.B. v. L.W.*,[83] a Mississippi Court of Appeals Judge boldly described her thoughts on the best interest of a child:

> [T]he mother may view her decision to participate in a homosexual relationship as an exertion of her perceived right to do so. However, her choice is of significant consequence, as described before in the discussion of our State's policies, in that her rights to custody of her child may be significantly impacted . . . . Under the principles of Federalism, each state is permitted to set forth its own policy guidelines through legislative

---

[80] UNIF. MARRIAGE AND DIVORCE ACT § 402 (1970).

[81] Jeffrey Jackson & Mary Miller, ENCYCLOPEDIA OF MISSISSIPPI LAW § 28:11 (citing Albright v. Albright, 437 So. 2d 1003, 1005 (Miss. 1983) (emphasis added)).

[82] Conversation between Harvey L. Fiser, author and a Mississippi Chancery Court judge in Jackson, Mississippi (Sept. 12, 2006). For confidentiality purposes, the Judge's name has been withheld.

[83] S.B. V. L.W., 793 So. 2d 656 (Miss. App. 2001).

> enactments and through judicial renderings. Our State has spoken on its position regarding rights of homosexuals in domestic situations. I agree that . . . the homosexual lifestyle of one of the parents in this case [may be considered] as a factor in determining suitability for custody.[84]

---

[84] *Id.* at 663-64. The case is of considerable controversy as the following quote from the concurring opinion was joined by Judge Leslie Southwick, a recent appointee to the Fifth Circuit by President George W. Bush. The following is a more complete quote from that opinion:

> While I do agree with the majority, I write separately because I feel the dissent has delved into an area where our State legislature has made clear its public policy position relating to particular rights of homosexuals in domestic relations settings. In my review of statutory authority, I find that in 2000 the legislature added an amendment to MISS. CODE ANN. § 93-17-3 (Supp. 2000) which reads, "(5) Adoption by couples of the same gender is prohibited." This statute is brand new and has not yet been challenged in our appellate courts. Another statute which shows the legislature's intention concerning homosexuals and family relations is MISS. CODE ANN. § 93-1-1(2) (Supp. 2000). A 1997 amendment to that statute added the sub-section which reads, "Any marriage between persons of the same gender is prohibited and null and void from the beginning. Any marriage between persons of the same gender that is valid in another jurisdiction does not constitute a legal or valid marriage in Mississippi." Additionally, MISS. CODE ANN. § 97-29-59 (Rev. 2000) states, "Every person who shall be convicted of the detestable and abominable crime against nature committed with mankind or with a beast, shall be punished by imprisonment in the penitentiary for a term of not more than ten years." That statute has been held to apply to homosexual acts. *See* Miller v. State, 636 So. 2d 391 (Miss.1994); Haymond v. State, 478 So.2d 297 (Miss.1985); State v. Mays, 329 So. 2d 65 (Miss.1976). Looking to these cited authorities and to the United States Supreme Court case of Bowers v. Hardwick, 478 U.S. 186, 106 S. Ct. 2841, 92 L.Ed.2d 140 (1986), which upheld the constitutionality of a Georgia sodomy statute, I find that the legislature has clearly set forth the public policy of our State with regard to the practice of homosexuality.

The concurring opinion continued:

> I do recognize that any adult may choose any activity in which to engage; however, I also am aware that such person is not thereby relieved of the consequences of his or her choice. It is a basic tenet that an individual's exercise of freedom will not also provide an escape of the consequences flowing from the free exercise of such a choice. As with the present situation, the mother may view her decision to participate in a homosexual relationship as an exertion of her perceived right to do so. However, her choice is of significant consequence, as described before in the discussion of our State's policies, in that her rights to custody of her child may be significantly impacted.
>
> Under the principles of Federalism, each state is permitted to set forth its own public policy guidelines through legislative enactments and through judicial renderings. Our State has spoken on its position regarding rights of homosexuals in domestic situations. Coupling the legislature's unambiguous rules with our established case law rules, I agree that we should not find that the chancellor erred in considering the homosexual lifestyle of one of the parents in this case as a factor in determining suitability for custody.

S.B. v. L.W., 793 So. 2d at 663. *See also* Christopher Carnahan, *Inscribing Lesbian and Gay Identities: How Judicial Imaginations Intertwine with the Best interest of Children*, 11 CARDOZO WOMEN'S L. J. 1 (2004). While the opinions of the judges in the above quoted cases may still apply their homophobic bias in their decisions regarding "best interest of the child," it should be noted that, with respect to sodomy among adults, "their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government." Lawrence v. Texas, 539 U.S. 558, 578 (2003). These judges may also find it interesting that in the 2000 Census, Mississippi, a state with no laws relating to AI and an active legislative agenda against gay and unmarried couple adoption, had the highest percentage of lesbian couples raising children in the United States—43.8%—and the second highest percentage of gay male couples raising children—31.1%. James G. Pawelski, et al, *The Effects of Marriage, Civil Union, and Domestic Partnership Laws on the Health and Well-being of Children*, J. AM. ACAD. PEDIATRICS 349, 351 (2006) (citing U.S. CENSUS BUREAU. MARRIED-COUPLE AND UNMARRIED-PARTNER HOUSEHOLDS: 2000-CENSUS 2000 SPECIAL REPORTS, *available at*

Mississippi is not the only state with judges willing to express homophobic opinions. Other judges have similar views. In a concurring opinion in an Alabama custody matter, Chief Justice Moore[85] clarified his position:

> I write specially to state that the homosexual conduct of a parent—conduct involving a sexual relationship between two persons of the same gender—creates a strong presumption of unfitness that alone is sufficient justification for denying that parent custody of his or her own children or prohibiting the adoption of the children of others.[86]

One commentator, discussing the conflict between the best interest of the child analysis and various court opinions toward homosexuality, notes several instances in which personal bias has impacted custody decisions.[87] In describing one Michigan case, the writer notes:

> [D]uring a challenge to the custody rights of one mother, Mrs. Brown, the trial court ignored the internal aspects of the relationship, and focused instead on what the appellate court deemed their "state of lesbianism" as partial justification for ruling against Mrs. Brown. The precise meaning of the phrase "state of lesbianism" is unclear. Residing in this state was apparently sufficiently evil for the trial court to conclude that these women were unfit parents. Accordingly, the best interest of the child analysis required the court to protect these children from what it deemed the negative effects of "lesbianism."[88]

These judges, like family court judges throughout the country, are the ones who would ultimately be called upon to make decisions regarding the "best interest of the child" in cases involving reproductive rights, child custody, child support, and parental rights. Statements made by judges such as, "every child needs a father," exposes the clear bias in any potential child custody case. While judges are free to hold a personal opinion, it is also their duty to apply the law. Many courts seem to have no issue with gay parents; however, the bias expressed by the aforementioned courts illustrates the problem of determining the best interest of a child.

How can lesbian parents, absent the UPA, protect their children against a potential challenge by a sperm donor for custody? If a state has not adopted the

---

www.census.gov/prod/2003pubs/censr-5.pdf (Last visited March 7, 2006)). While lesbian and gay individuals can and apparently do have children in that conservative location, their partners are denied parenthood by legislation. MISS. CODE ANN. 93-17-3(5). Therefore, one member of the same-sex couple is, in the eyes of the law, a single parent regardless of the wishes of the child or the parents.

[85] Chief Justic Roy Moore was removed from office on November 13, 2003 for defying a federal order to remove a 2.6 ton carving of the Ten Commandments from the Alabama Supreme Court rotunda. When discussing his removal, Moore stated, "God has chosen this time and this place so we can save our country and save our courts for our children." *Ten Commandments Judge Removed From Office,* CNN, Nov. 14, 2003, http://www.cnn.com/2003/LAW/11/13/moore.tencommandments/.

[86] Ex Parte H.H., 830 So. 2d 21, 26 (Ala. 2002).

[87] *See* Carnahan, *supra* note 84.

[88] *Id.* at 11 (citing People v. Brown 212 N.W.2d 55 (Mich. Ct. App. 1973)).

UPA or its UPA provides no protection for unmarried women, then the courts are often open to the challenge by a donor for paternity. Given the bias expressed by many judges against a homosexual parent, factors such as "moral fitness of the parents," "stability of the home environment and employment of each parent," or "other relevant factors" are considered when determining the best interest of the child. So, how do lesbian families protect themselves? In a custody battle, a judge could hold that the "best interest of the child" means that a child should have a mother and a father based solely on the judge's personal belief that this traditional family is best for the child—as our Mississippi judge believes, "every child needs a father." Or in a neighboring state, a judge may honor the intentions of all parties, and allow for the creation of dual-mother families and the termination of the donor's rights and responsibilities. Because of the wide discrepancies by state or by judge in the interpretation of "best interest of the child," a child's welfare and security cannot be predictably determined and may be left to the luck of the particular location or particular judge.[89] This exposes an egregious gap in legislation regarding artificial insemination and parental rights. Because of this gap, parties are left to creating legal documents to clarify their rights and obligations.

IV. CONTRACTS: THEIR VALIDITY AND THEIR ROLE

Absent legislation, or even in those states with partial or antiquated legislation, parties to insemination are left with few options. One possible solution is to mitigate the effects of uncertain legal consequence of AI by entering into a private contract. As one commentator notes, "'[u]nlike married partners whose obligations are specified by law, unmarried partners must create and delineate their mutual obligations in accordance with the needs of their relationship.'"[90] With respect to custody and divorce proceedings, courts have been increasingly supportive of private custody contracts, stating that they are important in child custody determinations.[91] Other courts have held that the agreements will be

---

[89] For a discussion of issues raised by discrepancies from state to state in custody battles, *see* Oren Goldhaber, *"I Want My Mommies": The Cry for Mini-Domas to Recognize The Best interest of The Children of Same-Sex Couples*, 45 FAM. CT. REV. 287 (2007).

[90] Durkin, *supra* note 6, at 342 (quoting Note, *Developments in the Law-Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1625 (1989)).

[91] "[T]he law is more willing to enforce agreements that tailor family life to individual preferences and . . . is more solicitous in general of individual choice in family matters" Bernie D. Jones, *Single Motherhood by Choice, Libertarian Feminism, and the Uniform Parentage Act*, 12 TEX. J. WOMEN & L 419, 427-28 (2003). *See* In Interest of R.C., 775 P.2d 27, 33-34 (Colo. 1989) (holding that the Colorado version of the UPA bars contracts for paternity for donors when the parties are married or when the donor is anonymous, but the same prohibition may not apply when the parties are unmarried). *See also* Lori Andrews, *Legal and Ethical Aspects of New Reproductive Technologies*, 29 CLINICAL OBSTETRICS & GYNECOLOGY 190, 200 (1986) (advocating that paternity in various AI cases should be based on intent of the parties); N.J. STAT. ANN. § 9:17-44(b) (West 1983) (providing that a donor and recipient have a right to enter into a written contract for terms affecting the paternity of the child).

upheld if they are in the "best interest of the child,"[92] thus introducing potential judicial bias in these contracts. Herein lies a problem with courts that have unchanging, historically conservative values. As the issue of custody and parental obligations usually hinges on "the best interest of the child," judges with negative opinions on gay and lesbian parenting may inject their bias in determining the "best interest of the child," even in the face of clear, contract-delineated rights.

In states that have adopted the 2000 version of the UPA, the rights of a donor are often clearly expressed by legislation, as the "donor is not a parent of a child conceived by means of assisted reproduction."[93] The major issue arises in states that have no law governing AI or have the unmodified 1973 version of the UPA.[94] In these states, no legislative protection exists to protect an unmarried mother against a donor's assertion of paternity rights. In those states, most courts will revert to determining the "best interest of the child," a standard that arguably should no longer apply to determine parentage in AI cases.

A. Types of Protections for Contracts

One strategy for mitigating judicial bias and clearly establishing intentionality has been a two-step contract to ensure the rights of co-parents.[95] This two-step contract would include the following: the first step includes terminating the parental rights of the donor, and the second step involves providing rights to the non-biological co-parent in the event of a separation of the couple or death or incapacity of one of the biological parents.[96] However, the difficulty lies in determining how courts will view this private contract.

While a two-step contract could serve as the basic form for AI agreements, the terms of the contract should be much more detailed and comprehensive. Contracts outline the expectations and duties of parties to artificial insemination for several reasons. Typically, three or four parties need to be protected in contracts for artificial insemination. Contracts could include the rights and obligations of the mother, the donor, the child and the co-parent, if there is one. Formal contracts may also be useful in the event that a court wishes to consider the "intent of the parties" in determining custody and support issues in a court proceeding.[97]

From the perspective of the mother, contracts often spell out that the donor will have no contact with the child or that the donor has no legal right to custody of the child. The contracts seek to formalize the agreement between mother and donor

---

[92] Durkin, *supra* note 6, at 343.

[93] 2000 UPA at § 702.

[94] The 1973 UPA applies only to married women and therefore has no applicability to lesbian couples in any state where same-sex marriage is not possible. *See* 1973 UPA at § 5.

[95] Durkin, *supra* note 6, at 342.

[96] *Id.* at 342.

[97] *See, e.g.* Ferguson v. McKiernan, 940 A.2d 1236 (Penn. 2007); T.F. v. B.L., 813 N.E.2d 1244 (Mass. 2004); Johnson v. Calvert, 851 P.2d 776 (Cal. 1993); McIntyre v. Crouch, 780 P.2d 239 (Or. Ct. App. 1989).

that the donor has no legal connection, right or obligation to the child whatsoever. In the event the parties agree to some kind of support arrangement, the rights regarding the arrangement may be spelled out in the contract.[98] Further, a clause stating that the donor shall remain anonymous could assist the mother in protecting her rights to the child.[99] Again, having these terms spelled out can assist a court in determining the intent and the rights of the parties in the event of a custody challenge.

Contracts are also important for protecting the rights of the donor. Contracts are drawn in an attempt to protect the donor against suits for support from the potential child or the mother.[100] Contracts may also contain a confidentiality statement prohibiting anyone from speaking of the donor's identity in order to protect anonymity for various reasons, including protection from suits for support.[101] Some donors and recipients may wish to spell out other terms, such as the terms for visitation, the manners and methods by which the donor is allowed to have other kinds of contact with the child. They may also wish to spell out whether the donor will be contributing to the care of the child and, if so, under what terms.[102]

Furthermore, contracts protect the child. Contracts may help prevent a donor from seeking to take the child away from the mother or asserting visitation rights.[103] Contracts may also spell out the terms under which the donor will no longer be anonymous, such as the child's eighteenth birthday. If a support agreement exists, the contract can formalize the terms of the support.

Finally, contracts may be used to define the rights and obligations of a co-parent. Given the infancy of same-sex marriage or civil unions in the United States, rights for same-sex co-parents are far from automatic. Absent a formal adoption by a co-parent, a solution that is against legislation in some states, a contract should spell out the obligations of support and rights to custody of a child in the event of a break up or death of one or both of the co-parents.[104]

---

[98] *See, e.g., Ferguson*, 940 A.2d 1236 (holding that a contract terminating rights and obligations of a donor is valid without UPA type legislation); In Re Sullivan, 1575 S.W.3d 911 at 913 (Tex. Ct. App. 2005) (holding that donor had standing to bring suit to enforce co-parenting agreement); C.O. v. W.S., 639 N.E.2d 523 at 524 (Oh. Ct. App. 1994) (holding that a contract could override the statutory presumption against paternity); *McIntyre*, 780 P.2d 239 at 241 (ruling that a contract with the mother may overrule the statutory presumption of no-paternity).

[99] *See, e.g., Ferguson*, 940 A.2d at 1241.

[100] *Id.*

[101] *Id.* at 1241. The court seemed to find significant the parties' attempts to maintain anonymity and other requirements of the UPA.

[102] *See, e.g., In Re Sullivan*, 1575 S.W.3d at 913.

[103] *See, e.g., Ferguson*, 940 A.2d at 1241.

[104] For a discussion of cases involving interstate problems absent contracts for custody, *see* Goldhaber, *supra* note 89. *See also* Davis v. Kania, 836 A.2d 480, 481. (Conn. Super. Ct. 2003) (enforcing a co-parenting agreement between two men). While many courts will refuse to enforce an actual agreement for co-parentage, the contract provides written evidence of intent. This intent could be important when determining custody and support in the event problems arise. *See, e.g.,* Elisa B. v. Superior Court, 117 P.3d 660 at 669. (Cal. 2005); L.S.K. v. H.A.N., 813 A.2d 827 (Pa. Super. Ct. 2002)

B. Questionable Enforceability: Judicial Bias, Antiquated Understanding or Legitimate Interests?

While the possible contractual terms are unlimited, their enforceability remains the problem. Absent legislation protecting private agreements between a donor and a recipient mother, courts acting in equity could invalidate all or part of the contract between the parties just because of the judge's personal belief as to what is in the "best interest of the child"—arguing "public policy."[105] A court could substitute its beliefs, regardless of the parties' beliefs and intentions about what is in the "best interest of the child." Even though a donor and a mother may have agreed that the donor remain anonymous and that the donor have no support obligations, a court may find that "every child needs a father" and impose unintended obligations on the parties. In short, "a judge's personal view and opinion might be used to override the right of individuals to contract with "the best interest of the child" analysis, bringing about unpredictable and potentially manipulative rulings.

Perhaps no single case illustrates the struggle between the "best interest of the child" standard, contract principles and the lack of legislative intervention better than the Pennsylvania case *Ferguson v. McKiernan*.[106] In *Ferguson*, the mother of a child created through AI procedures sought to force the sperm donor to make child support payments.[107] The donor and the mother were formerly in a relationship and remained friends up to and past the time of insemination.[108] Prior to any attempt at in vitro fertilization (IVF) or insemination:

> the parties entered into an *oral agreement* where the mother purported to release the donor of any and all financial burdens associated with the donation and any paternal obligations.[109] The agreement also provided that the donor "surrender any rights and privileges to the children arising from his biological paternity in return for being released of any attendant support obligation."[110] The parties further agreed to keep the terms of the procedure and knowledge of the donor confidential.[111] After the agreement was formed, the donor provided his sperm to a physician at the Hershey Medical Center in Hershey, Pennsylvania.[112] The IVF procedure was

(Actions and intent may confer obligations of co-parenting). *See also* Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J. L. & PUB. POL'Y 1, 52. (2004).

[105] For a discussion of the effects of judicial bias against gays and lesbians, *see* Carnahan, *supra* note 84.

[106] *Ferguson*, 940 A.2d at 1236.

[107] *Id.* at 1238.

[108] *Id.* at 1238-39.

[109] *Id.* at 1239-41.

[110] *Id.* at 1241.

[111] *Ferguson*, 940 A.2d at 1241.

[112] *Id.* at 1240.

> successful and the mother gave birth to twins.[113] There was limited contact between the donor and the mother for the next five years.[114] However, five years after the birth of the twins, the mother found the donor and filed a claim for child support.[115]

The trial court heard the evidence and found that the parties had entered into "a binding oral agreement prior to the twins'' conception."[116] The trial court also found that the donor's "donation" and the mother's agreement not to seek financial support were valid consideration to support the contract."[117] However, the trial court found the agreement unenforceable because "'a parent cannot bind a child or bargain away that child's right to support . . . .'"[118] In ruling against the donor, the trial court reasoned that "'[a]lthough we find the [mother's] actions despicable and give [sic] the [donor] a sympathetic hue, it is the interest of the children we hold most dear.'"[119]

On appeal to the Pennsylvania Supreme Court, the mother continued to argue that the "best interest of the children" were paramount to the case and should override and nullify any agreement between her and the donor.[120] The donor contended that the public policy arguments for "precluding parents from bargaining away a child's entitlement to child support should not preclude enforcement of an otherwise binding contract where the bargain in question occurs *prior to*, and *indeed induces*, the donation of sperm for IVF and implantation in a clinical setting."[121] The donor made particular note that this contract was formed months *before* any conception occurred, thus, distinguishing this case from prior precedent holding that contracts to bargain away rights of support for children in existence are void as not in the "best interest of the child" and therefore "void as against public policy."[122]

The Supreme Court rejected the mother's arguments, noting that the public policy argument is not persuasive "in the face of the evolving role played by alternative reproductive technologies in contemporary American society."[123] The court noted:

> [I]t violates the commonsense distinction between reproduction via sexual intercourse and the non-sexual clinical options for conception that are increasingly common in the modern reproductive environment. The

---

113 *Id.*

114 *Id.* at 1240.

115 *Id.*

116 *Ferguson*, 940 A.2d at 1241.

117 *Id.*

118 *Id.* (quoting Kesler v. Weniger, 744 A.2d 794, 796 (Pa. Super. Ct. 2000)).

119 *Id.* (quoting Ferguson v. McKiernan, 60 Pa. D. & C.4th 353, 364 (Dauphin Cty. 2002)).

120 *Id.* at 1244.

121 *Ferguson*, 940 A.2d at 1242 (emphasis added).

122 *Id.*

123 *Id.* at 1245.

> inescapable reality is that all manner of arrangements involving the donation of sperm or eggs abound in contemporary society, many of them couched in contract or agreements of varying degrees of formality . . . . An increasing number of would-be mothers who find themselves either unable or unwilling to conceive and raise children in the context of marriage are turning to donor arrangements to enable them to enjoy the privilege of raising a child or children, a development neither our citizens nor their General Assembly have chosen to proscribe despite its growing pervasiveness.[124]

It can be argued that the contracts between sperm recipient and sperm donor are not contracts for paternity or contracts necessarily delineating the rights of the child; these contracts are drawn up prior to insemination and are contracts for the donation of sperm, not necessarily about the custody or creation of a child.[125] At most, these are contracts for potential children. The donor is not donating a child, he is donating sperm that may or may not result in the recipient's impregnation. One could argue that the donation of sperm is equivalent to the donation of any other body part or fluid.[126] People regularly donate blood; in addition, donation of body parts, such as kidneys is relatively common, and bone marrow donations are becoming routine.[127] In the not too distant future, other fertilization processes may also be possible, making sperm irrelevant as long as some DNA can be harvested from any body part.[128] A sperm donation is analogous to a donation of a body part in that a bone marrow donor might actually give the substance of life that saves a child, a child that would die otherwise. But what if this child does not have a legal father? If the same court procedures were in play, that donor might then have legal rights to this child, or the child's mother might then have grounds to sue the marrow donor for support.[129]

To make the counter argument that a sperm donation involves the creation of a child, one would have to logically argue that life begins not at conception but at ejaculation, a currently impossible scientific argument. If sperm cannot be donated

---

[124] *Id.* (citing 2000 UPA, Prefatory Cmt. to Art. 7) (citations omitted).

[125] *See* J.F. v. D.B., 848 N.E.2d 873, 878-79 (Oh. Ct. App. 2006) (noting that a contract for surrogacy was made prior to any parental rights attached, and therefore, the contract did not violate Ohio public policy against private agreements to forgo parental rights).

[126] *See* Ronald Munson, *Artificial Insemination, Who's Responsible, in* SEX/MACHINE: READINGS IN CULTURE, GENDER, AND TECHNOLOGY 107 (Patrick D. Hopkins, ed. 1998).

[127] *See* Hecht v. Superior Court, 20 Cal. Rptr. 2d 275, 282 (Cal. Ct. App. 1993) ("The American Fertility Society, in its Ethical Statement on in vitro fertilization, has written that 'it is understood that the gametes and concepti are the property of donors. The donors therefore have a right to decide at their sole discretion the disposition of those items, provided such disposition is within medical and ethical guidelines . . . .'") (quoting York v. Jones, 717 F. Supp. 421, 426 n.5 (E.D. Va. 1989)) (citations omitted).

[128] Brian Alexander, *Will Science Render Men Unnecessary?,* MSNBC, June 27, 2007, www.msnbc.msn.com/id/17937813 ("[R]ecently a team of scientists announced they had made artificial sperm from human bone marrow . . . .").

[129] *See generally,* Gloria Banks, *Legal & Ethical Safeguards: Protection Of Society's Most Vulnerable Participants In A Commercialized Organ Transplantation System,* 21 AM. J.L. & MED. 45, 51-52 (1995).

with legal guidelines and protections, then why can other body fluids or parts? Why should contracts for sperm be subject to the prejudices of a judge in a particular locale when the same prejudices do not apply to contracts for other fluids, tissues or organs? No judge would ask what is in the best interest of red blood cells or whether or not the custody of bone marrow or its recipient needs to be disputed. Why then is sperm subject to different contractual rules? Judges must address the purpose of the contract prior to determining whether the standards of "best interest of a child" even apply to the particular situation. In a typical artificial insemination, the donor is not present for the point of conception. Arguably, sperm is merely personal property until the point of conception.[130] If so, one could contract away rights with it just as with any other bodily fluid. Or, will donors of blood be able to seek custody rights of the recipients? Of course, in many cases, but for the contract for the donation, no child would exist in the first place, no child whose "best interest" trump the intents of the donor and donee.

V. WORKING WITH THE CURRENT LEGAL SYSTEM

Given the current state of the legal system with respect to contracts for the donation of sperm, parties to these contracts are invited to "trick" the system instead of relying on sound legal precedence for guidance as to how a particular court may rule.

A. Forum Selection Clauses

Parties to contracts may insert terms into contracts in an effort to circumvent the prejudices of a judge or jurisdiction. For example, forum selection and choice of law clauses may be employed.[131] Those clauses may attempt to pick a jurisdiction that either has adopted a favorable version of the UPA or is known to be friendly toward lesbian parenthood. For example, parties could choose to have the contract decided under the laws of a more favorable state or county within a state. However, many states require a nexus to the chosen state to use the laws of another state.[132]

To circumvent this requirement, lesbian and gay parents are even going as far as traveling to friendly states for the insemination process and the completion of requisite contracts.[133] This would potentially allow them to benefit from the laws of the friendlier state in the event of a challenge to the insemination contract.

---

[130] *See supra* note 127, at n.134 (discussing that "'it is understood that the gametes and concepti are the property of donors.")

[131] *See, e.g.*, J.F. v. D.B., 848 N.E.2d 873, 878-79 (Oh. Ct. App. 2006) (holding that a surrogacy contract including choice of law provision selecting Ohio law would make Ohio law applicable).

[132] *See* RESTATEMENT (SECOND) CONFLICT OF LAWS § 187 (2004) (typically requiring the choice of law to have a substantial relationship to the action or parties).

[133] Informal survey of gay and lesbian couples (on file with authors).

B. Indemnification and Support Provisions

Other donors may consider adding indemnification provisions in sperm and egg donation contracts. There are several possible types of indemnity and support provisions. In the case of lesbian co-parents, in the absence of marriage rights or formal registered partnerships, the parties may contract for child support, custody and visitation rights in the event that the co-parents split.[134] As the parties intended to have a child together, equity would seem to support a claim that both parties should share in the financial burden of raising the child.[135]

With respect to the donor, the parties may include a contract for the reimbursement of child support or other financial payments to the parents in the event that the donor seeks custody of the child and wins.[136] Finally, the donor may seek indemnity against the mother and, in the event that a lesbian co-parent is involved, may form a separate contract with the co-parent, which seeks to indemnify and defend the donor for any losses that he may incur as a result of the donation if a court awards child support against him. While the indemnification agreement against the biological mother will most likely be found unenforceable as against public policy under current case law,[137] the co-parent agreement should be found enforceable since the primarily responsible party is still the donor in the event that the original contract is challenged.[138] The donor is merely seeking reimbursement for any losses from the co-parent. While courts have held that a father may not contract away his child support obligations, a sperm donor may be entitled to reimbursement from a co-parent who, in the eyes of a court that does not recognize lesbian co-parenting, would necessarily be considered a non-party to any parenting arrangement. In this way, courts are faced with a choice, recognize co-parent obligations of support or treat the co-parent as a non-party to the arrangement and allow enforcement of private contracts for indemnity against them.

---

[134] Formal contracts of this nature have rarely been enforced. If enforced at all, the courts have typically used equitable theories such as the "presumed parent doctrine" or the "de facto parent doctrine." *See* Swift, *supra* note 79, at 913. *But see*, T.F. v. B.L., 813 N.E.2d 1244, 1246 (Mass. 2004) (holding that the plaintiff "established the existence of an implied agreement, 'parenthood by contract,'" but that the contract was unenforceable as against public policy in Massachusetts).

[135] *See* Swift, *supra* note 79, and *What is Sauce for the Gander, supra* note 3, for a discussion of cases regarding contractual support and equity.

[136] While this is a relatively small penalty for seeking to remove a child from his or her family, seeking to become an involved father should carry with it the financial burdens of that support.

[137] *See, e.g.*, Miesen v. Frank, 522 A.2d 85 (Pa. Sup. Ct. 1987) (holding that a divorce settlement agreement indemnifying husband for any ordered child support payments is void as against public policy).

[138] Courts have based the general denial of indemnity on the arguments that to have one parent indemnify the other parent for mandated child support payments would be effectively taking money out of the child's pocket. *See Miesen*, 522 A.2d at 87. However, in jurisdictions that will refuse to recognize any rights in a lesbian co-parent, these same courts should have difficulty explaining a decision to refuse to allow payments for child support and indemnity from a person it considers a "non-party" to the family but not the contract itself.

C. Custody Provisions and Co-Parent Adoption

Of the utmost difficulty under current laws would be any provision to establish custody rights for a co-parent by contract. In a sympathetic jurisdiction, however, a contract that clearly indicates the intent of a co-parent may, show that it is in the "best interest of the child" to have both parents involved in the parenting decisions.

Some couples have resorted to forum shopping to assist them in seeking co-parental rights. For example, a couple in North Carolina may consider establishing residency in Virginia in order to avail themselves of the jurisdiction of a court that allows co-parent adoption, relying on the Full Faith and Credit Clause of the U.S. Constitution to enforce that adoption decree after the couple returns to their home state.[139]

VI. SIMPLE SOLUTION—ENFORCEMENT OF CONTRACTS BASED ON INTENT

One possible solution to these issues is for courts to recognize the rights to private contracts in AI matters. There is a distinct difference between parents of a child created by accident during heterosexual intercourse and parents of a child born through AI processes. Most often, a great amount of thought and often significant financial outlay has occurred in AI cases.[140] The parties have often discussed and rehearsed the outcomes of their actions. These informed and deliberate parties should have their agreement enforced. Indeed, some courts are already recognizing the intent of the parties in enforcing these parentage rights.[141]

Courts should stop relying on the "best interest of the child" standard in determining legal parentage and instead look to the intent of the parties and more on basic contract principals of meeting of the minds of informed parties. Informed parties—whether gay, lesbian or straight—should be allowed to make their own decisions about their rights and abilities to procreate. Allowing parties to enter into contracts that delineate rights enforcing the wishes of those parties would remove the prejudice and bias of certain judges in AI cases. Certainly, legal precedence for statutes of this nature exists. Some courts are already using intent of the parties to

---

[139] *See* Finstuen v. Crutcher, 496 F.3d 1139 (10th Cir. 2007) (holding that Oklahoma statute denying recognition of gay co-parent adoption, while valid in other jurisdictions, is a violation of the Full Faith and Credit Clause of the United States Constitution).

[140] As one writer explains:

> When a child is conceived through the process of artificial insemination into a union of two women, 'the decision to create the child is even more conscious and deliberate than the decision that is made by some couples who are both biological parents and conceived a child by direct sexual intercourse.' While the latter could occur in a time span of about ten minutes in an act of lust, the former could take weeks if not months to obtain the necessary reproductive assistance.

What is Sauce for the Gander, supra note 3, at 220 (quoting T.F. v. B.L., 813 N.E.2d 1244, 1255 (Mass. 2004)).

[141] *See* Ferguson v. McKiernan, 940 A.2d 1236 (Pa. 2007); K.M. v. E.G., 117 P.3d 673 (Cal. 2005).

help form their decisions in custody battles.[142] Indeed, even the drafters of the Uniform Marriage and Divorce Act saw that "intent" is an important factor in child custody cases.[143] Why not formalize the legality of the contracts and allow parties to protect themselves against the potential bias of a judge who is unwilling to allow lesbians to be co-parents or unwilling to terminate the rights of a donor?[144] Equity and reason should hold that those parties who joined together with the intent to create a child—whether gay, straight, unmarried, or married—should be allowed to legally protect their interests as legal parents.[145] Courts have made clear that a biological donor of sperm must be given the right to participate as a father if he has entered into an agreement to do so.[146] There is now precedent allowing a donor to terminate his parental rights and obligations by contracts even in jurisdictions without a version of the UPA.[147]

Clearly, biology has had an impact on the earlier cases determining parentage. As the court in *McIntyre v. Crouch* held, it would be unconstitutional to refuse to allow a biological donor the right to prove that a contract existed for

---

[142] *See,* K.M. v. E.G., 117 P.3d 673 ; In Re Sullivan, 157 S.W.3d 911 (Tex. Ct. App. 2005); *See e.g.* Laura WW. v. Peter WW., 51 A.D. 3d 211, 856 N.Y.S. 2d 258, (N.Y.A.D. 3 Dep't. 2008).

[143] In considering the "best interest of the child" in child custody matters, courts shall consider: "(1) the wishes of the child's parent or parents as to his custody . . . ." UNIFORM MARRIAGE AND DIVORCE ACT § 402 (1970).

[144] Several courts have addressed this possibility with mixed results. In T.F. v. B.L., 813 N.E.2d 1244 (Mass. 2004), the Massachusetts Supreme Court held that "'Parenthood by contract' is not the law in Massachusetts, and to the extent the plaintiff and the defendant entered into an agreement, express or implied, to coparent a child, that agreement is unenforceable." *Id.* at 1251. *But see Ferguson*, 940 A.2d 1236.

[145] In *Laura WW.*, one New York court noted that:

> Certainly, situations will arise where not all of these statutory conditions are present, yet equity and reason require a finding that an individual who participated in and consented to a procedure intentionally designed to bring a child into the world can be deemed the legal parent of the resulting child. Indeed, "if an unmarried man who biologically causes conception through sexual relations without the premeditated intent of birth is legally obligated to support a child, then the equivalent resulting birth of a child caused by the deliberate conduct of artificial insemination should receive the same treatment in the eyes of the law."

51 A.D. at 262 (quoting In re Parentage of M.J., 787 N.E.2d 144, 152 (Ill. 2003)). In *Laura WW.*, however, the New York court was faced with a woman who was inseminated by a man, not her husband, against her husband's wishes. The parties divorced and entered into a separation agreement providing that the husband would not be financially responsible for the child. *Id.* at 260. The court found that the agreement was void as against public policy, "[g]iven that 'the needs of a child must take precedence over the terms of the agreement when it appears that the best interest of the child are not being met . . . ." *Id.* at 261. It must be noted, however, that the father was seeking to avoid child support payments in a situation where he, in part, implicitly agreed with the insemination. There was no evidence that the husband "ever informed his wife that, should a child be born as a result of AID, he would not accept the child as his own." *Id.* at 263. "Indeed, he offered no evidence that he took any steps before the AID was performed to demonstrate that he was not willing to be the child's father. Under these circumstances, we find that the husband failed to rebut the presumption that he consented to brining a third child into the marriage through AID." *Id.*

[146] McIntyre v. Crouch, 780 P.2d 239 (Or. Ct. App. 1989) (holding that a "donor" of semen has a right to fatherhood under "the Due Process Clause of the Fourteenth Amendment *if* he can establish that he and respondent agreed that he should have the rights and responsibilities of fatherhood and in reliance thereon he donated his semen."). *Id.* at 244 (emphasis in original).

[147] *See Ferguson*, 940 A.2d 1236.

parentage.[148] More recently, California courts created an intent-based right to parenthood in a case involving two potential biological mothers.[149]

In *Johnson v. Calvert*,[150] the court was faced with a child custody battle between two women, one supplying an egg for fertilization and one contracted as a surrogate.[151] In choosing the genetic mother over the birth mother, the California court noted that pre-conception intent controlled.[152] The majority opinion challenged the dissent for attempting to invoke the "best interest of the child" standard" in determining parentage.[153] The court notes, in part, that "[s]uch an approach raises the repugnant specter of governmental interference in matters implicating our most fundamental notions of privacy, and confuses concepts of parentage and custody . . . . It may be argued that, by voluntarily contracting away any rights to the child, the gestator has, in effect, conceded the best interest of the child are not with her."[154] The majority's approach allows parties to decide what parentage role is best in their particular situation—the parties that are the most informed of the facts surrounding their decision to parent. Further, this approach removes potential bias of judges who have a negative view of lesbian and gay relationships.

---

148 *Id.* at 1243.

149 Johnson v. Calvert, 851 P.2d 776 (Cal. 1993).

150 *Id.*

151 *Id.* at 778.

152 *Id.* at 782. The Court noted:

> Because two women each have presented acceptable proof of maternity, we do not believe this case can be decided without enquiring into the parties' intentions as manifested in the surrogacy agreement. Mark and Crispina are a couple who desired to have a child of their own genetic stock but are physically unable to do so without the help of reproductive technology. They affirmatively intended the birth of the child, and took the steps necessary to effect in vitro fertilization. But for their acted-on intention, the child would not exist.
>
> *Id.*

153 *Id.* at 782, n.10.

> Thus, under our analysis, in a true "egg donation" situation, where a woman gestates and gives birth to a child formed from the egg of another woman with the intent to raise the child as her own, the birth mother is the natural mother under California law. The dissent would decide *parentage* based on the best interest of the child. Such an approach raises the repugnant specter of governmental interference in matters implicating our most fundamental notions of privacy, and confuses concepts of parentage and custody. Logically, the determination of parentage must precede, and should not be dictated by, eventual custody decisions. The implicit assumption of the dissent is that a recognition of the genetic intending mother as the natural mother may sometimes harm the child. This assumption overlooks California's dependency laws, which are designed to protect *all* children irrespective of the manner of birth or conception. Moreover, the best interest standard poorly serves the child in the present situation: it fosters instability during litigation and, if applied to recognize the gestator as the natural mother, results in a split of custody between the natural father and the gestator, an outcome not likely to benefit the child. Further, it may be argued that, by voluntarily contracting away any rights to the child, the gestator has, in effect, conceded the best interest of the child are not with her. *Id.* (emphasis in original).

154 *Id.*

The suggested intent rule does not negate the "best interest of the child" standard; the former merely places the latter in its proper role. At least, one court has opined on the possibility of having contracts in a co-parenting relationship, stating that it does not affect or weaken any standards of "best interest of the child."[155] It has also been suggested that, in the face of intent-based decisions for custody, "best interest of the child" should continue to have a significant role.[156] In AI cases of lesbian co-parents and donor contracts, intent should be the primary consideration in determining parentage of a child, whether that involves lesbian co-parents or termination of the rights of a donor. However, in the event of a split between the co-parents, a court determining custody should invoke the "best interest of the child" standard—not to determine parentage which has already been established by intent—but to determine custody, visitation and support from the lesbian co-parent. A clear separation of these concepts is possible and preferable.[157]

VII. CONCLUSION

Obviously, the nature of family in the United States is changing. In the 80's, when the fictional Murphy Brown stood up to literal Dan Quayle to argue for her right as a single parent, Candace Bergen and her supportive television audience could not have imagined where the American family would be today. In fact, the demise of the notion that "the American family" is some monolith that the courts should uphold and protect is long overdue. The most recent U.S. Census indicates that there are 105.5 million households in the USA.[158] Of this 105.5, 5.5 million of these consist of unmarried partnerships. [159] Of these 5.5 million, at least 595,000 consist of same-sex partners.[160] This means that the face of the "traditional"

---

[155] In a co-parenting situation, one Massachusetts court described the interplay of the best interest standards with contracts as follows:

> We disagree with the dissent's assertion that "parenthood by contract" would weaken the "best interest" standard. . . . Where a person's obligation to support a child is established, a court uses the "best interest" standard to measure whether and how that obligation is being fulfilled. However, this standard is irrelevant unless and until the person in question has a legal relationship to the child. Here, where there is no legal relationship (other than an unenforceable contract), the "best interest" standard does not come into play.

T.F. v. B.L., 813 N.E.2d 1244, 1250, n.6 (Mass. 2004).

[156] *See* Sanja Zgonjanin, *What Does It Take to be a (Lesbian) Parent? On Intent and Genetics*, 16 HATINGS WOMEN'S L.J. 251, 279 (2005) (noting that "[w]hile the advocates of nontraditional family rights include intent as an approach to solving parentage disputes between lesbian parents, it is clear that the intent must not be the determinative factor considered in isolation.").

[157] While this article does not presume to address all of the problems involved in the "best interest of the child" standard, one issue that must be addressed, even under the proposed scenario, is that all sexual orientation bias be removed from determining the "best interest of the child."

[158] U.S. CENSUS BUREAU, PROFILE OF GENERAL DEMOGRAPHIC CHARACTERISTICS, *available at* http://factfinder.census.gov/servlet/QTTable?_bm=y&-geo_id=01000US&-qr_name=DEC_2000_SF1_U_DP1&-ds_name=DEC_2000_SF1_U.

[159] *Id.*

[160] *Id.*

family in the United States is sufficiently "non-traditional."[161] Whether or not the U.S. legal system is prepared to provide the non-traditional families with Constitutional rights, there are 10,456,405 people who identify as gay or lesbian living in the United States. Sodomy laws have been rendered unconstitutional.[162] Several states have granted the right to gay marriage or civil unions.[163] In fact, "the love that dare not speak its name"[164] is now talked about in almost every political debate.

However, the legal issues that need to be handled are not spoken of as frequently. In fact, just as with interracial relationships in the 1960s, social norms in this country have far out-distanced the legal system. The issues regarding civil rights for gay and lesbian Americans abound and the courts may be well on their way to addressing gay marriage or civil unions. But laws regarding gay adoption are still woefully vague and laws protecting the rights of lesbian potential parents are practically non-existent. These issues will likely be settled in case after case, with wide discrepancies depending on the state in which or the judge by which the case is heard. Clarifications to the UPA, including thorough consideration of "unwed" mothers and, more specifically, lesbian mothers, would begin to remedy this gap in legislation. Acceptance of contracts between sperm donors and donees would further remedy this situation. Until then, however, thousands of gay and lesbian parents will live in this country in fear that their parental rights might be taken away. What is more, the children of these parents are being taught that they and their parents are second-class citizens in a country that purports to provide "equal protection under the law"[165] and that "all men," or in this case, all men and women, gay or straight, "are created equal."[166]

---

[161] *See, e.g., id.*

[162] Lawrence v. Texas, 539 U.S. 558 (2003).

[163] Only Massachusetts and California grant full marriage rights for same-sex couples. *See* Goodridge v. Dept. of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (ruling that the Massachusetts state constitution prohibits the denial of same-sex marriage rights); In Re Marriage Cases, 2008 WL 2051892 (Cal. May 15, 2008) (holding that the California state constitution guarantees the right to marry to all individuals and couples regardless of sexual orientation).

[164] Lord Alfred Douglas, *Two Loves*, 1 THE CHAMELEON, Dec. 1894. The poem was used in the cross examination of Douglas' "friend" Oscar Wilde.

[165] U.S. CONST. AMEND XIV.

[166] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).